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Confronting Judicial Values: Rewriting the Law of Work in a Common Law System

JAMES ATLESON†

The need to reform the federal law of labor relations has been a staple of discussion for many years, but the current debate on the wisdom and possible shape of change is more thorough and sustained than at any time in recent memory.¹ A good deal of discussion has centered on the types of substantive or procedural changes that would make the promises of the National Labor Relations Act (NLRA)² more of a reality. Thus, many valuable proposals have been presented, for instance, for streamlining the representation process and strengthening the power of the National Labor Relations Board to remedy violations of the statute. All of these suggestions make certain assumptions about the effectiveness of law in effectuating change and, more commonly, in strengthening and invigorating unions.

The most commonly made argument in favor of the Wagner Act³ was that it would reduce industrial conflict, an argument framed in large part to ease what was perceived to be a serious constitutional hurdle. Other goals were present as well.⁴ One theme was that the economy would be strengthened by independent unions which could insist upon a more equitable division of profits, thereby maintaining high purchasing power. The Act, then, was seen as consistent with the view that the Depression was caused by under-consumption. Unionization, therefore, would serve positive social functions, one of which was to re-

† Professor of Law, State University of New York at Buffalo. The author acknowledges the always inciteful comments of Fred Konefsky. An earlier version of this paper was presented at the 1995 Annual Meeting of the Industrial Relations Research Association in Washington, D.C., in January 1995.


3. Id.

strict corporate power. Closely related, the most important theme in all of Wagner's speeches was that the statute would effect a greater economic stability by creating a better economic balance. Finally, and germane to the theme of this essay, the enlargement of democratic processes in the workplace was independently valued, partly because it would deepen the roots of political democracy. The failure of unions to ever organize more than approximately thirty-five percent of the workforce, their limited organizational density at present, the opposition of most employers, and the weaknesses of the National Labor Relations Act, obviously threaten the goal of industrial democracy, condemning most workers to toil in highly autocratic work situations.5

If we assume, despite all contradictory indications, that labor law reform supportive to workers and unions occurs, can drafters avoid the judicial assertion of a quite different set of values? Those who propose changes assume, as they must, that the values or goals of such enactments will not be subverted by a hostile or indifferent judiciary or National Labor Relations Board. Yet, in this area where feelings are strong and deep-seated, all issues are contentious. After all, the employment relation is one of the important human relationships in which, especially for individual workers, the common law does not assume any inherent notion of fairness. Moreover, as the volume of academic scholarship demonstrates, the labor law field is littered with judicial decisions which seem inconsistent with the language, purpose, and the legislative history of the National Labor Relations Act.

The issue is more complex than inherent bias, for there are real differences of opinion affecting every conceivable question in the field. Apart from economic or social bias or differences of value, people bring different assumptions to each issue. Each decision-maker looks at the situation through the lens of experience, one which refracts light in different ways. To avoid decisions that are based upon values which are inconsistent with legislation requires, in addition to good lawyering, a recognition of the importance of economic power as well as the power of ideas. The former means that both the likelihood of legal reform as well as the future responsiveness of the courts will be strongly affected by the amount and expression of union power. The latter, relating to our perception of the employment rela-

5. Atteson, supra note 4, at 34-43.
tion, suggests the need to reconceptualize the way we view that relationship.

A focus on judicial values means that two serious issues can be dispatched quickly. First, there must be considerable doubt whether supportive legal change of any kind can occur in the present political climate, especially in the absence of strong or at least troublesome unions. Changes in the law of union-employer relations have occurred only rarely, generally because of special circumstances. Moreover, except for perhaps the Norris-LaGuardia Act, passed during the Hoover administration, the Wagner Act of 1935 remains the sole twentieth century example of an exclusively union-supportive, federal legislative enactment. The passage of the statute turned on unique historical circumstances, and surely the most significant cause was the degree of turbulence in labor-management relations. Since then, the unions' legislative agenda in relation to collective labor-management issues consistently failed even during Democratic control of the United States House and Senate.

A second question involves the type of changes we might expect if amendments to the NLRA did occur. If all or even most of the suggested proposals were indeed enacted, the United States might have the labor law of Ontario. Indeed, many U.S. unionists and scholars look longingly at the legal systems of certain Canadian provinces, believing that legal rules are the primary cause and explanation of union strength or weakness. The reverse possibility is rarely considered, that is, that legal rules are the result and not merely the cause of strong unions. The problematic relationship of legal rules to satisfactory social outcomes is too little discussed. In any event, although union density in Canada has historically been considerably higher than that of the United States, density in Canada is falling, suggesting the importance of factors other than substantive law.

Moreover, a number of Canadian scholars are quite critical of the "Wagner-model" of labor legislation and they include both the United States and Canadian labor law regimes within that
characterization. The changing nature of work in an international environment, for instance, may suggest that maintaining the Wagner Act structure, even supplemented by helpful amendments, may not be an adequate response to contemporary conditions. Harry Glasbeek and Judy Fudge of Osgoode Hall Law School in Ontario, for instance, note that in Canada there has been an exponential growth of small firms which are generally more difficult to organize and, obviously, are less attractive to unions. Improvements in organizational procedures, even if leading to greater unionization, are "unlikely to make a great deal of difference" because small firms have "little to offer workers by way of extra economic or job security benefits, whether they have been organized or not." Arguing for consolidated bargaining structures, the authors submit that fragmented organizational structures cannot deal with a revamped economy exhibiting increasing competition in relation to wage rates. In short, unions need structures which enable "them to take wages out of competition far more than the collective bargaining statutes as administered presently permit." In addition, the authors believe that the collective bargaining model is "posited on the notion of a male full-time employee, while non-standard types of employment are increasing." To focus only on improvements in the collective bargaining model, assert the authors, is to give the model a status to which it is not entitled: "it treats that regime as an optimum evolution of capital-labour regulation, rather than just a valuable compromise which labour squeezed out of capital at a propitious time."

Lawyers, however, have been trained to believe that law can be an engine for change. Comparativists such as Janice Bellace and Roy Adams, among others, convincingly argue that state policy has real effects. Legal rules certainly affect the

12. Judy Fudge & Harry Glasbeek, PC1003—The Legacy (unpublished manuscript, on file with the BUFFALO LAW REVIEW).
13. Id. at 52.
14. Id.
15. Id.
16. Id. at 53.
17. Id. at 49.
18. Id. at 61. See Howard Wial, The Emerging Organizational Structure of Unionism in Low-Wage Services, 45 RUTGES L. REV. 671, 672 (1993). See also, Roy Adams, A Pernicous Euphoria: 50 Years of Wagnerism in Canada, McMaster University Working Paper #395 (1994), where Adams discusses the strong desire to maintain the model despite "its failure to accomplish its essential objectives . . . ." Id. at 3.
outcome of particular disputes, and law can affect the way in which employees and employers envision possibilities and re-
straints.20 Drafters of legislation, however, must consider the
very real risk that the supportive goals of new legislation may
be derailed or finessed by a quite different set of cultural values
that often, although not always, has motivated the judiciary.
The point is not to denigrate serious and thoughtful proposals
for legislative reform, but only to note that legislative revision is
not the end of the effort. The historical existence of an often
hostile judiciary means that a double-discounting occurs in rela-
tion to any labor legislation. After the congressional balancing of
political power results in legislation, the courts may subse-
quently assert values which may be inconsistent with the draft-
ers’ purposes.

Many scholars have recognized that certain labor law deci-
sions do not seem to be consistent with the principles of statu-
tory interpretation, that is, some rulings are seemingly not
based upon the statutory language, the legislative history, or
the statute’s professed goals. The seeming incoherence of a good
deal of American labor law can be explained by a quite coherent
set of judicially held values which resonated from or paralleled
those expressed in nineteenth century opinions.21 These values
included the following:

(1) Continuity of production must be maintained, limited only when stat-
tutory language clearly protects employee interference.
(2) Employees, unless controlled, will act irresponsibly.
(3) Employees possess only limited status in the workplace and, corre-
spondingly, they owe a substantial measure of respect and deference to
their employers.
(4) The enterprise is under management’s control, and great stress is
placed upon the employer’s property rights in directing the workplace.
(5) Despite the participatory goals of the NLRA, employees cannot be full
partners in the enterprise because such an arrangement would interfere

Bellace, The Role of the Law in Supporting Cooperative Employee Representation Sys-
tems, 15 COMP. LAB. LJ. 441, 458-60 (1994); Janice Bellace, Labor Law Reform for the
Post-Industrial Workplace, PROCEEDINGS OF THE 1994 SPRING MEETING OF THE INDUS. REL.
RESEARCH ASS’N 460-65 (Apr. 21-23, 1994).
20. See WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT
(1991); VICTORIA HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS
UNIONISM IN THE UNITED STATES (1993); CHRISTOPHER TOMLINS, THE STATE AND THE UNI-
IONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-
Contracts Act in New Zealand, see Ellen J. Dannin, We Can’t Overcome? A Study of Free-
21. ATLESON, supra note 4, at 7-9.
with inherent and exclusive managerial rights.  

These values, in short, involve the presumed limited status of employees, the prerogatives of owners, and the placement of continued production on the highest rung of value, but the list could easily be expanded to include a more abstract set of beliefs. Thus, some decisions seem to reflect the view that collective representation and action is inconsistent with individualism, that collective bargaining conflicts with the value of individual effort, initiative, and evaluation, and that the proper focus should be the individual employee-employer relationship, meaning that the union is an "outsider" to that relationship. Moreover, courts have frequently treated workers and unions as inherently violent. Last but not least, the fear of class solidarity and conflict might explain the early injunctions against picketing as well as the traditional opposition to the secondary boycott and, especially, the sympathetic boycott.  

American law has historically viewed unions as an "outsider" to the employment relationship, a view often voiced, explicitly or implicitly, by current supporters of worker participation schemes. Unions and collective bargaining are often viewed as the source of the problem, not the remedy. More specifically, unions are often seen as the occasion for conflict in the workplace, rather than simply the result of that conflict. Rather than being seen as the embodiment of the workers, unions are seen as intruders into the relationship.  

One hears echoes of this theme in almost every representation campaign as employers seek to exploit the American fear and distrust of the "outsider." Although it may not be surprising that employers would view a union organizational attempt as something like "The Invasion of the Body Snatchers," the same theme is repeatedly reflected in legal decisions. Let me offer a few examples out of many that could be presented. In the latter half of the nineteenth century, some craft unions secured virtual

22. Id.
25. The first appearance of attempts to create what would now be called participation schemes was the 1920s, another period when the labor movement seemed moribund. See Thomas Kohler, Models of Worker Participation: The Uncertain Significance of Section 8(a)(2), 27 B.C. L. Rev. 499, 519 (1986).
26. A highly memorable film in which pods from outerspace take over human minds and bodies.
monopolies over certain kinds of skilled work. When union membership was intimately related to actual work, courts, as Clyde Summers has shown in his classic articles, began to shed their reluctance to interfere in the organizational affairs of "private organizations." Courts stressed that union membership could not be arbitrarily lost if access to work would be affected because workers had "property" rights in jobs or union membership. Often, courts focused upon the loss of union benefits such as disability, retirement or death benefits, but the courts routinely found a legally-protected property interest to be involved when union membership was tied to work. Some courts did not even seek to find a specific property right but, instead, referred to union membership itself as a significant property right. Unions, it was thought, should not be able to arbitrarily interfere with work opportunities.

In 1890, for instance, a New Jersey court held that there was no right to join a union, applying notions courts had long used to avoid interfering with the internal affairs of private, voluntary organizations. The power of the union to exclude, the court said, was "incident to its character as a voluntary organization . . . . " With the growth of the closed shop, membership in unions often became directly related to access to jobs, and some courts indicated that such a monopoly challenged the traditional reluctance to interfere with admission policies. The growing power of unions was also recognized in cases where members challenged internal union discipline. Courts began to intervene when they found some property right involved, including access to various union benefits, such as disability or death plans. "The most serious economic effect of expulsion is that the expelled member may be discharged from his job under a union security agreement," and courts "uniformly recognized

29. See Summers, Legal Limitations on Union Discipline, supra note 27, at 1053.
31. Id. at 525.
33. Summers, Legal Limitations on Union Discipline, supra note 27, at 1052-53.
34. Id. at 1053.
that a man's trade is property, and his union membership, with its ensuing benefits, is a property right which will be protected.\textsuperscript{35} Finding some property right at stake provided the reason to intervene, and courts then developed the notion that a union's constitution and bylaws were a contract so that discipline could be judicially reviewed under the union's own standards. The critical point is that when access to work was arbitrarily affected by a union, the right to work was treated as a legally protectable interest. The union, treated as a third party to the employment relationship, could not adversely and arbitrarily affect that relationship. The employer, however, as one of the immediate parties to that relationship, could, under the doctrine of employment at will, end the relationship at any time and for any reason.

Similarly, the Supreme Court in the 1940s exhibited justifiable concern when the Brotherhood of Local Firemen and Enginemen signed collective agreements designed to eliminate black firemen on the railroads.\textsuperscript{36} Unions, said the Supreme Court in creating a new doctrine without clear legislative support, could not discriminate on the basis of race because their power over workers was derived from federal labor law.\textsuperscript{37} Unless the union owes some duty to represent nonunion members of the craft, said the Court, "the minority would be left with no means of protecting their interests, or indeed, their right to earn a livelihood by pursuing the occupation in which they are employed."\textsuperscript{38} The Supreme Court's early recognition of the evils of racial discrimination is commendable, and the legal result certainly creative, but fair treatment and freedom from arbitrary bias was only required when the actor was a union or a union bargaining with employers. The African-American firemen had no parallel protection from arbitrary action on the part of employers, and, of course, they had few rights in the absence of union representation. Moreover, the unions' representative power over those involuntarily represented flowed more from the union's economic power than from the Railway Labor Act,\textsuperscript{39} a statute created long after the union had secured bargaining status on many rail lines. By focusing upon the union's legislatively-derived power, the Court was able to ignore economic power, a recognition that would have forced it to confront the

\textsuperscript{35} Id.
\textsuperscript{36} Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944).
\textsuperscript{37} Id. at 203-04.
\textsuperscript{38} Id. at 201.
power of employers over workers even in the absence of unions. In any event, it would be more than twenty years before similar restrictions would be applied to employers, many of whom, as corporations, are exclusively creatures of law.

The common law's treatment of employment, and certainly the doctrine of employment at will, could be viewed as treating the relationship as "private," one that should be free from public regulation and interference. But as Karl Klare has convincingly demonstrated, the "public/private" distinction in labor law has been employed to characterize the same phenomena as "private" or "public," and decisionmakers beginning from the same premise about the public or private nature of conduct can arrive at diametrically opposite conclusions. The employment relation and the right to employment is sometimes treated as private, but not when third parties seek to affect the relationship. The work is said to be so important that the law will often protect the employment relationship against outsider interference, yet, at least until recently, insiders, usually employers, can end the relationship for any reason. The employment relationship is seemingly so valuable that the law of torts will protect it from interference from outsiders, even if the transgressors are other employers and even if the employment relationship is deemed to be at-will, yet employment at will is still the common message to workers.

Concededly, the protection of the employment relation from both judicial interference or the actions of "third parties" could be simply seen as the application of traditional contract doctrine. What remains to be explained, however, is why normal contract doctrine applies in different ways to employment. Thus, employment at will, as many have noted, assumes, without an inquiry into the parties' intentions, the employer's power to make rules, interpret them unilaterally, and, most critically, discipline and discharge arbitrarily. Moreover, the modern easing of doctrines of consideration and mutuality did not necessarily apply to the employment relation. As Lawrence Blades noted in his path breaking article in 1967, "from the contractual princi-

ple of mutuality of obligation, it has been reasoned that if the employee can quit his job at will, then so, too, must the employee have the right to terminate the relationship for any or no reason. 42 When courts recognized that mutuality was not generally required under the law of contracts, they turned to "the real obstacle to enforcing any kind of contractual limitation of the employer's right of discharge—lack of consideration." 43 When promises of permanent employment were explicitly made, and even when these explicit promises were combined with action by the employee in reliance of those promises, courts often treated those promises as unenforceable for lack of consideration. 44 Despite the modern relaxation of consideration requirements in general, Blades still believed that "it is not policy but the technical difficulty of relaxing the rather rigid rules of consideration which makes it unlikely that the employer's right to terminate the at will employment relationship can be limited under contract law." 45 Although the courts' decisions could be explained by notions of freedom of contract, Gary Minda has argued that the same principles could be used "to secure the reasonable expectations of the employee or employer from wrongful interferences . . . ." There is, in fact, "no a priori 'free contract' principle that justifies the presumption that employment contracts of indefinite duration are intended by the parties to be terminable at will." 46 The critical point is that contract principles do not require the assumption that all employment of indefinite duration is at will, and the traditional principles of contract law, especially the doctrine of consideration, are often applied more stringently in the context of the employment relation.

Finally, in a recent decision by the Eighth Circuit, Town & Country Elec., Inc. v. N.L.R.B., 47 the appellate court seemed to directly challenge the critical policies of the Wagner Act by holding that an employer did not commit an unfair labor practice by discriminating against employees, some paid union organizers and others just members of the union, because they sought em-

43. Id. at 1419-20.
44. Id. at 1420-21; see also, Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, supra note 41, at 488-89; Joseph DeGiuseppe, Jr., The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits, 10 Fordham Urb. L.J. 1, 7-16 (1981).
45. Blades, supra note 42, at 1421.
46. Minda, supra note 41, at 983.
47. 34 F.3d 625 (8th Cir. 1994), vacated, 116 S. Ct. 450 (1995).
Employment in order to organize the workplace. One cannot simultaneously be employed by a union and an employer, held the court, and even employees who were not employed by the union were denied normal NLRA rights because their "continued presence on the job will be determined by an entity other than itself." One cannot work for two masters, said the court, echoing ancient master-servant law. The Supreme Court's recent reversal will not result in the immediate disappearance of these notions in the courts.

The notion that workers owe an obligation of fealty and loyalty to their employers suggested to the Eighth Circuit that workers could not at the same time owe loyalty to their fellow workers or the union. These ideas are mirrored in the language of seventeenth and eighteenth century apprenticeship and indentured servant agreements. Similar obligations have been read into modern employment relations despite the contractual assumption that only those obligations spelled out are to be enforced. Those familiar with the area will recognize parallels to the exclusion from the statute of supervisors, managerial employees, and too-powerful Yeshiva professors. Perhaps the most classic exposition of this view is to be found in the 1947 House Committee Report on Taft-Hartley explaining its exclusion of supervisors from the statutory definition of "employee": "It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the leveling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism." The legal issue arose because many supervisors, those valiant and rugged individualists, were organizing and others were indicating support for collective representation. Deeply embedded in legal thinking is the

48. Id.
49. Id. at 629.
50. Id. at 622-29.
53. See, e.g., N.L.R.B. v. Local Union No. 1229, Int'l Bd. Elec. Workers, 346 U.S. 464, 472 (1953) (holding that the distribution of handbills to the public during negotiations that disparaged the output of a television station is not protected: "There is no more elemental cause for discharge of an employee than disloyalty to his employer.").
55. Virginia A. Seitz, Legal, Legislative and Managerial Responses to the Organization of Supervisory Employees in the 1940s, 28 AM. J. LEGAL Hist. 199 (1984).
notion that the expression of worker solidarity is foreign to American soil, let alone to the work place. As Judge Edwards said in an early criminal conspiracy case: "They (meaning a society of tailors) are of foreign origin, and I am led to believe are mainly upheld by foreigners." The judge was speaking in 1836.67

Importantly, these underlying values are not limited to situations involving collective action or representation. The traditional common law hostility to collective action could be explained by the ascendancy in the late nineteenth and early twentieth centuries of values of individualism, freedom, and independence, ideas at variance with the strategy of unions to seek independence via collective action.58 Indeed, since the 1890s employees have been treated as being "at will," meaning they can be discharged for any reason and at any time. Historically, the old contract rules of mutuality and consideration have even barred the enforcement of explicit promises of long-term employment, even though these rules have been modified in other areas of contract law. The judge-made rule hangs on, although modified in many states by a variety of exceptions. Nevertheless, the modifications are often narrow or grudgingly provided, and in some major states the common law rule has not been modified at all. In Pennsylvania, for instance, the state's highest court decided to retain the doctrine because, if fairness or good faith was part of the relationship, employers like U.S. Steel would become hesitant to discharge employees, thus choosing employer freedom to be arbitrary over the competing job security interests of employees.59 The fact that federal and state laws already limit employers' unfettered right to discharge, and that thousands of U.S. Steel's employees already enjoyed protection under "just cause" provisions of collective bargaining agreements, was somehow irrelevant. The New York Court of Appeals held, less forthrightly, that to read into unwritten agreements a promise of good faith or fair dealing would be inconsistent with the presumed right of employers to fire at will, neatly begging


58. This notion was suggested to me by Fred Konefsky in a far more erudite and elaborate fashion.

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the very question before it. Such matters, said the court, should be left to the legislature, although the New York Court has taken an interventionist path in other areas of law.

American labor law is unique among western nations in its double concern over the legitimacy of collective action and the loyalty obligation owed by workers to their employers. On the eve of the Revolution perhaps fifty percent of the workforce was bound in some way, indentured or slave. Free workers were neither the most numerous or important group in the workforce. Indentured workers and apprentices had written agreements specifying the duty of loyalty and fealty owed to masters. Although the employment relation would be deemed contractual in the 19th century, the "contract" would continue to contain unstated assumptions of loyalty even when workers were considered to serve "at-will."

Moreover, the employment relationship is treated differently than other important social relationships in other areas of law. Regina Austin found, for example, that judicial assumptions about workers and the needs of management made it difficult for workers to succeed when they sought to use the tort of intentional infliction of mental distress. The requirement that supervisory action must be extreme or outrageous, when combined with a deference to managerial authority, creates difficulties for employees:

Only the extraordinary, the excessive, and the nearly bizarre in the way of supervisory intimidation and humiliation warrant judicial relief through the tort of intentional infliction of emotional distress. All other forms of supervisory conduct that cause workers to experience emotional harm are more or less 'trivial' in the terminology of the Restatement of Torts. The very ordinariness of such conduct and the ubiquity of the experience of pain at the hands of supervisors are justification enough for the law's refusal to intervene.

60. Murphy v. American Home Prod. Corp., 448 N.E.2d 86, 89 (N.Y. 1983). As the dissenting Justice Meyer noted, the New York courts have read into many other kinds of contacts an "implied covenant of fair dealing and good faith." Id. at 311. The majority did not explain why normal contract principles did not apply to employment arrangements, let alone why the court, the creator of the at-will doctrine, was not the proper forum to reevaluate its continuing wisdom.


62. Id.


64. Id. at 18.
Principles of constitutional law often apply in special ways in collective as well as individual work situations. Scholars have noted that the courts traditionally interpret the First Amendment in labor cases to provide extremely weak protection, for instance, in situations involving employee picketing and handbilling, and writers are virtually unanimous in concluding that the Supreme Court's often unique arguments for such distinctions are weak and unconvincing. In addition, the scope of normal constitutional protection is often narrowed when the state is the employer. Similarly, the protections against illegal search and seizure do not apply when the individual is a public employee. As the Court noted in O'Connor v. Ortega, a search of a government employee's desk and file cabinets, made without warrant or probable cause, was reasonable and proper either for a noninvestigatory work-related purpose or to investigate work-related misconduct. A totally different type of example comes


66. See, e.g., Cynthia Eslund, Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 Geo. Wash. L. Rev. 1, 8, 12 (1990). To be protected an employee's speech must deal with "a matter of public concern." Connick v. Myers, 461 U.S. 138, 143 (1983). This is a necessary condition, but even in this case the interest in free expression can be outweighed by any injury the speech could cause to the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 142 (citing Pickering v. Board of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968)). Moreover, a four-justice plurality in Waters v. Churchill, 511 U.S. 661 (1994) noted that the injury need not be actual; instead, the state need only show that the speech threatened to interfere with governmental operations. Importantly, the Court stated that greater deference must be given to the government when it acts as employer rather than as sovereign. A recent Second Circuit opinion reversed its decision in favor of Leonard Jeffries at CUNY in light of the Waters holding that the employer's prediction of disruption need only be reasonable, enough to outweigh the value of the speech, and the employer took action based on the potential disruption and not in retaliation for the speech. Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995). Another recent case held that a state judge enjoyed qualified immunity when he fired a staff research attorney for Illinois' Fourth District Court of Appeals because of his efforts to unionize his colleagues. Gregorich v. Lund, 63 U.S.L.W. 2711 (7th Cir. 1995). The Seventh Circuit held that the despite the lawyer's exercise of a constitutional right, the judge could reasonably conclude that those with research responsibilities, working closely with judges, would threaten the delicate working relationship by taking such an adversarial position. Id.


68. Id. at 723-24.
from copyright law where the constitutional power for Congress to permit "authors" to secure a copyright in their "works" does not apply if the author is an employee. In such cases, the copyright law since 1909 has made clear that the employer is the copyright owner of its employee's "works."

In many areas of law, therefore, the employment relationship is treated as unique. The normal rules of law often do not apply, whether common law, statutory or constitutional. What is never made clear is what is so compelling about the employment relation to lead to such results. In some areas reasonable conclusions can be drawn. In collective action cases, the fear of class action is not difficult to see. Since the criminal conspiracy cases in the early 1800s, for instance, courts have reflected a fear of the power of collective action, and the boycott and secondary activity cases demonstrate the concern that pressure may extend beyond the immediate workplace. But if collective action and bargaining somehow generates concern over the effect upon individualist or property notions, how can we explain the presence of a similar reticence to protect individual employees from arbitrary employer action?

This summary means that reformers face a difficult task in limiting the vision of employment often found among the judiciary. Lawyers might assert that the primary means of restraining the judiciary is careful statutory draftsmanship. Perhaps the best example of effective drafting is the Norris-LaGuardia Act, which has generally been conscientiously followed by the lower courts despite its purpose to restrict the most significant judicial power: the power to enjoin behavior. Even here, however, judicial respect for legislative intent might be due to causes independent of Felix Frankfurter's careful drafting. In any event, even this statute has been finessed when it conflicted with values the Supreme Court believed more important. For instance, a strike arguably in breach of a contractual no-strike clause is clearly a "labor dispute" within section 13(c) of the Norris-LaGuardia Act, seemingly barring the exercise of a federal court's injunctive power. Yet, the Supreme Court

69. See Latman, et al., Copyright for the Nineties 303-21 (3d ed. 1989).
70. Id.
73. 29 U.S.C. § 113(c) (1994).
in its 1970 decision in *Boys Markets*\(^7^4\) was able to approve injunctions against such strikes under NLRA section 301 by "accommodating" that statute to the developing law of collective agreements, a body of rules ironically created by the Court itself without significant legislative guidance.\(^7^5\)

The problem with the NLRA is not that it was carelessly drafted, although it certainly is a loosely worded statute permitting, and often requiring, a common law type of interpretation. In addition, of course, drafters can not foresee many of the problems that may arise. The problem, however, is not simply one of unclear legislative guidance, but that many cases tend to present conflicts of values.\(^7^6\) The judicial application of values quite different than those which motivated the drafters long precedes the Reagan administration. The disillusionment with the administration of the statute in the 1980s led some union officials to call for the repeal of the statute, but the return to the glorious days of yesteryear would hardly be helpful, at least without a labor movement that relied less upon law than on organization and collective action.\(^7^7\)

Conflicts also occur within the various levels of the federal judiciary. There are, for instance, examples of long-term guerrilla warfare by appellate courts even in the face of clear Supreme Court directives. The phrase "guerrilla warfare" comes directly from a dissent of Judge Gibbons in *NLRB v. K & K Gourmet Meats*,\(^7^8\) explaining that the Fourth Circuit's refusal to approve Board orders directing employers to bargain under the Supreme Court's *Gissell*\(^7^9\) decision was based on the appellate court's disagreement with that decision.\(^8^0\) In addition, appellate courts routinely review the records of NLRB cases, often differing with the Board on questions of fact as well as law, despite the Supreme Court's clear admonition to the lower courts in the

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76. For instance, in *Elk Lumber*, 91 NLRB 333 (1950), a collective slowdown to respond to a substantial reduction in pay was treated at indefensible, conflicting with management's control over the rate of work effort, whereas the workers were reflecting collective values of solidarity.
Universal Camera\textsuperscript{81} decision to respect the findings of the Board, a case that ironically involved the Board.\textsuperscript{82} Arguments that the NLRB's decisions should be upheld under well recognized administrative law principles are often found in dissents.\textsuperscript{83}

Another obvious suggestion might be to make the stated purposes and goals of any new amendments to the NLRA so clear that even lawyers would have difficulty finding them porous or ambiguous. One cannot, however, overlook the creativity of lawyers and the historical level of judicial resistance to collective values. The stated values of the Wagner Act, after all, were relatively clear.\textsuperscript{84}

Two recent examples of judicial or administrative creativity are instructive. First, when organized professional workers at the College of Osteopathic Medicine and Surgery—via collective bargaining—gained significant participation rights in their workplace, the Board treated them as "managerial employees," no longer covered as "employees" within the NLRA.\textsuperscript{85} The professionals had seriously used collective bargaining to gain a measure of participation in their workplace, securing a measure of "industrial democracy," but their very success removed them from the coverage of the statute.

This outcome, based upon fairly recent Supreme Court decisions, also reflects the importance of the courts' perception of union power. In the 1944 \textit{Hearst}\textsuperscript{86} decision, for example, the Supreme Court upheld a broad definition of "employee" under the NLRA so as to include within the Act all those who needed its protection, no matter whether they would be treated as "employees" or "independent contractors" under traditional common law rules.\textsuperscript{87} The Court stressed that the act should be read broadly so that it could "bring industrial peace by substituting . . . the rights of workers to self organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established."\textsuperscript{88} The stress on "industrial peace" clearly reflected the Court's understanding that the NLRA, passed in the midst of a turbulent labor period, could not fulfill its goals without a liberal, inclusive interpretation. Such a mes-

\begin{itemize}
\item \textsuperscript{81} Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
\item \textsuperscript{82} Id. at 488.
\item \textsuperscript{83} See, e.g., NLRB v. Lorben Corp., 345 F.2d 346, 349 (2d Cir. 1965) (Friendly, J., dissenting); Lechmere Inc. v. NLRB, 502 U.S. 527, 541 (1992) (White, J., dissenting).
\item \textsuperscript{84} See Karl Klare, supra note 4, at 281-93; ATLESON, supra note 4, at 35-43.
\item \textsuperscript{85} College of Osteopathic Medicine and Surgery, 265 NLRB 295 (1982).
\item \textsuperscript{86} NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).
\item \textsuperscript{87} Id. at 127-28.
\item \textsuperscript{88} Id. at 125.
\end{itemize}
sage was especially clear during wartime when the need to institutionalize labor relations within an administrative system seemed eminently reasonable.89

Recently, however, in Bell Aerospace, Division of Textron90 and Yeshiva University,91 the Court, without supportive legislative history or statutory language, excluded from the statute perhaps hundreds of thousands of employees deemed to be "managerial," workers who are in a position to "formulate and effectuate management policies . . . ."92 There is no mention in these opinions of a need to contain "industrial strife" or to institutionalize labor conflict within the beneficial embrace of the statute. It is, of course, possible that the Court does not believe that workers who can be deemed "managerial" are likely to be disruptive. It seems more likely, though, that the Court no longer sees a need to read the NLRA broadly because it no longer fears the "industrial strife which prevails where these rights are not effectively established."93

A second and related example deals with the scope of mandatory bargaining. The Court has often stressed the policy favoring the reduction of "industrial strife" as if it was the only purpose of the NLRA. Nevertheless, the concern was used at times to justify a fairly liberal interpretation of the NLRA. In 1979, for instance, the Court upheld a NLRB ruling holding that the prices of Ford Motor Company's in-plant food service was a subject of mandatory bargaining.94 The employees had boycotted the food service, and the Court referred to that mild action as an example of the kind of "labor strife" that might occur if the scope of bargaining was not interpreted in an expansive fashion.95 Yet, only two years later in First National Maintenance96 the Court held that a partial closing of the enterprise, obviously much more critical to workers than cafeteria food prices, was

91. 444 U.S. 672 (1980).
92. NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. at 288-89. Similarly, the Court has recently expanded the definition of supervisor, excluding nurses who exercise some supervisory control over staff. NLRB v. Health Care Retirement Ass’n, 511 U.S. 571 (1994).
95. Id. at 497.
not within the scope of mandatory bargaining.97

These decisions indicate that the Court no longer feels a need to read the statute broadly so as to institutionalize labor conflict or even to protect worker concerns which seemingly are encompassed within the statute. Thus, it is reasonable to assume that the likely responses of the courts will be related to the perception of weakened union power. Courts, as well as Congress, are affected by what is happening in bargaining rooms, the workplace, and in the streets. Current decisions not only embody certain judicial values that resonate throughout American legal history, but the state of the law also reflects the perceived strength of unions just as much as the hostility or indifference of any presidential administration. In a period of reduced labor conflict and weakened unions, what will induce courts (or Congress) to more effectively protect workers?

Aside from draftsmanship, another possibility is to change the makeup of the courts, but the likelihood of this occurring seems too remote. As the 1980s made clear, it is difficult enough to assure a responsive National Labor Relations Board. Ultimately, the problem is not the courts alone. It is true that state and federal legislatures often reflected a more supportive view of workers and unions, only to be thwarted by judicial obstruction based upon particular views of the Constitution or upon statutory interpretation. It may also be true, however, that many legislative efforts may have been over-advertised as significant or even radical change. State legislative attempts to restrict conspiracy convictions or to limit the injunctive power of courts in the nineteenth century, for instance, or even the Clayton Antitrust Act98 in this century, may have been oversold to pacify constituents.99 As the current state of many areas of law suggests, however, vigorous enforcement needs the eternal vigilance and constant prodding of a strong pressure group.100

Congress and the courts seem to respond affirmatively to unions only when they are seen as troublesome. True, with the singular exception of the Wagner Act, legislative action in the United States has often been more restrictive that supportive. Yet studies suggest that although unionization may lead to more

97. Id. at 686.
strikes, higher union density is also a consequence of strikes. Unions tend to grow and expand when they are seen as active protectors and militant representatives of employees. Only at such times does the legal system seem to respond in a supportive manner. Unfortunately, there will be no possibility of a positive legal response unless unions are perceived to be vital and potentially disruptive economic actors.

The current emphasis upon "competitiveness," found, for instance, sprinkled throughout the Dunlop Commission's fact-finding report, ignores a commitment to democratic values in the workplace. Those principles still involve the securing of industrial democracy, full freedom of association, actual freedom of contract, and citizenship rights in the place where people spend the lion's share of their lives. Comparative labor scholars view with amazement our representation election process with employers possessing a constitutional right to persuade employees not to join. Why should workers have the choice between collective representation or working in an undemocratic, authoritarian structure?

No where else in the advanced liberal democratic world does industrial autocracy have the level of legitimacy that it does in Canada and the United States. In most other advanced countries industrial democracy is seen to be the natural concomitant to political democracy and by some combination of collective bargaining, works councils, representation of corporate boards of directors and by labour participation in labour market and social protection nearly all working people have institutions in place through which they are able to participate in the making of the conditions under which they toil.

In addition, the United States is generally viewed as an exception to the notion, commonly found in other Western nations, that workers are an organic and important part of the enterprise. The more supportive legal regime in European countries, a reflection of more militant unions than their cause, demonstrates that effective representation is inconsistent with


102. Atleson, supra note 77, at 165-77.

103. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS (1994).

104. Adams, supra note 18, at 12.

neither capitalism nor "competitiveness." The goal must be to reassert the idea that industrial democracy, or participatory involvement in this post-industrial age, is a vital part of the rights of individuals.

Indeed, it is vital to a thriving democracy that workers engage not only in collective association but also in the making of the rules under which they spend the greatest part of their lives. To arbitrators, managers, and sometimes even union representatives, the questions that arise often seem trivial, unworthy of serious attention. Yet, as Thomas Kohler reminds us, such a characterization would be a serious mistake:

Individuals and societies alike become and remain self-governing only by repeatedly and regularly engaging in acts of self-government. It is the habit that sustains the condition. Consequently, a democracy encounters its greatest danger of becoming perverted when its people no longer have direct responsibility for making the day-to-day decisions about the order of their lives. This point represents an important aspect of the significance of collective bargaining as a social institution. For it is through their involvement in the collective bargaining process that average citizens can take part in deciding the law that most directly determines the details of their daily lives. Thus, unions and the practice of bargaining can serve as "schools for democracy" where the habits of self-governance and direct responsibility are instilled.106

As Robert Wagner stressed, the firmness of the commitment to political democracy depends in large part of the democratic quality of workplace life.107 Wagner's fears were expressed at a time when hope was being extinguished in Europe, and he perceived real threats to democracy at home, a period not comparable to our own. Yet, at a time when Americans express great skepticism about the viability of existing political institutions to act in responsive ways, Wagner's concerns are nevertheless still timely.

Although the most effective stimulus for labor law reform is a vibrant, assertive labor movement, it might be time to change not only the legal rules but also the ideas embedded in those rules to alter the way the role of workers in the enterprise are regarded.108 If this does not occur, legal conflicts will still involve the rights of workers who are perceived to have limited

abilities and thus limited rights to involvement in the workplace, challenging what is thought to be the greater wisdom and the "property" rights of employers. The goal should be to develop a vocabulary that treats workers as a valuable, organic part of the enterprise, as long-term participants with a valuable investment and citizenship stake in the operation.\textsuperscript{109}

In an atmosphere where "free enterprise" notions, reminiscent of the 19th century meaning of the phrase, affect everything from international trade to the neighborhood school, such thoughts, even from a professor, might seem overly fanciful. Yet, the very currency of these views suggest that ideas can change and that ideas have power. The "market", after all, which is used to define the scope of employer freedom, is a legal, social, and political entity, defined by law itself. Moreover, political rhetoric that proposes that taxes can be reduced while military investment can be dramatically increased, and characterizes tomato catsup as a vegetable, suggests that the way we think about the world of work could also change.\textsuperscript{110}

One of the hallmark changes of the twentieth century was the notion, now under attack and often simply ignored, that the costs of enterprise consist not only of the price of labor and materials but also the social, environmental, and economic effects of that enterprise. One of the costs of our current system is that democratic representation at the workplace has become highly problematic, sixty years after the passage of the Wagner Act. The value at stake is that of industrial citizenship, as important now as it was in Robert Wagner's time. The value of participation and protection in the workplace should be seen as a human right, not just as a means to greater productivity or reduced conflict. In the end, however, a general rethinking of the employment relationship helpful to workers is unlikely to occur without an upsurge of organization and militancy. Without such action, rethinking and redefinition will continue to occur, but the result will be a further weakening of individual and collective rights of participation.

\textsuperscript{109} I do not wish to stress the concept of "investment," which to some extent tends to dehumanize the contribution of workers. Moreover, ownership rights without participation rights, as shareholders or worker-owners often realize, often is an empty shell. But we do need a way to express democratic and participatory rights in the workplace.

\textsuperscript{110} It may be doubtful that such paradigm shifts can occur without changes in relative power. Yet, ideas do change. One can criticize the long-standing rule of employment-of-will but still be interested in why there recently has been some success in creating more humane exceptions to that rule.