Articles

Divide and Conquer: The Legal Foundations of Postwar U.S. Labor Policy[+]

By Joel Rogers[*]

A. Introduction

This paper provides an outline for a general theory of postwar U.S. labor law and regulation. It focuses on the structure and administration of the Labor Management Relations Act (LMRA)[1], the centerpiece of U.S. labor policy over the past two generations. The central thesis of the analysis is that American labor law tends systematically to constrain and fragment worker organization, and is best understood as comprising a regulatory regime that both codifies and furthers the weakness of American labor. The organizing principle of this regulatory regime is the general denial of substantive generic entitlements for workers, and the general limitation of enforceable substantive worker claims to those claims arising from the guarantees of specific collective bargaining agreements negotiated within narrow contexts of union-employer dealings. As a consequence of this distinctive structure of interest articulation and satisfaction, unions rationally adopt highly particularistic bargaining strategies in their dealings with employers. As a consequence of such adoption, unions are divided within themselves, from one another, and from unorganized workers, with the result that workers overall are cumulatively weakened as a class.

The paper argues for this thesis by exploring the constraints on union strategy imposed by the LMRA in successive stages of the bargaining relation. Before doing so, however, it locates the discussion of the LMRA within 1) a more general account of political interest formation and articulation within capitalist democracies, as qualified by 2) the "exceptional" weakness of worker organization in the U.S. case.

[+] In fairness to the commentator on this paper, I have made no substantive changes in preparing it for publication. An expanded version of the argument, however, is published in 1988 Wisconsin Law Review.

[*] Professor of Law, Political Science, Public Affairs, and Sociology, University of Wisconsin-Madison; BA Yale College, 1972; JD Yale Law School, 1976; PhD Princeton University (Department of Politics), 1984. All of Rogers' work has been on positive and normative democratic theory and practice. Representative books are On Democracy (1983), Right Turn (1986), Associations and Democracy (1995), Metro Futures (1999), What Workers Want (2006), American Society (2010). Email: jerogers@wisc.edu

[1] 29 U.S.C. 141-97 (Supp. 1981).

https://doi.org/10.1017/S2071832200016825 Published online by Cambridge University Press

B. Capitalist Democracy: Constraints, Consent, and Reproduction

As argued elsewhere,[2] I take the political arrangements that mark most advanced industrial states to comprise a distinctive social system – capitalist democracy – which is neither just capitalism, nor just democracy, nor just some disjointed (on most liberal views) or mutually antagonistic (on most radical views) combination of those two principles of social organization. By a social system I mean a set of social relations characterized in the first instance by a distinctive structure – and with that structure a certain distribution of power and interests – that can and does reproduce itself over time. In the case of capitalist democracy, the basic structure consists in private control of investment, free labor markets, and universal formal political liberties (including associational rights and suffrage). As in any system in which capitalism is the dominant mode of economic production, power is unequally divided between capitalists and workers; the former exploit the latter.[3] Especially given the existence of political liberties, a central burden of any account of system reproduction, then, is to explain why workers consent to this exploitation.

Apart from state-centered accounts of reproduction, which have been effectively criticized elsewhere,[4] two basic answers to the question of consent are familiar. On the first sort of account, force, or fear in anticipation of the use of force, keeps workers in line. On this view, workers "go along" with capitalist democracy because they realize that if they did not go along they would be beaten up or killed. On the second sort of account, emphasis is placed on problems of "false consciousness" among workers, or more broadly on their rank inability to understand their exploitation. By arguing that workers are coerced or uninformed, both of these familiar answers to the question of consent in effect deny the existence of the question.

Against such views, Cohen and I argue that worker consent to the continuation of capitalist democracy is both "real" (in the sense that workers knowingly and willingly choose that position) and explicable. It arises from the widespread application of a norm of economic rationality – specifically encouraged by the structure of the system – and follows on the interaction of what we call the "demand" and "resource" constraints on worker interest articulation and collective action.

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[2] JOSHUA COHEN & JOEL ROGERS, ON DEMOCRACY (1983); Joshua Cohen & Joel Rogers, "Response to Clark and Cunningham", Canadian Philosophical Association Annual Convention (1985).

[3] See KARL MARX, CAPITAL (B. Fowkes trans. 1976); JOHN ROEMER, A GENERAL THEORY OF EXPLOITATION AND CLASS (1982).

[4] See JOSHUA COHEN, MARXISM AND POLITICS: OR, TROUBLE IN PARADISE (1980) (unpublished manuscript); Adam Przeworski, *Material Bases of Consent*, 1 POLITICAL POWER AND SOCIAL THEORY 21 (1980); Adam Przeworski & Michael Wallerstein, *The Structure of Class Conflict in Democratic Capitalist Societies*, 76 AM. POL. SCI. REV. 215 (1982); JOEL ROGERS, DIVIDE AND CONQUER: THE LEGAL FOUNDATIONS OF POSTWAR U.S. LABOR POLICY, 90-110 (1984) (Princeton University, unpublished Ph.D. dissertation).

The *demand constraint* refers to the ways in which the structure of capitalist democracy tends to reduce political conflict to conflict over short term material gain, a reduction which is achieved in the first instance by the institution of private control of investment. Such control structurally subordinates the satisfaction of the interests of workers to the satisfaction of the interests of capitalists (without the expectation of profits, there will be no investment, production, or employment), but its most immediate effect is to generate pervasive material uncertainty for workers. This uncertainty arises from the fact that while the satisfaction of the interests of capitalists is a necessary precondition for the satisfaction of the interests of workers, it is also an insufficient one. Profits can be consumed, hoarded, exported abroad, or otherwise deployed in ways that do not increase or maintain the availability of employment within the domestic system.

Within capitalist democracy, struggles to mitigate the material uncertainty that follows from private control of investment thus provide a "natural" focus for worker political action; hence the reduction of politics to striving for material gain. But since the costs and risks of transformative struggles (which would be required to achieve social control of investment – the precondition for the removal, as opposed to mere mitigation, of material uncertainty) are far greater than those of struggles to achieve limited gains within existing arrangements, it is also economically rational for workers to confine their struggles to the short term. In essence, the production of worker consent to capitalist democracy follows from numberless such locally rational decisions to consent to continued capitalist production.[5]

The demand constraint establishes, within the framework of structural subordination, the conditions for economically rational compromise between workers and capitalists. The basic parameters of such compromises are the "agreement" of workers not to make confiscatory wage demands and the "agreement" of capitalists to invest a sufficient share of current profits to provide for future well-being.[6] The concessions of the parties are asymmetric; workers are agreeing to do something now, while capitalists are only agreeing to do something in the future. Still, the institutionalization of such compromises (and this is the form we assume them to take, thus obviating the need for explicit agreements) permits gains by both parties in a positive sum game.

The parameters just described permit wide variation both in the respective shares of the social product claimed by workers and capitalists and in the share of profits compelled to investment. Specific outcomes achieved along these two dimensions vary across regimes and depend upon the particular balance of power between workers and capitalists within them. Within all capitalist democracies, however, the ability of workers to press and

[5] Compare MICHAEL BURAWOY, MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM (1979).

[6] See Adam Przeworski, *supra*, note 4; see also Przeworski & Wallerstein, *supra,* note 4.

https://doi.org/10.1017/S2071832200016825 Published online by Cambridge University Press

enforce demands within the above parameters is limited by the *resource constraint* on worker political action. Here it is enough to note the obvious. Collective political action requires more than convergent interests and shared enthusiasm,[7] and on virtually all critical dimensions of collective action capitalists have distinct advantages over workers. They have greater assets, better information (deriving from their position in the economy), access to key decision makers,[8] and relatively limited numbers of actors to coordinate. Each of these political strengths of capitalists points up a corresponding worker weakness. The operation of the resource constraint, which consists in the sum of these debilities, underscores the difficulty of collective worker action, which difficulty in turn gives added force to the demand constraint on the ends of that action.

Whatever the particular conditions of compromise achieved by workers and capitalists, they are institutionalized and enforced by the state. But while the state provides an arena for the articulation of class compromise, on the view just offered it cannot itself, qua state, guarantee the stability of those arrangements.[9] The state can act "autonomously" in the specific sense that its enforcement of the compromises between workers and capitalists can instantiate a truly general interest in social coordination not exhausted by the particular interests of the parties to that coordination.[10] But its power derives from the willingness of workers and capitalists to permit that coordination, and its form and functions arise from the particular ways in which those parties struggle to defend and advance their interests within the demand and resource constraints.

The domestic conditions of regime stability within any capitalist democracy follow from this discussion, and their statement may be used to summarize it. By enforcing the compromise in place at the moment (or, in periods of transition, by providing an arena for the construction of a new one), the state must secure a level of business investment adequate to achieving worker consent, and a reciprocal limitation on wage and other worker pressure adequate to achieving "business confidence". Finally, it must secure consent to its own use of coercion in enforcing these arrangements by demonstrating its legitimacy. Apart from the legitimacy that derives from its "fair" enforcement of the terms of the existing compromise ("the rule of law"), this demonstration is provided by winning elections.

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[7] See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

[8] CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS (1977).

[9] BOB JESSOP, THE CAPITALIST STATE, 221 (1982).

[10] See Cohen, *supra,* note 2; Fred L. Block, *The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State*, 7(3) SOCIALIST REVOLUTION 6 (1977).

C. The Exceptional U.S. Case

Before moving to the postwar system of labor regulation in the U.S., this general account of the dynamics of worker action in capitalist democracies needs to be supplemented by notice of the exceptional weakness of worker organizations in the U.S. This weakness gives added force to the demand and resource constraints. Two aspects of it bear special note.

The first is that phenomenon most centrally identified with the term "American exceptionalism", namely the longstanding absence within the U.S. of political organizations deriving their programmatic identity and organizational form from independent organizations of workers *qua* workers – as evident for example in the absence of a labor party or socialist movement in the U.S. of significant strength or duration – and the more general concomitant absence of class-based partisan cleavages within the party system. U.S. workers have never succeeded in forming electoral organizations of their own to wage reform struggles in the state, and in comparative terms the organizations they do have exert relatively little influence on the shape of public policy. The consequences for the outputs and administration of that policy, as compared to the public policies of other advanced industrial states, are enormous, predictable, and widely explored,[11] and need not detain us here. Suffice it to say that on virtually all critical dimensions of policy substance and administration U.S. workers have been relatively unsuccessful in mitigating their material uncertainty through the state. Most generally, the U.S. features relatively low levels of social spending, and an almost total lack of generic (as opposed to means-tested) substantive entitlements or claims that workers can make upon the state during their working lifetimes.

The second aspect of U.S. labor's weakness goes to the nature of its organization. Here what is particularly relevant to the discussion that follows is the extreme *fragmentation* (decentralization and lack of coordination) of the different organizational units. Claiming a relatively small share of the working population, organized labor mimics in its own highly

[11] See David Cameron, *The Expansion of the Public Economy: A Comparative Analysis*, 72 AMER. POL. SCI. REV. 1243 (1978); David Cameron, *On the Limits of the Public Economy*, 249 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 46 (1982); David Cameron, *The Politics and Economics of the Business Cycle*, *in* THE POLITICAL ECONOMY: READINGS IN THE POLITICS AND ECONOMICS OF AMERICAN PUBLIC POLICY, 237 (Thomas Ferguson and Joel Rogers, eds., 1984); Gøsta Esping-Anderson, SOCIAL CLASS, SOCIAL DEMOCRACY AND STATE POLICY (1980); C. Hewitt, *The Effect of Political Democracy and Social Democracy on Equality in Industrial Societies: A Cross-National Comparison,* 42 AMERICAN SOCIOLOGICAL REVIEW (AMER. SOC. REV.) 450 (1977); Douglas Hibbs, *Political Parties and Macroeconomic Policy*, 71 AMERICAN POLITICAL SCIENCE REVIEW (AMER. POL. SCI. REV.) 1467 (1977); Robert W. Jackman, POLITICS AND SOCIAL EQUALITY: A COMPARATIVE ANALYSIS (1975); Robert W. Jackman, *Socialist Parties and Income Inequality in Western Industrial Societies*, 42 JOURNAL OF POLITICS (J. OF POL.) 135 (1980); Walter Korpi, *Social Policy and Distributional Conflict in the Capitalist Democracies: A Preliminary Comparative Framework*, 3 WEST EUROPEAN POLITICS 296 (1980); WALTER KORPI, THE DEMOCRATIC CLASS STRUGGLE (1983); FRANK PARKIN, CLASS INEQUALITY AND POLITICAL ORDER: SOCIAL STRATIFICATION IN CAPITALIST AND COMMUNIST SOCIETIES (1971); Michael Shalev, *Class Politics and the Western Welfare State*, *in* SOCIAL POLICY EVALUATION: SOCIAL AND POLITICAL PERSPECTIVES (Shimon E. Spiro and Ephraim Yuchtman-Yaar, eds., 1982).

https://doi.org/10.1017/S2071832200016825 Published online by Cambridge University Press

federated organization the "politics of heterogeneity"[12] characteristic of the political system in which it operates. What one might expect to be a natural consequence of union growth, viz. sharply increased strength, is often confounded by this structure. Instead of being more than the sum of their parts, and capable of collaborative, synergistic strategic action, unions are commonly less than the sum of their parts – long on numbers (decreasingly so, of course), but short on effectiveness.

These two factors are intimately related. The general failure to achieve class-wide gains through the state sharpens concentration on achieving more particular gains in narrow arenas through particular (commonly local) organizations. The particularity of both the gains sought within those arenas and the organizations that seek them makes the articulation of general demands more difficult. And success in the achievement of particular demands tends to consolidate the pattern of organizational isolation, while slowing the impetus to cross-sectoral coordination.

The precise sources of American exceptionalism are, as is well known, a matter of continuing dispute. They are sometimes located in critical events in early nation-building (the "no feudalism, no socialism" thesis and its variants); sometimes in the variety of forces (ethno-religious cleavages, racism, extremely rapid industrial growth) that repeatedly "unmade" the American working class in the middle and late 19th century; sometimes in state repression, or the massive defeats American labor has suffered in past moments of crisis and struggle with capital. A familiar difficulty with all these accounts, however (and this is part of the reason why the exceptionalism debate continues), is that they explain both too little and too much. They explain too little in the sense that while each account has plausibility, at least for particular periods or events in the history of American worker weakness, none captures the complexity of the picture as a whole. The problem here is finding a way to integrate the insights of the various accounts in an explanatory framework that is not causally promiscuous. These accounts commonly explain too much, however, in the sense that in their search for the historical sources of American labor's weakness virtually all of them take the reproduction of that exceptionalism to be, after some point, unproblematic. It is as if each assumes that history stopped somewhere (perhaps about 1830, or 1865, or 1896, or 1919, or 1935, or, more plausibly perhaps, the early 1950s), and that after that point (whenever it may be) the exceptionalism picture was fully drawn. The problem here is finding a way to make sense of the present production of consent, in its peculiarly enfeebled American form, and to do so in a way that is continuous with the account of the past.

In my view, both of these problems can be better solved within the general analytic framework of compromise structuring offered above. First, the notion of institutionalized

[12] See Walter D. Burnham, The United States: The Politics of Heterogeneity, *in* ELECTORAL BEHAVIOR: A COMPARATIVE HANDBOOK, 653 (Richard Rose, ed., 1974).

compromises between workers and capitalists provides an analytic key to the periodization of institutional forms and conflict strategies.[13] Such periodization, in turn, permits more precise assessment of the conjunctural significance of the different variables just noted. Secondly, such a framework offers a way of thinking about strategic action that takes continued reproduction to be problematic and underscores how conflict resolution at one point – that is, the elaboration of new institutional and organizational forms to guide the "normal" course of consent – 1) shapes the pattern of ongoing conflict while 2) being itself shaped by the outcome of strategic actions taken under earlier arrangements. On such a view, unraveling the problem of American exceptionalism would consist in showing how each in a succession of solutions to the problem of regime stability in the U.S. tended to *codify* the weakness of labor in the compromise just past, while furthering that weakness in its own. No such elaboration will be attempted here.[14] In the postwar system of labor regulation, however, both sorts of processes are evidently at work.

Regarding the codification, or "sedimented historical experience",[15] of previous struggles and defeats, for example, the fragmentation of bargaining which is at the core of that system reflects the earlier distinctive absence of large scale employer associations in the U.S.[16] This absence is itself best understood as a consequence of the comparatively early consolidation in the U.S. of large scale industrial enterprises with secure monopoly positions (and thus little need for cooperation with other firms) and sufficient individual resources (immensely supplemented, of course, by the state) to face down early 20th century labor challenges (most spectacularly in 1912 and 1919). This early consolidation, in turn, was facilitated by the repeated defeats of working class insurgency in the late 19th century, which defeats themselves echoed the antebellum fracturing of emergent American working class solidarity by bitter religious, ethnic, and racial cleavages. In a similar play on the theme of weakness begetting weakness, the deeply economistic character of collective bargaining, and the relative absence of generic substantive entitlements that encourages it, trace back not only to longstanding failures of worker political organization, but to almost equally longstanding union strategies (undertaken in face of that failure) to construct particular private equivalents of what was elsewhere a social wage. The intensely federated structure of the labor movement, as well as its merely regional status (of great importance, of course, in understanding its peculiar post-New

[13] See MICHEL AGLIETTA, A THEORY OF CAPITALIST REGULATION: THE U.S. EXPERIENCE (D. Bernbach trans. 1979); ROBERT BOYER & JACQUES MISTRAL, ACCUMULATION, INFLATION, CRISES (1978).

[14] See Mike Davis, *Why the U.S. Working Class is Different*, 123 NEW LEFT REVIEW 3 (1980); Mike Davis, *The Barren Marriage of American Labour and the Democratic Party*, 124 NEW LEFT REVIEW 43 (1980); JOEL ROGERS, *supra*, note 4.

[15] See Davis, *id*.

[16] See Andrew Thomson, A View From Abroad, *in* U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, 297 (Jack Stieber, Robert B. McKersie and D. Quinn Mills eds., 1981).

Deal relation with the Democratic Party), is built on the wreckage of earlier worker experiments (the Knights of Labor, labor populism, Debsian socialism) at building national class-wide coalitions. And so on.

At least as important, however, is understanding the other sort of process – the ways in which these and other familiar indicia of American labor's weakness and fragmentation were furthered during the postwar period. For it was then that the exceptionalism of the U.S. case became most pronounced, as American unions, in contrast to their counterparts in virtually all other advanced industrial states, traced a trajectory of virtually monotonic decline. And it was here that the regulatory framework in which labor operated, while surely not the only cause of labor's decline, may be seen as making an important contribution.

D. Postwar Labor Regulation: The Constraints of the LMRA

The postwar system of U.S. labor regulation furthered the weakness of American labor by encouraging highly particularistic strategies by unions. It did so chiefly by imposing enormous barriers to the class-wide articulation of political demands, while simultaneously providing potential rewards for more limited attempts at gain. In what follows, I trace through the "divide and conquer" logic of the LMRA in successive stages of the bargaining relation. Before doing so, however, three general remarks on the LMRA's structure and administration are appropriate.

The first concerns the nature of the protections afforded by the Act. Here what is crucial is that these protections are largely procedural, and not substantive. Unlike labor legislation in most other advanced industrial states, the provisions of the LMRA do not specify substantive claims that individual workers can make against employers or the state. Rather, they specify a set of procedures – for union recognition and bargaining – workers may follow to put themselves in the position of making such claims against private employers.

The second concerns coverage. Like much social legislation in the U.S., the LMRA is substantially narrower in coverage than national labor laws in most advanced capitalist democracies. In addition to the exclusion of workers already covered under the Railway Labor Act, and public sector workers later covered under the Postal Reorganization and Civil Service Reform Acts, various executive orders and state statutes (which, of course, feature important differences with the LMRA on such vital matters as the use of economic force) its protections on worker representation do not apply to domestic workers, agricultural laborers, independent contractors, workers in church-run operations, those who are broadly defined as supervisors or "managerial" employees, and those who work for enterprises that do not have a "pronounced impact" on interstate commerce. Together these various exclusions account for roughly a third of the labor force.

The third concerns enforcement. The orders of the National Labor Relations Board (NLRB) to persons falling within its jurisdiction are generated by an administrative process that, even under conditions of low case backlog in Washington, commonly takes a year and a half to two years. Moreover, these orders are not self-enforcing; for their enforcement they require successful application to (and review by) the Circuit Courts of Appeals, a process that can easily take another year. Such delay is particularly burdensome to unions, since Board remedies and orders that are subject to this review are *never punitive*. They are "make whole" remedies presumptively designed to promote a process of interest representation by restoration of the status quo obtaining before its disruption by illegal activity. The lack of punitiveness means that Board sanctions are often supremely ineffective in deterring violations of the Act. To take one prominent example, a typical remedy for massive employer misconduct during union representation elections (where unions seek to become certified as bargaining representatives for workers) is simply an order for a new election, where the same employer tactics may be used again, with the same potential for a "make whole" sanction of ordering yet another election. The problem with delay, compounds this, however, in a special way, because the process (in this case, gaining employee support for a representation drive, and the critical search for a new contract) which is the putative object of legal solicitude commonly ends long before action to repair that process is prescribed. By the time the feeble doctor arrives, the patient is already dead. Put otherwise, the real target of the employer's action – which is not the individual worker, but the prospect of unionization – is already destroyed.

With these general remarks made, I move to the major stages in the collective bargaining relation: 1) bargaining unit determinations, 2) the recognition process, 3) collective bargaining, 4) the use of economic weapons, 5) contract enforcement, and 6) (the impact on workers of) changes in employer organization. By indicating the chief constraints on union action, I hope to indicate the general framework of postwar labor regulation, and the locally rational and ultimately self-defeating character of union action within it.

I. The Bargaining Unit

The LMRA directs the NLRB to require employers to bargain with those unions that have established majority status in "appropriate units" of employees, and it gives the Board substantial discretion in determining what constitutes such an appropriate unit. This determination, which commences the union-employer relation, is probably the single most important determinant of that relation. All the substantive gains workers may achieve through collective bargaining, and all the ways in which the NLRB regulates union relations with the employer are framed by it. For my purposes here, what is most interesting is how very narrow that framework is.

As a matter of Board law[17], the general principle governing unit determinations is that only those workers having a substantial "mutuality of interest" in wages, hours, and other conditions of employment should be grouped in a single bargaining unit. In deciding whether employees are united by such a community of interest, the Board looks to such factors as operational integration, geographic proximity, extent of common supervision, similarity in job function, and degree of employee interchange and mutual contact. As a practical matter, codified by the NLRB in *Dixie Bell Mills, Inc*.,[18] this requirement sets a very low threshold presumption on the size of appropriate units, mandating that they almost always be limited to single location units and, within those *single locations*, most commonly include only a fraction (albeit sometimes a large one) of total employees.

The effect of this presumption is to further, through the collective bargaining relation that may ensue, worker fragmentation. The policy mandates that workers be organized into units of relatively small size, institutionally segregated from one another. The fragmentation of these small units, in turn, reflects and is exacerbated by the historic divisions within the workforce which the policy mandates that unions accept as a framework for their self-help. This promotion of fragmentation receives added support from statutory restrictions. Section 9(b) of the LMRA, for example, prohibits the Board from finding any unit "appropriate" that includes both professional and nonprofessional employees unless the majority of professionals specifically vote for inclusion in such a "mixed" unit; it permits skilled craft employees (whose special relation to the production process gives them added bargaining power, which could be shared with less powerful colleagues) to sever themselves from a broader unit including less skilled employees, even where the broader unit has been certified by the Board; and, in a measure designed to protect the employer's property during strikes and other labor disputes, it prohibits certification of any unit which includes both plant security guards and non-guard employees. Taken together, Board imposed and statutory restrictions on unit determinations make the segmentation of workers a controlling norm in labor policy.

Beyond the segmentation effect, two aspects of the law on unit determinations should be noted. First, notice that in the usual case (i.e., a unit with no bargaining history), the degree of "mutuality of interest" among workers is itself employer determined. It depends on prior management choices, in a non-union setting, concerning general operations, degree of integration, construction of employee groups and job classifications, the manner of supervision, and the pattern of wages and benefits already conferred. Characteristically, the LMRA leaves such "management prerogatives" undisturbed, and even takes their past exercise as dispositive of the proper framework for present regulation. Second, however, it is important to emphasize that unions have done their share in the elaboration of this general policy. Operating with limited financial and staff resources, constraints on their

[17] *Purnell's Pride, Inc.,* 252 NLRB 110 (1980).

[18] 139 NLRB 629 (1962).

https://doi.org/10.1017/S2071832200016825 Published online by Cambridge University Press

own coordination, a general statutory presumption of decentralized bargaining, and, most commonly, employer hostility, unions have directed their organizing efforts to workers in relatively small units. There are many reasons for this, but let me focus on just one. In the short term, the organization of such units is less costly than the organization of large ones, both because of the limited number of workers who need to be reached and because firms employing workers in such units are commonly less capable than larger firms of resisting unionization. (Some 50 percent of all "representation elections" to certify unions as bargaining representatives are conducted in units of 20 or fewer employers, and units of 50 or fewer workers account for 75 percent of such elections.[19] Since union win rates are higher in smaller units, many friends of labor are currently urging them to concentrate even a greater share of resources here.) It is thus in the unions' short term interest that the threshold for appropriateness be set very low, and the characteristic pattern in the case law establishing the guidelines on appropriateness has been for *unions* to seek smaller units, at least for purposes of achieving recognitional status.

If the general policy on "mutuality" reflects the subordinate position of labor, then, its specific form also reflects successful short-term-oriented union struggles. Thus the reproduction of labor market segmentation cannot be exhaustively described either by technical and economic factors,[20] or by employer strategy.[21] It includes, as a critical component, the strategies of worker organizations articulated through the state's administrative regulation.

II. Achieving Recognition

Section 9(a) of the LMRA provides that any:
... representative designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of all the employees in such unit for purposes of collective bargaining ...

The requirement of "majority status" and its correlative guarantee that the majority union within an appropriate unit be recognized as the exclusive bargaining representative of employees within that unit are principles of labor regulation virtually unique to the American system. They represent the flip side of the presumption of decentralized

[19] See Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 198 U. ILL. L. REV. 75 (1981).

[20] Compare Michael Piore, *An Economic Approach*, *in* DUALISM AND DISCONTINUITY IN INDUSTRIAL SOCIETIES, 13 (Suzanne Berger & Michael Piore eds., 1980).

[21] Compare RICHARD EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY (1979); DAVID M. GORDON, RICHARD EDWARDS & MICHAEL REICH, SEGMENTED WORK, DIVIDED WORKERS: THE HISTORICAL TRANSFORMATION OF LABOR IN THE UNITED STATES (1982).

bargaining, where the well being of workers is tied to the welfare of particular employers and where no legal mechanisms for the simple "extension" of worker gains made against one employer, or employer association, to other employers exist. In such a system, majority status is a precondition for any extended dealings between unions and employers in the collective bargaining relation, and exclusivity is the gravamen of union power within that relation.

Where an employer is resistant to unionization, as will be assumed throughout this part of the discussion, majority status can be achieved only through 1) compelling a "voluntary" employer recognition of the union through recognitional strikes or picketing, or 2) a legally mandated recognition after success in a representation election supervised by the Board. The difficulties of this second route are by now well known. The Board's election procedure is particularly rife with opportunities for delay (which always works against unions) and other forms of legal employer resistance, while, again, the absence of punitive remedies removes any significant deterrent to illegal employer resistance. As a growing number of studies[22] have documented in detail, resistance of both kinds, which has increased dramatically over the past 15 years (Richard Freeman has described it, colorfully and appropriately enough, as a "massive crime wave") is highly successful and cost effective. On one estimate, where employers offer no resistance, or campaign only lightly against unions, unions will win representation elections 53-67 percent of the time; intense employer campaigning brings the success rate down to the 22-34 percent range; campaigning coupled with unfair labor practices (such as discharges of union supporters) reduces it to 4-10 percent.[23]

Since this literature is familiar, I will not review it here. What should be indicated, however, is the rationality of union use of this second and famously tortuous route to recognition. Such indication can be provided simply enough by looking at the potential risks associated with the alternative route of recognitional strikes and picketing.

A recognitional strike by bargaining unit employees is fully protected as "concerted activity" by Section 7 of the LMRA, and retaliation by an employer against employees who

[22] See W.T. DICKENS, UNION REPRESENTATION ELECTIONS: CAMPAIGN AND VOTE, (1980) (Massachusetts Institute of Technology, unpublished Ph.D. dissertation); RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984); Morris M. Kleiner, *Unionism and Employer Discrimination: Analysis of 8(a)(3) Violations*, 23 INDUSTRIAL RELATIONS (IND. RELS.) 234 (1984); Richard Prosten, The Longest Season: *Union Organizing in the Last Decade, a/k/a How Come One Team Has to Play With Its Shoelaces Tied Together*, 31 PROCEEDINGS OF THE ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 240 (1978); Richard Prosten, *The Rise in NLRB Election Delays: Measuring Business' New Resistance*, 102(2) MONTHLY LABOR REVIEW 38 (1979); see also Roomkin & Block, *supra*, note 19; Ronald L. Seeber & William N. Cooke, *The Decline in Union Success in NLRB Representation Elections*, 22 IND. RELS. 34 (1983); B.R. Skelton, Economic Analysis of the Costs and Benefits of Employer Unfair Labor Practices, 59 N.C. L. REV. 167 (1980); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

[23] Dickens, *supra,* note 22.

https://doi.org/10.1017/S2071832200016825 Published online by Cambridge University Press

engage in such strike activity is prohibited by Section 8(a)(3). This "full" protection means that an employer cannot lawfully discharge an employee for striking. But such protection is vitiated by the employer's concurrent right to hire permanent replacements for striking workers, and by the policy that once a striker's job has been filled by such a replacement, the striker's right to reinstatement is tolled until the opening of a new vacancy.[24] Thus the individual worker contemplating participation in a recognitional strike must weigh the near certain cost of an indefinite period of unemployment against the only possible achievement of representative status for the union. Given the often disastrous consequences of unemployment, particularly in the U.S., the situation presents workers with substantial downside risks. This again, is where the narrowness or permeability of the American "safety net" comes into play, as a sort of intrusive background against which strategic union calculations should be assessed. At present, for example, despite the near universal formal coverage of (state administered) unemployment insurance programs, only about a third of the unemployed (26.8 percent as of October 1985) actually receive benefits; their size, of course, like the size of other state administered programs (AFCD, workers compensation, etc.) varies considerably from state to state.

The potential risks for the union are also high. If the strike fails to achieve its purpose and the union is forced to resort to the election process, the employees whom the employer has hired as strike replacements will be accorded full voting rights. The more total the support at the outset of the strike, the greater the potential number of strike replacements; the greater the number of strike replacements, the lower the probability of union success in a subsequent election. For a recognitional strike to be a rational strategic choice, it must carry a very high probability of almost immediate success.

Recognitional picketing, as opposed to striking, has the advantage of limiting employee exposure to replacement. It thus avoids the "unit packing" problem just described. But Section 8(b)(7)(C) of the LMRA makes it an unfair labor practice for a union to continue recognitional picketing for more than 30 days without filing a petition for a Board election. Section 10(1), in addition, requires the Board to give "priority" to the investigation and processing of 8(b)(7)(C) charges, and further requires the Board, upon finding an 8(b)(7)(C) violation, to seek an immediate Federal court injunction against it. Thus recognitional picketing that does not accomplish its purpose within 30 days will be subject to swift restraint. Moreover, unlike the recognitional strike, which is protected activity in the sense just described, recognitional picketing found to violate Section 8(b)(7)(C) is unlawful, and therefore outside the scope of Section 7 protections. Any employee who participates in such unlawful picketing is subject to discharge without rights to future reinstatement. These various constraints, naturally known in advance to both the union and the employer, sharply limit the usefulness of recognitional picketing as an organizational tool.

[24] *Laidlaw Corp.,* 171 NLRB 1366 (1968).

https://doi.org/10.1017/S2071832200016825 Published online by Cambridge University Press

Thus the structure of the LMRA and its administration drive unions toward the election route to recognition. Whatever its distinctive shortcomings, this path permits some possibility of gain. The alternatives to it, while no more certain of success, are in the short term more costly and dangerous.

III. The Duty to Bargain

If a union successfully runs the gauntlet of the recognition process and achieves representative status under the LMRA, it is the obligation of the employer to bargain with it over the terms of employment of the unit employees. The requirement of bargaining, however, is emphatically *not* a requirement to come to terms. The process of collective bargaining promoted and protected by American law is conceived as a purely private process, occurring in a private labor market, with government supervision limited to the specification of the *procedures* for bargaining, and with virtually no government control over the terms of the bargained-for contract that may result.

The Board does require that the parties bargain in "good faith", but this requirement is limited in its application to enumerated "mandatory" subjects of bargaining (see discussion below), and has been interpreted as a subjective standard, a showing of whose violation requires a showing about the relevant party's state of mind. Once into the realm of *mens rea* additional restrictions appear. With very rare exceptions, the state of mind necessary to find a violation of the bargaining obligation has been understood to be not merely that a party did not intend to reach agreement on mandatory subjects of bargaining, but that the party actively intended not to reach agreement. This restrictive interpretation of what has been taken to be a subjective standard has, not surprisingly, drastically limited the number of behaviors whose proof will warrant a conclusive inference of the required mens rea. Specifically, apart from refusals to meet or confer at all, such per se violations of the good faith requirement are limited to five objective actions: 1) a unilateral change in working conditions, 2) direct dealing with employees, 3) insistence on a non-mandatory subject, 4) a refusal to reduce a contract to writing, and 5) a refusal to provide upon request information of immediate relevance to mandatory subjects.[25]

Beyond these very limited cases of gross employer hostility, however, the law governing the good faith requirement resists easy codification. Instead the Board takes a "totality" approach to offensive behaviors, evaluating each charged violation of the good faith requirement in the context of the charged party's overall posture and conduct. This context-embedded approach to the specification of objective indicia of bad faith, however, in effect means that no such indicia – apart from the *per se* violations just noted – can be specified in advance. There is, in effect, no law, but only the potential for retrospective

[25] THE DEVELOPING LABOR LAW (Charles J. Morris ed., 1983).

https://doi.org/10.1017/S2071832200016825 Published online by Cambridge University Press

condemnation, which provides yet additional comment on the problems of traditional notions of "rule of law" in the context of the administrative state.[26] Finally, as elsewhere, Board remedies for violations of this "law" are notably weak. The remedy for a finding of bad faith bargaining is merely a Board order to recommence bargaining in good faith. For all these reasons, the good faith requirement, as Archibald Cox (1958) pointed out some thirty years ago, provides no serious curb to sham bargaining by employers.

As noted above, the requirement of good faith bargaining, as weak as it is, is limited to certain "mandatory" bargaining subjects. These include wages, hours, and working conditions – so-called "bread and butter" issues. But they emphatically do not include a range of important issues – ranging from company investment decisions to basic changes in firm operation – that the Board and the courts have found to lie near "the core of entrepreneurial control",[27] a point I will return to below. More immediate to the general argument about fragmentation, they do not include matters extending beyond the particular bargaining unit – for example, issues of unit scope (e.g. a demand that the employer join a multi-employer bargaining group, or a demand that the original bargaining unit be expanded to include workers not heretofore included), or issues that tie units together (e.g., demands in the course of negotiation in one unit that might affect another, such as a seniority system that permitted transfer between units during a reduction in force). All of these vital subject matters are deemed "permissive" subjects of bargaining, and bargaining to impasse over such subjects, or using economic force to secure demands regarding them, constitute illegal activity. The effect of the distinction is to narrow the scope and usefulness of union activity. Faced with the considerable sanctions available to employers and the state upon a finding of illegal union use of economic force, a point I will return to below, unions quite rationally tend to confine their use of force to securing employer compliance on mandatory terms. But while rational, union self-limitation to mandatory terms serves to further particularize union demands, thus contributing to further fragmentation.

It is worth noting that the mandatory/permissive framework, like the policy presumption of small bargaining units, was first secured through union action. The distinction was first explicitly drawn in *NLRB v. Borg-Warner Corp.*,[28] hailed at the time as a major union victory. There a weak union successfully sought the assistance of the Board in narrowing the range of conflict with a powerful employer. It did so by gaining a Board declaration that the subject on which the employer was insisting was only a "permissive" one, and that

[26] See JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978); MORRIS HORWITZ, THE CRISIS OF LEGAL THEORY IN THE REGULATORY STATE (1980) (Harvard Law School, unpublished manuscript); Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TX. L. REV. 1307 (1979).

[27] *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964)

[28] 356 U.S. 342 (1958).

https://doi.org/10.1017/S2071832200016825 Published online by Cambridge University Press

such insistence constituted a violation of the good faith requirement. The effect of the decision and its subsequent elaboration, however, has been to further shift the balance of power in negotiations toward employers by, as it were, making all unions equally weak. Weak unions confronting employer insistence on permissive subjects gain the support of the Board in overcoming that insistence. This support, however, at most consists in a remedial order directing the employer to bargain in good faith. Strong unions that wish to insist on permissive terms, on the other hand, lose all protection for explicit attempts to compel acquiescence to those terms through the use of economic weapons. As elsewhere, the administration of the LMRA, while shaped by the successful efforts of individual unions, tends as a system to enlist them in their own defeat.

IV. Economic Weapons

Given the weakness of legal remedies against employer refusals to bargain, and the limitations on government regulation of the process of negotiation, the union's leverage in negotiations generally comes down to the measure of its ability to apply economic pressures on the employer through picketing and strikes.

Despite the overwhelming importance of their subject, the laws governing union use of economic pressures are relatively simple. Three sorts of pressures are distinguished: protected, unprotected, and unlawful. I consider them in turn.

A strike in support of contract demands (on mandatory subjects) during negotiation is generally deemed an "economic" strike, and economic strikers have the same legal status as recognitional strikers (see section 3.2 above), with the same risk to the employee of sustained unemployment after the strike (however successful) due to permanent replacement, and the same risk to the union of representing a unit packed with unsympathetic strike-breakers. Sympathy strikers – employees of another employer who refuse to cross a picket line at the site of the primary strike – have identical protections and risks.

Certain other forms of strike activity are unprotected but not unlawful. Workers engaging in them are subject to discharge for that activity, and have no rights of reinstatement. Sit-down strikes and "partial" strikes (including refusals to work overtime or perform certain tasks, walkouts over a grievance dispute, in-plant demonstrations interfering with the production process, and slowdowns to protest new piece rates or wage reductions) fall into this category.

Finally there is unlawful action. This category includes picket line misconduct (including violence, "mass picketing" of entrances and exits, and, in some cases, verbal threats), which leaves an employee open to discharge by the employer, and may leave the union open to state injunctive action. It also includes any form of economic coercion (strike

activity, picketing, etc.) directed to achieving agreement on a permissive term, for which conduct employees may again be discharged, and against which the employer may obtain Federal injunctive action. The most significant legal ban, however, which both underscores and furthers the fragmented character of the U.S. system, and employer reliance on which is uniquely salient here, is the ban on "secondary" strikes and picketing. What this means is a union is prohibited from exerting economic pressures on "neutral" or "secondary" employers who do business with the "primary" employer with which the union has its dispute – something a union might do in the hope of forcing the "secondaries" to exert pressure on the primary. In addition to being subject to Federal injunctive action for such activity, unions are liable for any damages caused by it. In obvious ways, and in some not so obvious ones, the prohibition (despite various exceptions) on secondary activity serves to limit coordination among unions, or even within unions that represent employees of more than one employer, and confine the range of their action to particular, limited targets. The result is that unions tend only to direct action against primary employers, and decline to press (even with their own resources, let alone those of other unions) the network of supply and service firms that permit those employers to flourish. As severe as this limitation on union power is, it appears recently to have been extended. In a 1980 case, the Board applied "secondary" analysis to economic action directed against two facilities of the same employer, accepting for the first time the proposition that a single employer could be both the "primary" and the "neutral".[29]

The significance of this typology of economic weapons is straightforward. No exercise of these weapons is without serious long-term risks to the workers involved, and the most radical forms of collective action, including shop floor militancy and cross-sectoral coordination of workers in secondary activities, are either unprotected or unlawful. They thus carry the risk of sharp state or employer sanctions. The effect of these various restrictions is to further canalize and fragment industrial conflict and the articulation of worker demands. That, despite the risks, American workers long engaged in the highest level of strike activity in the advanced industrial world[30] is eloquent testimony to their tenacity. Equally, however, it reflects their enduring weakness and desperation. Strikes are as frequent and as long as they are in the United States precisely because so much is at stake in the bargaining relation. So much is at stake there, relatively speaking, because of the absence of generic entitlements secured elsewhere in the political system. As political interpretations of industrial conflict[31] have correctly insisted, resort to the strike weapon

[29] Curtin Matheson Scientific Inc. 248 NLRB 1212 (1980).

[30] See PAUL K. EDWARDS, STRIKES IN THE UNITED STATES 1881-1974 (1981).

[31] See Douglas Hibbs, *Industrial Conflict in Advanced Industrial Societies*, 70 AMERICAN POLITICAL SCIENCE REVIEW (AM. POL. SCI. REV.) 1033 (1976); Douglas Hibbs, *On the Political Economy of Long-Run Trends in Strike Activity,* 8 BRITISH JOURNAL OF POLITICAL SCIENCE (BRIT. J. OF POL. SCI.) 153 (1978); Walter Korpi & Michael Shalev, *Strikes, Industrial Relations and Class Conflict in Capitalist Societies*, 30 BRITISH JOURNAL OF SOCIOLOGY (BRIT. J. OF SOC.) 164 (1979); Walter Korpi & Michael Shalev, *Strikes, Power and Politics in the Western Nations*, 1900-1976, 1 POLITICAL POWER AND SOCIAL THEORY (POL. POWER & SOC. THEORY) 301 (1980); Alessandro Pizzorno, *Political Exchange and Collective*

https://doi.org/10.1017/S2071832200016825 Published online by Cambridge University Press

becomes both more frequent and more urgent in those cases (such as, most famously, the U.S.) where workers have failed to act collectively through the state, and where they must therefore confine their activities to the "economic" sphere.

V. Contract Enforcement

Assuming a union achieves certification as the exclusive bargaining representative of the workers in an appropriate unit, assuming further that the union and employer successfully discharge their mutual duty to bargain, and assuming finally that a collective bargaining agreement emerges out of this negotiation, the next question that confronts the parties is how that agreement will be enforced. The answer, which at least since the "Steelworkers Trilogy"[32] has been Federal law, is judicially enforced recourse to "arbitration", or the submission of disputes between the parties to the contract (the union and the employer) to a neutral private party for resolution.

This reliance on non-judicial means of dispute resolution, while at odds with the reliance on labor courts or other judicial venues widely characteristic of other industrial relations systems,[33] is perfectly continuous with other aspects of the U.S. framework of regulation. Its institutionalization is also exemplary of the dynamics of union demand formation within that framework's many constraints.

Arbitration is continuous with the rest of the U.S. labor regulation system in that it is the most efficient means of resolving disputes within an extremely fragmented and heterogeneous pattern of labor contracts (which are themselves, given the absence of background substantive worker rights, exceptionally detailed by comparative standards). Such a pattern, which is everywhere encouraged by the constraints on union activity, is notably insusceptible to formal administrative or judicial codification. More immediately, given the structure of the regulatory system neither employers nor unions desire such codification, and then not merely for reasons of delay and cost. For employers, formal administrative or judicial intrusion would risk articulation of general norms on contract substance and performance, which articulation would cut against the extreme fragmentation of worker benefits that strengthens their overall position. For unions, on the other hand, at least in the short term, such articulation would pose a danger to those

Identity in Industrial Conflict, *in* THE RESURGENCE OF CLASS CONFLICT IN WESTERN EUROPE SINCE 1968, 277 (Colin Crouch and Alessandro Pizzorno, eds., 1978); EDWARD SHORTER & CHARLES TILLY, STRIKES IN FRANCE, 1830-1968 (1974).

[32] *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 & Car Corp*., 363 U.S. 593 (1960).

[33] See BENJAMIN AARON, LABOR COURTS AND GRIEVANCE SETTLEMENT IN WESTERN EUROPE (1971); Benjamin Aaron, *Labor Relations in the United States from a Comparative Perspective,* 39 WASH. & LEE L. REV. 1247 (1982).

discrete exceptional gains they have made through particular bargains in particular contexts. For both parties, arbitrators, who are selected and paid by union and the employer, and are therefore as much "creatures of the parties" as the contracts they interpret, are therefore preferable to independent judges.

Notice however that reliance on arbitration as the preferred means of dispute resolution, while making sense from the unions' point of view given the fragmentation of benefits, prolongs and extends that fragmentation by limiting the specification of the duties of the parties to particular contracts. It thus tends to reproduce the original sources of union weakness, even as its operation can provide unions with benefits in the short run.

Equally problematic for unions, at least in the longer run, has been the conception of the collective bargaining agreement that is canonized in the reliance on arbitration. On this conception, first, the particular terms of the collective bargaining agreement that define working conditions are seen not as promises in the familiar sense of promises at contract, but as rules; as posed in disputes over the agreement the issues are thus not framed as questions about breach of promise but about failed application of these rules; and the remedy (arbitration) for such failed application is thus not damages in the traditional contract sense but an order to conform the present situation to the one that would hypothetically have followed on the application of the rules, that is, an order of what might be thought of as "retrospective specific performance".[34] Second, and critically, what is understood as an enforceable agreement is not an agreement between the members of the union and the employer, but between the union and the employer, and what is enforceable as a contractual obligation is the "quid pro quo", characteristic of collective bargaining agreements, that consists in the employer's promise to comply with the arbitration process as the means of resolving disputes, and the union's pledge, made in exchange for that promise, not to strike.[35]

Since the Steelworkers Trilogy this theory, which was precisely the interpretation of the collective bargaining agreement that the union sought in those cases, has been elaborated along three main lines. Each has been perfectly consistent with that interpretation; each has worked to debilitate workers' capacity for self-help. First, in a succession of cases, the "quid pro quo" doctrine was interpreted, in the context of judicial enforcement of arbitration, to imply a no-strike pledge by the union even where none was offered in the contract, and further interpreted to make union violations of a no-strike pledge actionable activity, subject to injunctive relief and damage actions, rather than merely unprotected activity.[36] Second, the understanding of who the parties to the collective bargaining

[34] See David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973).

[35] *Id.*

[36] *Local 1974, Teamsters v. Lucas Flour*, 369 U.S. 95 (1962); *Boys Markets, Inc. v. Retail Clerks Unions, Local 770*, 398 U.S. 235 (1970).

agreement are – namely, the union and the employer – has been extended to block individual worker enforcement of the terms of such contracts,[37] thus further diminishing the prospects for internal union democracy. Third, given the availability of arbitration as a secure mechanism for resolving union-employer disputes, the NLRB has progressively withdrawn from the superintendence of union-employer dealings, even in cases involving unfair labor practices.[38] In a variety of ways, then, the triumph of arbitration as the preferred means of dispute resolution, once announced as the greatest triumph for the U.S. labor movement in the postwar period, has served to weaken worker agency over the long run.

VI. Changes in Employer Organization

Finally there is the question of the status of employer obligations to unions in the event of a significant change in the employer's organization, for example a merger or consolidation with another operation, the removal of operations to another location, or the sale or liquidation of a business. The answer is that any significant change in employer organization can cancel the employer's obligation to bargain with the union, and over no such change is the employer obligated even to bargain with the union. Moreover, a successor employer has no obligation to honor a predecessor's collective bargaining agreement.[39]

As throughout the bargaining relation, the framework of that relation is exhaustively described by ownership decisions at the untouched "core of entrepreneurial control". Since such decisions commonly affect the organization of employment, the relation itself is an extremely fragile one. Well aware of this, unions typically moderate their demands on individual employers in the hope of preserving the bargaining relation, even as that moderation vitiates, at least for workers, that relation's essential purpose. Even with wage and other demand moderation, moreover, the operation of firms remains notoriously unstable. And this is particularly so in those smaller units to which, as noted above, unions customarily direct their organizing efforts.[40] Thus the "natural" rate of union attrition is raised. This completes the circle of legal sources of union dependency and decline, and

[37] *Vaca v. Sipes*, 386 U.S. 171 (1967).

[38] *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corporation*, 268 NLRB No. 83 (1984); *Olin Corporation*, 268 NLRB No. 86 (1984).

[39] *NLRB v. Retail Clerks Local 888*, 587 F2d 984 (9th Cir. 1978); *Milwaukee Spring Div. of Illinois Coil Spring Co.,* 268 NLRB No. 87 (1984); *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[40] See DAVID BIRCH, THE JOB GENERATION PROCESS (1979); HARVEY GARN & LARRY LEDEBUR, THE ESTIMATION OF DEVELOPMENT IMPACTS (1981); BARRY BLUESTONE & BENNETT HARRISON, THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY (1982).

brings us back to the specification of another bargaining unit, and the conduct of another recognition campaign, that may, but usually does not, commence another bargaining relation.

E. Conclusion

The legal framework of postwar U.S. labor regulation tends to fragment and weaken worker organization by 1) limiting the "appropriate" range of initial organization, 2) imposing enormous costs on unions during the recognition process, 3) applying an almost purely procedural requirement on bargaining, and then only for a sharply restricted range of subject matters, 4) limiting the use of economic weapons, particularly where their use would entail cross-sectoral or cross-firm (or now perhaps, even intra-firm) coordination among or within unions, 5) channeling contract enforcement into a private system of arbitration that restates and enforces the fragmentation from which those contracts first arise, and 6) rendering unions virtually helpless in face of changes in employer operation. Unions have participated in the elaboration of this framework, which has repeatedly driven them to pursue highly particularistic strategies in their dealings with employers. These particularistic strategies are, given the overlapping constraints of U.S. labor regulation, economically rational in a short term and local sense. In the longer term, and in combination, however, their pursuit reproduces and extends the weakness of worker organization in the U.S. The dense legal framework of postwar U.S. labor regulation both reflects and advances the exceptionalism of the U.S. case. That exceptionalism, in turn, underscores the demand and resource constraints characteristic of capitalist democracy.