

# Class Conflicts of Law I: Unilateral Worker Lawmaking versus Unilateral Employer Lawmaking in the U.S. Workplace

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## INTRODUCTION

Writing in the early twentieth century, leading labor scholar John R. Commons depicted the workplace as a battleground between opposing normative orders. On one side, workers had constructed a “common law of labor springing from the customs of wage earners.”<sup>1</sup> Through this common law, workers sought to gain protection against “economic coercion” by employers.<sup>2</sup> They developed informal norms and, where possible, union rules governing such issues as pace of work, safety precautions, workplace etiquette (e.g., no “bossing”), and compensation. The core principle of this common law of labor was solidarity—the idea that workers would improve their lives through mutual assistance and united action. Arrayed against the workers’ law was the common law of business, developed from the customs of merchants and manufacturers. The core principle of this law, individual success through competition, was “exactly opposite” to the workers’ principle of solidarity. Unfortunately for workers, courts had long ago

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1. JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 304 (Univ. of Wis. Press 1968) (1924); *see also infra* Part I.

2. COMMONS, *supra* note 1, at 304.

embraced the employers' law, and had been "defining and classifying" it for centuries.<sup>3</sup>

During the half century after the Taft-Hartley Act of 1947, this legal-pluralist model was displaced by a unitary conception of the "workplace rule of law," a regime characterized by detailed collective bargaining agreements and grievance procedures culminating in binding arbitration. Instead of independent lawmakers in their own right, unions were conceived as the lower house of a bicameral legislature, in which employers constituted the upper, House of Lords. The collective bargaining agreement became an "industrial constitution" erecting a system of private self-government.<sup>4</sup> The organizing model of workers joining together to build organization and solidarity gave way to a model of individual, rational choice. Instead of exercising their statutory right "to self-organization," workers would choose between joint employer-union lawmaking and unilateral employer lawmaking—euphemistically termed "individual bargaining"—in a one-shot representation election conducted under government-guaranteed "laboratory conditions."<sup>5</sup>

In a seminal article written a quarter-century ago, Katherine Van Wezel Stone identified the fundamental problem with this vision, namely that it rested "upon an assumption of equality of power between management and labor, the very equality that the Act was intended to create." That assumption, she charged, "has rendered the Act incapable of actually creating that equality."<sup>6</sup> This essay proposes that both the assumption and the resulting inequality reflected, and continue to reflect, the failure of judges, NLRB members, and arbitrators to recognize the

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3. *Id.* at 305.

4. See DAVID BRODY, *WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE* 199-207 (1980) ("workplace rule of law"); WILLIAM LEISERSON, *AMERICAN TRADE UNION DEMOCRACY* 12 (1959) (House of Lords); Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1492 (1959) ("industrial constitution"); see also *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960) ("A collective bargaining agreement is an effort to erect a system of industrial self-government.").

5. *In re General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

6. Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1513-14 (1981).

crucial role played by unilateral worker lawmaking in the formation and continuing invigoration of labor organizations. The industrial relations professionals who developed the workplace rule of law assumed equality of power because, at the time, workers in the then-core sectors of the economy embraced the core norm of labor solidarity and routinely engaged in unilateral lawmaking. These professionals saw solidarity and work group action not as conscious achievements but as natural and timeless impulses.<sup>7</sup> It did not occur to them that the exclusion of worker lawmaking from the enterprise might, in the long run, undercut and erode the customs and commitments that had enabled workers to form unions in the first place. In hindsight, however, it is apparent that the professionals' unitary order of collective bargaining cleared the way not for reasoned and peaceful relations between unions and employers, but for a regime of unilateral lawmaking by employers. Conversely, a revival of unilateral worker lawmaking—hints of which are visible in some of today's most successful organizing unions—could contribute crucially to a revival of the American labor movement.

Part I of this essay provides a brief introduction to unilateral worker lawmaking. Part II reviews the three key rulings that banished worker lawmaking from the place of work: *Elk Lumber Company*, decided by the NLRB in 1950, *Ford Motor Company*, decided by arbitrator Harry Shulman in 1944, and *NLRB v. Fansteel Metallurgical Corporation*, decided by the U.S. Supreme Court in 1939. It concludes that each decision rested not on any statutory or contractual command, but on an open, ideological embrace of employer lawmaking authority combined with a complete lack of attention to its impact on labor rights. Part III suggests that this lack of concern for labor rights rested on the decision-makers' assumption of a rough balance of power between

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7. During the formative period of U.S. labor law, even pro-union progressives blithely assumed away the problem of engendering collective action. To Robert Hoxie, for example, collective action was the "natural consequence" of the tendency for workers who shared a social and economic environment to develop a "group psychology." ROBERT FRANKLIN HOXIE, *TRADE UNIONISM IN THE UNITED STATES* 59 (1919). Selig Perlman similarly held that the "true psychology" of the wage laborer was to be found partly in "his desire for solidarity," which in turn resulted from the shared experience of labor market participation. SELIG PERLMAN, *A THEORY OF THE LABOR MOVEMENT* 246 (1949).

employers and unions, an assumption that, in turn, rested on the then-vibrant practices of worker lawmaking in core industries. Sometimes explicitly and sometimes implicitly, these industrial relations professionals counted on the continuing vitality of worker lawmaking to ensure that their preferred alternatives—reasoned collective bargaining, grievance arbitration, and NLRB enforcement—would remain effective. Unfortunately, as related in Part IV, the rulings that they issued undermined those practices and the norm of solidarity that supported them.

### I. UNILATERAL WORKER LAWMAKING, THEN AND NOW

The history of the U.S. labor movement can be viewed as a struggle between lawmaking workers and lawmaking employers over jurisdiction and enforcement power. In the early days of labor organization, this clash of laws played out in public. In 1827, for example, the journeymen carpenters of Philadelphia determined that they were working too many hours. They did not, however, petition the master carpenters for reduced hours or attempt to bargain with them over the issue. Instead, the journeymen met and passed a resolution barring any member of the journeymen's association from working more than ten hours a day. The resolution commenced by claiming Constitutional sanction. "Whereas," it began, "all men have a right to assemble in a peaceable and orderly manner, for the purpose of deliberating on their own and the public good . . . ." The journeymen then proceeded to condemn excessive hours as a danger to republican values and natural law, reflecting "a grievous and slave like system of labour" and violating the right of all men "derived from their Creator, to have sufficient time in each day for the cultivation of their mind and for self improvement." Instead of waiting for the masters' approval, they resolved that the ten-hour limit "be carried into effect from this day."<sup>8</sup> The masters responded by meeting and enacting their own resolution. It charged that associations like that of the journeymen evinced "a tendency to subvert good order, and coerce or mislead those who have been industriously pursuing their avocation." Accordingly, the masters resolved that it was "improper to

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8. 5 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 80 (John R. Commons et al. eds., 1958) (reprinting resolutions).

comply with the resolutions passed by the Journeymen House Carpenters.”<sup>9</sup>

Union laws operated directly on workers, with no involvement by the employer. When the Philadelphia carpenters resolved that their limit on hours would “be carried into effect from this day,” they meant that henceforth members would be bound not to work beyond the limit. Violators could be fined or expelled from the union, a penalty that might mean exclusion from the trade. Any employer who insisted that his workers violate the limit would lose his union workers until the law was repealed or otherwise rendered ineffective. Such unilateral union laws covered a wide variety of employment conditions and practices including compensation, hours, the union shop, and production methods.<sup>10</sup>

Unilateral worker lawmaking came first to the skilled trades, where the shortage of qualified workers made it difficult for employers to circumvent union rules. But workers at all skill levels were drawn to engage in unofficial lawmaking. “Whenever they came into regular contact on the job, wherever they recognized a common identity,” recounts labor historian David Brody, “factory workers formed bonds, legislated group work standards, and, as best they could, enforced these informal rules on fellow workers and on supervisors.”<sup>11</sup> Much of this activity was conducted surreptitiously and sporadically to avoid employer retaliation. Once workers succeeded in organizing local unions, however, their rulemaking emerged into the

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9. *Id.* at 81.

10. See DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925*, at 9-13 (1987); DANIEL T. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920*, at 165-66 (1978); see also LLOYD ULMAN, *THE RISE OF THE NATIONAL TRADE UNION* 526, 541-42, 545-46, 551-52 (1966) (describing and quoting union legislation regulating work pace in the glass, printing, machinist, and bricklaying trades); Benson Soffer, *A Theory of Trade Union Development: The Role of the “Autonomous” Workman*, 1 *LAB. HIST.* 141, 152-53 (1960) (observing that the “laws” of the iron workers’ and typographers’ unions “gave them unilateral powers over management functions”).

11. BRODY, *supra* note 4, at 205; see also STANLEY B. MATHEWSON, *RESTRICTION OF OUTPUT AMONG UNORGANIZED WORKERS* (1931); DAVID MONTGOMERY, *WORKERS’ CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLES* 15-18 (1979); FREDERICK WINSLOW TAYLOR, *SCIENTIFIC MANAGEMENT* 79-85 (1947).

open. Local unions of coal miners, for example, passed motions “on the books” requiring work sharing—as opposed to layoffs—prohibiting obedience to bosses who were “bossing” (i.e., violating the miners’ ethical code); and regulating working conditions.<sup>12</sup>

Unions developed organically out of this lawmaking process. At the core of the most militant industrial unions were groups of workers with especially strong traditions of informal lawmaking practice: deep shaft miners in the United Mine Workers, tirebuilders in the United Rubber Workers, and the skilled metal trades in the United Automobile Workers.<sup>13</sup> Once organized, the typical local union would commence functioning without formal recognition. In the absence of a collectively bargained grievance procedure, unilateral union rules required members to deal with management through their union stewards and not individually.<sup>14</sup> “We did not have any recognition from the company,” observed one activist. “We had our own recognition.”<sup>15</sup> Only later, when the workers’ norm of solidarity had grown strong enough, would the union begin to serve as the exclusive representative for all workers in a jurisdiction.<sup>16</sup> Unilateral lawmaking continued after the negotiation of collective bargaining agreements. Workers

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12. For documentation, see James Gray Pope, *The Western Pennsylvania Coal Strike of 1933, Part I: Lawmaking from Below and the Revival of the United Mine Workers*, 44 LAB. HIST. 15, 45 (2003).

13. See STEVE BABSON, BUILDING THE UNION: SKILLED WORKERS AND ANGLO-GAELIC IMMIGRANTS IN THE RISE OF THE UAW (1991); CARTER GOODRICH, THE MINER’S FREEDOM: A STUDY OF THE WORKING LIFE IN A CHANGING INDUSTRY 58-61 (1925); HOMER LAWRENCE MORRIS, THE PLIGHT OF THE BITUMINOUS COAL MINER 62-69 (1934); DANIEL NELSON, AMERICAN RUBBER WORKERS & ORGANIZED LABOR, 1900-1941, at 86-87, 93-94, 119-20 (1988).

14. For an example, see *Midland Shop Rules*, reprinted in Hartley W. Barclay, *We Sat Down With The Strikers and General Motors*, MILL & FACTORY, Feb. 1937, at 46 (cited as typical).

15. Interview by William A. Sullivan with Nick DiGaetano (April 29 & May 7, 1959) at 22 (on file with University of Michigan-Wayne State University, Institute of Labor and Industrial Relations).

16. See CHARLES MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 4-6, 29-30, 82-87 (2005) (noting the widespread practice of unions bargaining only for their members during the 1930s, with recognition as exclusive representative following later).

interpreted and enforced the agreements on their own, as well as continuing to enact rules on matters not covered.<sup>17</sup>

Today, the most successful organizing unions implement practices that hark back to the old, legal-pluralist model. Unionists do not cite John R. Commons or describe their tactics as unilateral lawmaking, but the continuity is clear. Consider Teresa Sharpe's account of a successful organizing effort in a waterfront hotel.<sup>18</sup> Instead of campaigning for votes in a representation election, the organizing committee built up strength until it was ready to begin functioning as a union. The committee staged "work-site actions" to resist management's anti-union campaign. In one case, for example, workers organized a delegation to confront "an unpopular manager in housekeeping who was picking on union activists."<sup>19</sup> In Commons' terms, the workers were enforcing a norm against "picking on union activists," a principle that is embodied in official law but not effectively enforced, while—at the same time—strengthening their own norm of solidarity. "We thought we needed to plan a delegation because Helen [the unpopular manager] was bothering Mary," explained one committee member, "and when she picks on one of us, she picks on all of us."<sup>20</sup> On other occasions, workers challenged lawful exercises of employer authority. Despite the employers' official legal privilege to require worker attendance and silence criticisms at anti-union meetings, the committee organized unionists to "take over" the meetings and demand recognition.<sup>21</sup> Many locals continue to employ direct action

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17. See JAMES W. KUHN, BARGAINING IN GRIEVANCE SETTLEMENT 139 (1961). For additional documentation, see Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958*, 24 LAW & HIST. REV. 45, 76-77 (2006).

18. Teresa Sharpe, *Union Democracy and Successful Campaigns: The Dynamics of Staff Authority and Worker Participation in an Organizing Union*, in, REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 62 (Ruth Milkman & Kim Voss eds., 2004).

19. *Id.* at 76.

20. *Id.* at 78.

21. *Id.* at 75; see also LINDA MARKOWITZ, WORKER ACTIVISM AFTER SUCCESSFUL UNION ORGANIZING 129 (2000) (noting that active participation in organizing led workers to develop "a deep sense of efficacy; they believed that what made the campaign successful was the solidarity and activism among the workforce"); Steven H. Lopez, *Overcoming Legacies of Business Unionism: Why Grassroots Organizing Tactics Succeed*, in REBUILDING LABOR, *supra* note 18, at

after winning recognition and negotiating a collective bargaining agreement. Instead of processing grievances on request, stewards help workers to resolve problems on their own, for example by organizing delegations.<sup>22</sup> Sometimes unions engage in activities that are illegal according to official law, for example the famous “Justice for Janitors” tactic of applying pressure on building management companies that—although they are considered “neutral” under the official law of secondary pressure—in fact control the labor policies of their cleaning contractors.<sup>23</sup> Only one central element is missing from Commons’ day: the public claim of right backed by top labor leaders.<sup>24</sup>

Some readers might question my use of the term “lawmaking.” I use the word to signify a range of practices from the formulation and enforcement of informal norms—as in the example of Helen and Mary above—to the full-fledged formal rulemaking of trade unions that claim “jurisdiction” over the workers in a trade or industry under

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114, 130 (“[C]ollective actions contributed something that face-to-face organizing alone could not: a growing feeling of solidarity and power, a sense that the workers were symbolically taking control of the nursing home.”).

22. This is the practice, for example, in the ten thousand-member UNITE-HERE Local 54, which represents casino and hotel workers in Atlantic City, New Jersey. According to one study, workers who experience participatory unionism during an organizing effort are likely to be deeply resentful if the union shifts to a service model after recognition. See MARKOWITZ, *supra* note 21, at 144-45, 172.

23. See Preston Rudy, “Justice for Janitors,” Not “Compensation for Custodians:” *The Political Context and Organizing in San Jose and Sacramento*, in REBUILDING LABOR, *supra* note 18, at 133-49; Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 678-80 (1993).

24. On occasion, however, organizers and workers do stress legal consciousness. See, e.g., Josephine LeBeau & Kevin Lynch, *Successful Organizing at the Local Level: The Experience of AFSCME District Council 1707*, in A NEW LABOR MOVEMENT FOR THE NEW CENTURY 121, 132-33 (Gregory Mantsios ed., 1998) (reporting that the “organizer was encouraged to see his work as lawful, and as a mission to proclaim the rights of working people,” thereby placing the labor movement in “the larger movement for social justice”).

authority of a nationwide labor federation.<sup>25</sup> In these activities, workers eschew the submissive posture of supplicants to law-making employers, and embrace the proud role of giving “laws to their masters.”<sup>26</sup> The process of union organizing is, in one sense, an effort to elevate the process of informal norm creation and enforcement to one of formal rulemaking conducted according to democratic procedures under a public claim of right. Legal professionals and scholars have had no trouble accepting this broad conception of law where the unofficial lawmakers are business owners. Not only has unofficial “merchant law,” for example, been accorded the label of “law,” but much of it has been incorporated into the official law via the Uniform Commercial Code.<sup>27</sup> In order to understand what happened to the NLRA and its promise of “restoring equality of bargaining power between employers and employees,” it will be necessary to accept the possibility that union stewards and business agents—no less than merchants and employers—can be counted among “the unacknowledged legislators of the world.”<sup>28</sup>

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25. This use of the term is consistent with the legal pluralist notion that a society can be said to contain multiple legal orders whenever there is more than one distinct rule of recognition, that is, where two or more bodies of normative principles are “not reducible the one to the other.” J. Griffiths, *Four Laws of Interaction in Circumstances of Legal Pluralism: First Steps Toward an Explanatory Theory*, in *PEOPLE’S LAW AND STATE LAW* 217, 217 (Antony Allott & Gordon R. Woodman eds., 1985); cf. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 8-9 (Isaiah Berlin et al. eds., The Noonday Press 1954) (contending that “law” can be made only by governmental bodies). In the first half of the twentieth century, the American Federation of Labor claimed to provide a rule of recognition for unofficial laws governing labor—namely, that they were passed by the Federation or by organizations possessing Federation charters—some of which purported to trump official law where the two conflicted. See CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 58-62 (1985); James Gray Pope, *Labor’s Constitution of Freedom*, 106 *YALE L.J.* 941, 954-55 (1997).

26. See SIDNEY WEBB & BEATRICE WEBB, *THE HISTORY OF TRADE UNIONISM* 37-39 (London, Longmans, Green & Co. 1894).

27. See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 *U. PA. L. REV.* 1765 (1996); K.N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 *HARV. L. REV.* 873, 903-04 (1939) (referring to the “laws” of merchants).

28. 29 U.S.C. § 151 (2000) (“restoring equality”); THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT’S FLAT ON ITS BACK* 4 (1991) (“unacknowledged legislators”).

## II. UNILATERAL WORKER LAWMAKING UNDER THE NLRA

The enactment of the National Labor Relations Act of 1935 appeared to put the workers' law on an equal footing with the employers' law. Sections 7 and 8 barred employers from interfering not only with union organizing, but also with "other concerted activities for . . . mutual aid or protection."<sup>29</sup> Worker lawmaking concerning wages, hours, and working conditions is certainly "concerted" and for "mutual aid or protection." Accordingly, the National Labor Relations Board (NLRB) initially held that workers who complied with union regulations banning, for example, working overtime without premium pay or processing orders from struck plants to be concerted activities protected under the Act.<sup>30</sup> But the courts and, eventually, the NLRB have since ruled that such activities, though concerted and for mutual aid or protection, are nevertheless unprotected. If workers attempt to enact and implement their own workplace rules, the employer may discharge them and call upon the state to evict them permanently from the workplace. Under this case law, there are only two legitimate forms of law in the workplace: unilateral employer-made law and joint employer-union-made law; unilateral worker lawmaking inside the workplace is outside the scope of Section 7.

Given that worker lawmaking falls within the literal language of Section 7, why did courts, administrators, and arbitrators carve out an exception? The key opinions were issued in *Elk Lumber Company*, decided by the NLRB in 1950, *Ford Motor Company*, decided by arbitrator Harry Shulman in 1944, and *NLRB v. Fansteel Metallurgical Corporation*, decided by the U.S. Supreme Court in 1939.

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29. §§ 157-58.

30. See, e.g., *C.G. Conn, Ltd.*, 10 N.L.R.B. 498 (1938), *enforcement denied*, 108 F.2d 390 (7th Cir. 1939) (reinstating workers laid off indefinitely for following union policy of refusing to work overtime without premium pay); *Montgomery Ward & Co.*, 64 N.L.R.B. 432 (1945), *enforcement denied*, 157 F.2d 486, 496 (8th Cir. 1946) (reinstating workers discharged for following union policy of refusing to process orders for struck plant of the same employer); Craig Becker, "Better Than a Strike." *Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 384-85 (1994).

A. *Elk Lumber: Worker Lawmaking on Matters Not Covered by a Collective Bargaining Agreement*

In *Elk Lumber*,<sup>31</sup> the company—which operated non-union—improved its plant in ways that made it easier for railroad car-loaders to do their work. At the same time, management changed the pay scale from an incentive plan under which the loaders had averaged \$2.71 an hour to an hourly rate of about \$1.53 an hour. In response to this employer legislation, the loaders enacted a rule of their own: henceforth, they would fill only one car a day—the standard output at other plants in the area and a pace that they considered to be “a good day’s work at a dollar and a half.”<sup>32</sup> Although the facts were silent on the parties’ particular views, it seems clear that this was a classic instance of workers and management differing on what constitutes “a fair day’s work.”<sup>33</sup> We can surmise that, from management’s point of view, the workers should have accepted the wage cut because their work was now easier. But the loaders’ needs had not changed, and they evidently felt that reduced pay called for reduced output. As a result, there were now two, unilaterally enacted rules competing in the shop. Consistently with the pre-NLRA tradition of unilateral employer lawmaking, management refrained from negotiating with the workers or even warning them to renounce their rule.<sup>34</sup> Instead, it terminated the loaders, who filed a charge under the NLRA.

As noted above, the Board had previously held similar partial strike activities to be among those “concerted activities for mutual aid or protection” protected by the statute. But by 1950, a number of courts had disagreed, and in *Elk Lumber* the Board capitulated. Nobody denied that the workers’ rulemaking was “concerted,” or that it was for “mutual aid or protection,” but the Board nevertheless held it to be unprotected. Why? The Board quoted a decision of the Seventh Circuit Court of Appeals:

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31. *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950).

32. *Id.* at 335.

33. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 50-51 (1983).

34. *Elk Lumber Co.*, 91 N.L.R.B. at 335.

We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment.<sup>35</sup>

The notion that the workers were claiming a “right to work upon terms prescribed solely by” them was pure fantasy. The workers claimed only a right to engage in “concerted activity for mutual aid or protection,” in this case legislating and implementing their own rule in response to the employer’s. Had the Board ruled in their favor, there would have been two rules in continuing conflict. The employer could have bargained with the workers to increase their output, or engaged in a test of economic strength. Under the law prevailing at the time, the company could have utilized economic pressure tactics short of selective discharge or discipline, for example locking the loaders out until they agreed to work at a faster pace or, alternatively, further reducing their wages to correspond to its valuation of their output.<sup>36</sup> But the Board, following the courts, read the statute as if it protected only the right to “strike,” narrowly defined as departing the premises, and not the right to engage in “concerted activities” for “mutual aid or protection.”<sup>37</sup> In so doing, the Board revived the old master-servant principle that the employer enjoys exclusive control

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35. *Id.* at 337 (quoting *C.G. Conn Ltd. v. NLRB*, 108 F.2d 390, 397 (7th Cir. 1939)).

36. Courts permitted employers to engage in lockouts in response to various union tactics. *See, e.g.*, *NLRB v. Dorsey Trailers, Inc.*, 179 F.2d 589, 592 (5th Cir. 1950) (holding that employer could lock out workers in response to a strike during the term of a collective bargaining agreement even though the agreement contained no no-strike clause). On the possibility of reducing pay, see Becker, *supra* note 30, at 384-85. Becker notes that “it might be difficult to distinguish striking from working, and hence docking pay from disciplining employees.” *Id.* (citation omitted). However, on the facts of *Elk Lumber*, the workers had admitted that they were engaged in a slowdown, and the employer could have verified its countermeasure by calculating it as a percentage decrease equivalent to the percentage decrease in work output. 91 N.L.R.B. 333.

37. *See ATLESON, supra* note 33, at 59; TOMLINS, *supra* note 25, at 240-41; Becker, *supra* note 30, at 383-84.

until and unless it consents to a contractual constraint. It “was implied in the contract of hiring that these employees . . . would comply with all reasonable orders,” observed the Board, quoting a court decision.<sup>38</sup>

The reader might wonder why the Board thought it was “reasonable” for Elk Lumber to impose a 43 percent wage cut. Indeed, the loaders’ slowdown might seem like a “perfectly natural and reasonable thing to do” under the circumstances.<sup>39</sup> But the Board intended no comment on the substantive reasonableness of the rate; that was entirely for the employer to decide. If the workers disapproved, they could exercise their right to exit the workplace and conduct an outside strike.

#### B. Ford Motor Company: *Worker Interpretation and Enforcement of the Collective Bargaining Agreement*

Second, the decision of arbitrator Harry Shulman in *Ford Motor Company*<sup>40</sup> gave employers the exclusive authority to interpret and apply collective bargaining agreements pending a final resolution through the grievance procedure. The factual context of the *Ford* case vividly highlighted the issue of unilateral worker lawmaking. The grievance arose at Ford’s gigantic River Rouge complex near Detroit, “the largest concentration of machinery and labor anywhere in the world.”<sup>41</sup> The nearly 80,000 production workers were enrolled in Local 600 of the United Automobile Workers, an exceptionally robust unit with numerous labor radicals among its leaders and activists. The collective bargaining agreement left many conditions including pace of work unspecified. By the time

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38. *Elk Lumber*, 91 N.L.R.B. at 337 (quoting *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946)). On the master-servant rule of unilateral employer control, see CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 227-28 (1993).

39. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962) (upholding NLRB’s reinstatement of non-union employees discharged for staging an unannounced strike in protest of frigid temperatures in the plant).

40. *Ford Motor Co. v. Int’l Union, Local 600*, 3 Lab. Arb. Rep. (BNA) 779 (1944) (Shulman, Arb.).

41. Nelson Lichtenstein, *Life at the Rouge: A Cycle of Workers’ Control*, in *LIFE AND LABOR: DIMENSIONS OF AMERICAN WORKING-CLASS HISTORY* 237-38 (Charles Stephenson & Robert Asher eds., 1986).

of the *Ford* case, Local 600 had filled the gaps, enacting “a set of uniform regulations to govern shop-floor working conditions” enforced by on-the-spot work stoppages.<sup>42</sup> As for enforcing conditions that were spelled out in the agreement, union committeemen and stewards often eschewed the grievance procedure in favor of work stoppages and direct appeals to higher management.<sup>43</sup>

In *Ford Motor Company*, managers ordered a number of employees to work outside of their contractually designated job classifications. A union steward advised the workers to refuse on the ground that the order violated the contract. Ford fired the steward, and the union grieved. At the arbitration hearing, Ford argued that management’s order was proper because the contract authorized the particular out-of-classification assignments at issue. Nobody denied that the steward could properly advise workers to defy an order that violated the contract. But arbitrator Shulman, who had been appointed by the National War Labor Board to serve as the impartial umpire for grievances at Ford, had his own views on the matter. A Yale Law Professor and experienced mediator, Shulman seized on the case to propound his own vision of proper industrial relations. He handed Ford a victory that it had not dared to request, holding that workers and the union must submit to management orders, no matter how flagrantly they might violate the contract—a rule known now as “obey now—grieve later.”<sup>44</sup>

To Shulman, the preeminence of management authority flowed from self-evident and timeless truths. He commented famously: “[A]n industrial plant is not a debating society. . . . When a controversy arises, production cannot wait . . . .”<sup>45</sup> By itself, however, this argument begged the question. In most cases, production could be resumed on the workers’ terms just as easily as management’s and, if it could not, then management could seek to negotiate a temporary departure from the contract. But to Shulman, management was inherently vested with the exclusive

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42. *Id.* at 246.

43. *Id.* at 245-47.

44. *Ford Motor Co.*, 3 Lab. Arb. Rep. at 780; *Crider v. Spectrulite Consortium*, 130 F.3d 1238, 1242 (1997).

45. *Ford Motor Co.*, 3 Lab. Arb. Rep. at 781.

authority to govern production. He spoke directly to the labor radicals in Local 600, opining that “any enterprise in a capitalist or a socialist economy requires persons with authority and responsibility to keep the enterprise running.”<sup>46</sup> Shulman could see only two alternatives for the period pending a final ruling by the arbitrator: unilateral employer authority and “jungle warfare”—a choice of imagery that might not have been entirely unrelated to the prominent role played by black unionists in Local 600.<sup>47</sup> In real life, these polar alternatives did not begin to exhaust the possibilities. For example, Shulman could have ruled that arbitrators would uphold the discharge of workers who defied proper orders, while reinstating those who defied improper ones, or clearly improper ones—thereby placing the risk of error on the worker.<sup>48</sup>

To Shulman, on-the-spot enforcement undermined the collective bargaining process itself. Ignoring the collective character of the stoppage at issue, he posited that to “refuse obedience because of a claimed contract violation would be to substitute individual action for collective bargaining and to replace the grievance procedure with extra-contractual methods.”<sup>49</sup> It was, however, Shulman’s rule—and not the union’s enforcement policy—that offended the contract. Not even Ford conceived of claiming that Local 600 had surrendered its right to resist contract violations pending arbitration. Ironically, given his later, famous insistence that the arbitrator’s sole function was to “administer the rule of law established by” the parties,<sup>50</sup> Shulman pulled the principle of “obey now—grieve later” straight out of his

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46. *Id.*

47. On Shulman’s predilection for the term “jungle warfare,” see JAMES B. ATLESON, *LABOR AND THE WARTIME STATE: LABOR RELATIONS AND LAW DURING WORLD WAR II* 66-67 (1998). On the activism and radicalism of black workers at River Rouge, see generally JUDITH STEPAN-NORRIS & MAURICE ZEITLIN, *TALKING UNION* 135-40, 143-45 (1996); Lichtenstein, *supra* note 41, at 245.

48. ATLESON, *supra* note 47, at 68.

49. *Ford Motor Co.*, 3 Lab. Arb. Rep. at 780. Shop-floor activity did have the potential to disrupt collective bargaining, especially if work groups ignored local union priorities in the pursuit of their own, particularistic interests. However, the steward in *Ford Motor Co.* was implementing local union policy.

50. Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955).

own vision of proper industrial relations. His declamations on the inherent necessity of management authority substituted for the null set of evidence indicating either that the parties had intended the grievance procedure to be the exclusive method of resisting a management violation or—even more improbably—that management was privileged to violate the contract pending an arbitral ruling.

C. Fansteel Metallurgical Corporation: *Worker Interpretation and Enforcement of Official Law*

Third, and finally, in *NLRB v. Fansteel Metallurgical Corporation*, the Supreme Court granted employers the exclusive authority to decide the validity and interpret the substance of official law pending a final resolution through the official legal process.<sup>51</sup> In *Fansteel*, the company systematically violated the workers' statutory right to organize by planting a labor spy in the union, isolating the local president from other workers, forming a company-dominated union, refusing to bargain with the union after it enjoyed majority support in the shop, and maintaining an official policy of refusing to negotiate with any national union.<sup>52</sup> The union filed unfair labor practice charges, but the National Labor Relations Board failed to act. After five months, the workers—who feared that further delay would fatally weaken their union—occupied Fansteel's factories and declared that they would not leave until the company recognized their union.<sup>53</sup> Instead, Fansteel discharged the sit-downers and obtained a court injunction commanding them to vacate the plant. The strikers repulsed one police assault, but were ousted on the second attempt. A majority

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51. For a more detailed version of the account presented here, see James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 520-26 (2004).

52. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 247-48 (1939); *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 931, *enforcement denied*, 98 F.2d 375 (7th Cir. 1938), *modified*, 306 U.S. 240 (1939).

53. Transcript of Record at 23-24, *Fansteel Metallurgical Corp.*, 306 U.S. 240 (No. 436); Henry M. Hart, Jr. & Edward F. Pritchard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1280-81 (1939).

were convicted of contempt of court and sentenced to fines and substantial jail terms.<sup>54</sup>

The strikers claimed that they had rightfully occupied the factories in self-defense of their statutory right to organize.<sup>55</sup> The NLRB evaded this claim by holding that the strikers should be reinstated in order to re-establish the status quo that had prevailed prior to Fansteel's unfair labor practices.<sup>56</sup> The Supreme Court, however, addressed the self-enforcement issue head-on. Obviously, the employer and the workers had each violated the legal rights of the other and each had deployed self-help measures in response. To the majority Justices, however, the employer's common-law property rights were of a different and higher order than the employees' statutory labor rights. An intrusion on the corporation's right of possession was "not essentially different" from an assault on a person.<sup>57</sup> And the corporation's right to discharge and evict the "wrongdoers" received the respect due to a right of constitutional dimension.<sup>58</sup> By contrast, the workers' statutory rights ranked so low on the majority's scale of value that they found no need to mention the effects of Fansteel's violations on the workers' right to organize. The workers' remedy was to be found in the "peaceful" procedures of the Act, and not in "force and violence in defiance of the law of the land."<sup>59</sup> The Court did not pause to consider the Board's finding that, as a practical matter, the employer's destruction of the union's majority support could not be remedied without reinstating the strikers.

Given this omission, the Court's holding was unremarkable. While the workers' defensive violation of the employer's property rights put them "outside the protection

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54. *Fansteel Metallurgical Corp.*, 5 N.L.R.B. at 942-43.

55. Transcript of Record, *supra* note 53, at 277, 302, 523, 1413-14 (reporting strikers' testimony); *see also* Hart & Pritchard, *supra* note 53, at 1280-81.

56. *Fansteel Metallurgical Corp.*, 5 N.L.R.B. at 944-45, 949.

57. *Fansteel Metallurgical Corp.*, 306 U.S. at 253.

58. "Apart from the question of the constitutional validity of an enactment of that sort," wrote Chief Justice Hughes, "it is enough to say that such a legislative intention should be found in some definite and unmistakable expression." *Fansteel Metallurgical Corp.*, 306 U.S. at 255; *id.* at 265 (Stone, J., concurring).

59. *Id.* at 257-58.

of the statute,” Fansteel’s unprovoked violations of the workers’ right to organize not only did not deprive the company of “its legal rights” protected by trespass law, but also left intact its right to discharge employees for trespassing.<sup>60</sup> This disparate treatment reflected a blind spot so dazzling that, at one point, the majority actually referred to the sit-down as “an illegal seizure of the buildings in order to prevent their use by the employer in a *lawful* manner.”<sup>61</sup>

After *Elk Lumber*, *Ford Motor Company*, and *Fansteel*, the official law recognized only two forms of private law in the workplace: employer-made law and joint employer-union law in the form of collective bargaining agreements. Henceforth, workers who dared to implement their own rules or to act on their understanding of their legal or contractual rights would forfeit their statutory protection. At the same time, employers would retain their power, grounded in the law of trespass, to enforce their own unilateral laws and—pending a final, official ruling—their own interpretations of official law and collective contracts. In fact, an employer need not advance any interpretation at all; workers may be punished for resisting even the most obvious violations of their legal and contractual rights.<sup>62</sup> Only by departing the workplace may workers avoid the duty to cooperate with employers in continuing violations of their own rights.

### III. THE ASSUMPTION OF ADEQUATE ALTERNATIVES TO WORKER LAWMAKING

The opinions of the NLRB in *Elk Lumber*, of arbitrator Shulman in *Ford Motor Company*, and of the Supreme Court in *Fansteel* closely resemble each other not only in what is included, but also in what is omitted. None of the decision-makers paused to consider the impact of their rulings on the workers’ Section 7 rights. Instead, they simply assumed that workers could protect their interests

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60. *Id.* at 253, 256-57.

61. *Id.* at 256 (emphasis added).

62. See *Crossroads Press v. Graphic Arts Int’l Union, Local 39B*, 72 Lab. Arb. Rep. (BNA) 1015, 1022 (1979) (McKenna, Arb.) (“Insubordination does not depend upon the validity of the foreman’s order . . . but upon [the employee’s] refusal to obey a legitimate order from the foreman and grieve later.”).

through means other than implementing their own rules or interpretations inside the workplace—by staging an outside strike, lodging a grievance, or filing an unfair labor practice charge. At the time, this assumption did not appear farfetched; the outside strike, the grievance process, and NLRB enforcement all operated reasonably well for many workers in the core industries of the mass-production economy. This Part suggests that the appearance of adequate alternative mechanisms itself rested, paradoxically, on the vitality of worker lawmaking grounded on the norm of solidarity.

A. *The Outside Strike as a Substitute for Inside Worker Lawmaking*

At the time that *Elk Lumber* rendered slow-downs unprotected, the outside strike functioned as an effective veto on production for most union workers in the then-core industries of extraction, mass production manufacturing, and transportation. Writing in 1956, Jack Barbash described the “prevailing situation” in the United States: “[T]he employer . . . makes no attempt to operate the plant during the strike and the picket line becomes only the symbolic expression of the strike.”<sup>63</sup> In this context of outside strikes and picket lines, courts recognized the vital role of solidarity, observing that “respect for the integrity of the picket line may well be the source of strength of the whole collective bargaining process.”<sup>64</sup> With this context in mind, it becomes easier to understand how the *Elk Lumber* Board could condemn the loaders for refusing to accept the wage cut “without engaging in a stoppage.”<sup>65</sup> As long as there was a viable, outside alternative, the Board could

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63. JACK BARBASH, *THE PRACTICE OF UNIONISM* 227 (1956); see also COMM. FOR ECON. DEV., *THE PUBLIC INTEREST IN NATIONAL LABOR POLICY* 88 (1961) (noting that, by the 1960s, strikes were “usually tame” but “violence does erupt occasionally, however, usually where the union’s continued existence is threatened by an employer’s effort to operate his plant during a strike”).

64. *NLRB v. Union Carbide*, 440 F.2d 54, 56 (4th Cir. 1971), quoted in ATLESON, *supra* note 33, at 76. As Atleson observed, the outside strike and picket line, unlike slowdowns and partial strikes, was considered to be “central to the act.” ATLESON, *supra* note 33, at 76.

65. *Elk Lumber Co.*, 91 N.L.R.B. 333, 337 (1950).

imagine that removing protection from inside protests would not seriously damage the workers' Section 7 rights.

The strike's effectiveness was, however, contingent upon the vitality and reach of the workers' law of solidarity. As of 1956, when Barbash wrote that employers no longer attempted to operate during strikes, the workers' unofficial rule banning strikebreaking prevailed in most of the United States. Employers had enjoyed the official privilege to permanently replace strikers since 1938,<sup>66</sup> but workers and unions successfully enforced an unofficial prohibition not only on permanent but also on temporary replacements in most of the country. Following World War II, employers mounted a concerted challenge to the workers' norm, obtaining injunctions against mass picket lines and inducing local police to enforce the injunctions. But the big unions of the CIO responded by reinforcing the picket lines, calling mass demonstrations, and staging general strikes of all trades in Oakland, California, Rochester, New York, and other cities.<sup>67</sup> After this experience, most employers abandoned any attempt to hire replacement workers.

Not until the 1960s did the advance elements of a new generation of managers launch a serious challenge to the old norm. They discovered that it had atrophied to the point that an ever-growing number of workers were willing to cross picket lines. Today, the outside strike no longer provides an adequate alternative to inside action even for most union workers in core industries. Once labor's great equalizer, the threat of a strike now serves as a tool of management both in negotiations, where employers are more likely to threaten permanent replacement than unions are to threaten a strike, and in organizing drives, where the prospect of permanent replacement is "Exhibit Number One" against unionizing.<sup>68</sup>

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66. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

67. See GEORGE LIPSITZ, *CLASS AND CULTURE IN COLD WAR AMERICA* 130-42 (1981); ART PREIS, *LABOR'S GIANT STEP: TWENTY YEARS OF THE CIO* 267-72, 276-78 (1972).

68. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1538 (2002); see also JOSIAH BARTLETT LAMBERT, "IF THE WORKERS TOOK A NOTION:" THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT 1-5, 151-54 (2005); Joel Cutcher-Gershenfeld, *The Social Contract at the Bargaining Table: Evidence from a National Survey of Labor and Management Negotiators*, 50 LAB. L.J. 214, 216-19 (1999).

B. *Arbitration as a Substitute for Inside Worker Lawmaking*

In *Ford Motor Company*, Arbitrator Shulman defended his “obey now—grieve later” rule on the ground that “the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.”<sup>69</sup> Ironically, however, Shulman’s confidence in arbitration rested partly on his assumption that workers would retain their solidarity and capacity for shop-floor regulation. Eleven years after his *tour de force* in *Ford*, Shulman warned employers that the arbitration process must remain “close to the shop” or they would be punished by direct action: “The less their private rule of law is understood by the workers and the more remote from their participation are the decisions made on their grievances, the greater is the likelihood of wildcat stoppages or other restraints on productivity.”<sup>70</sup> This expectation reflected Shulman’s experience as Local 600’s permanent arbitrator. In the years since *Ford*, shop-floor militancy had declined somewhat, but Local 600’s culture of direct action survived despite the “obey now—grieve later” rule.<sup>71</sup> Shulman understandably failed to anticipate that this situation was about to change dramatically. In hindsight, however, it is easy to see that Local 600—along with other large and militant locals like Dodge Local 3 of the UAW and Goodyear Local 2 of the United Rubber Workers—was holding out against a new industrial rule of law that preserved no space for worker lawmaking.<sup>72</sup>

C. *NLRB Enforcement as a Substitute for Inside Worker Lawmaking*

The Supreme Court justified its ruling against the *Fansteel* sit-downers on the ground that they could have obtained a remedy for their employer’s unfair labor

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69. *Ford Motor Co. v. Int’l Union, Local 600*, 3 Lab. Arb. Rep. (BNA) 779, 781 (1944) (Shulman, Arb.).

70. Shulman, *supra* note 50, at 1021.

71. See Lichtenstein, *supra* note 41, at 253-59.

72. See *infra* Part IV.A.

practices by relying on NLRB enforcement.<sup>73</sup> As applied to the Fansteel sit-down itself, this suggestion was specious; employers—including Fansteel—had been systematically defying the NLRB, tying up its limited resources with constitutional challenges.<sup>74</sup> After the challenges were resolved in the NLRB's favor later in 1937, however, its enforcement efforts did begin to appear effective. Highly publicized proceedings against defiant employers like the Ford Motor Company and the so-called "Little Steel" companies, for example, were eventually followed by union recognition and collective bargaining contracts.

Today, the inadequacy of Board remedies is painfully apparent. Given the savings to be had by avoiding unionization, the prospect of back pay awards is insufficient to render illegal discharges unprofitable.<sup>75</sup> Moreover, by pursuing all available appeals, employers can delay remedies until after an organizing drive is defeated.<sup>76</sup> But these weaknesses were present from the start. Then, as now, the Board was limited to back pay awards. And then, as now, employers prolonged NLRB proceedings for years. By 1940, CIO General Counsel Lee Pressman was already complaining about the "slow and cumbersome" NLRB procedures.<sup>77</sup>

In retrospect, it seems apparent that the NLRB appeared more effective in the late 1930s and 1940s partly because workers and unions conducted their own enforcement activities in conjunction with those of the Board. Although the *Fansteel* Court mentioned only Board processes, the real alternative to the sit-down was a combination of official and unofficial enforcement, including the outside strike, which was still viable for many workers.

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73. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-58 (1939).

74. IRVING BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-1941*, at 646 (1970); see also PETER H. IRONS, *THE NEW DEAL LAWYERS* 247-48, 254-71 (1982).

75. Morris M. Kleiner, *What Will it Take? Establishing the Economic Costs to Management of Noncompliance with the NLRA*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 137, 140-46 (Sheldon Friedman et al. eds., 1994).

76. See, e.g., 63 N.L.R.B. ANN. REP. 187 tbl.23 (1998) (reporting the median time for NLRB ruling as two years, and for the age of cases pending a Board decision, three years).

77. Lee Pressman, *The Norris-LaGuardia Act and the National Labor Relations Act*, 2 NAT'L LAW. GUILD Q. 236, 243 (1940).

Unions filed unfair labor practice charges not only to obtain the weak and tardy Board remedies, but also to strengthen their own organizing and self-enforcement efforts. In the cases of *Ford* and *Little Steel*, for example, employers delayed the final outcome of NLRB proceedings for more than three years. In the meantime, however, unions used the interim rulings to boost worker morale and expose the employers as lawbreakers. When the companies continued to resist, workers staged militant strikes to defend their rights.<sup>78</sup> This combination of NLRB proceedings and worker self-enforcement meant that the consequences of committing unfair labor practices could include not only back pay awards, but also worker non-cooperation, public disapproval, loss of customers, and threats to government contracts. As long as the meta-norm of solidarity remained strong, the combination of NLRB proceedings and outside strikes made inside enforcement appear unnecessary and, to many, irresponsible.

#### IV. CONSEQUENCES OF BANISHING WORKER LAWMAKING FROM THE ENTERPRISE

Unfortunately for workers, the rulings in *Elk Lumber*, *Ford*, and *Fansteel* contributed substantially to a dramatic decline in worker lawmaking, and, thus, to the erosion of labor solidarity. As ordinary workers lost their direct role in the formulation and enforcement of norms, their energy for union activities, loyalty to the organization, and support for the core norm of solidarity plummeted. Instead of equalizing the bargaining power of employers and employees, the NLRA—in the long run—provided employers with the tools to re-establish their own unilateral lawmaking as the standard practice in industry.

##### A. *Reducing Worker Participation, Loyalty to Unions, and Solidarity*

Initially, it was not clear how much effect *Elk Lumber*, *Ford*, and *Fansteel* would have on worker lawmaking. The decisions did not prohibit worker-made standards or job actions; they merely unleashed employers to retaliate, for

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78. See, e.g., BERNSTEIN, *supra* note 74, at 743-46; PREIS, *supra* note 67, at 103-11.

example by firing participants.<sup>79</sup> By denying shop-floor legislation and action legitimacy, however, the workplace rule of law gradually “ate at the vitals of the shop-floor impulse.”<sup>80</sup> Arbitrators, agency personnel, and an ever-growing number of union leaders forcefully reminded worker activists that they were breaking the rules.<sup>81</sup> Following Shulman, they argued that the availability of a “peaceful” grievance procedure rendered direct enforcement superfluous and irresponsible. “It would be hard to imagine a more insidious check,” observed labor historian David Brody, “on so fundamental a phenomenon as the self-activity of the work group.”<sup>82</sup> Instead of mobilizing workers to defend their rights, stewards and committeemen increasingly found themselves interpreting complex contract provisions and shepherding grievances through cumbersome arbitration procedures.<sup>83</sup> Over time, the labor movement came to resemble, as labor lawyer Tom Geoghegan quipped, “a giant bar association of nonlicensed attorneys” conducting “mini-lawsuits, millions of them, jam-packed in big backlogs, going back for years.”<sup>84</sup>

By the mid 1950s, industrial sociologists had noticed a significant reduction in union member activism and loyalty. They singled out the shift from shop-floor activism to formal grievance adjustment as a major factor. Based on an in-

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79. See *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 490, 493-94 (1960) (holding that slowdowns do not violate the NLRA). At this point the Norris LaGuardia Act continued to bar federal court injunctions to enforce no-strike obligations. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 203 (1962), *overruled by* *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

80. BRODY, *supra* note 4, at 206.

81. See, e.g., Nelson Lichtenstein, *Great Expectations: The Promise of Industrial Jurisprudence and Its Demise, 1930-1960*, in *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE* 113, 129 (Nelson Lichtenstein & Howell John Harris eds., 1993). Many union officers were drawn to the new system partly because a reduction in rank-and-file activity promised to reduce the likelihood of democratic challenges to their leadership. See *id.* Like the industrial relations professionals, these officers did not anticipate that the suppression of direct involvement might eventually undermine the foundations of their organizations.

82. BRODY, *supra* note 4, at 206; see also *id.* at 199-207; DAVID GARTMAN, *AUTO SLAVERY: THE LABOR PROCESS IN THE AMERICAN AUTOMOBILE INDUSTRY, 1897-1950*, at 268-80 (1986).

83. SIDNEY M. PECK, *THE RANK-AND-FILE LEADER* 31-34 (1963).

84. GEOGHEGAN, *supra* note 28, at 163-64.

depth study of four industrial union locals, for example, Arnold Tannenbaum and Robert Kahn concluded that the level of membership participation in meetings and union activities correlated directly with union stewards' involvement of members in decision-making.<sup>85</sup> As stewards turned their attention away from the job site and toward formalized grievance advocacy, however, participation and attachment correspondingly declined. "When the men settled things on the floor . . . , it was something they did themselves," observed a Buffalo union representative in 1961. "When things are settled legalistically, through the grievance procedure, it's something foreign."<sup>86</sup>

A number of managers understood this dynamic and began acting unilaterally, willingly accepting that workers would file and win large numbers of grievances. At first glance, this tactic might have appeared counterproductive. If workers were winning grievances, then the union's efficacy would seem to be confirmed. Arbitrators and conservative union leaders put this spin on the phenomenon, and—in the legal environment of *Elk Lumber*, *Ford Motor Company*, and *Fansteel*—many workers agreed. In the long run, however, this tactic enabled managers to shift the balance of power and "reduce the workers' identification with their union."<sup>87</sup> Arbitration victories won months after the event without any involvement from workers provided no substitute for the empowering experience of an on-the-spot resolution. Each time management acted unilaterally in disregard of the union, the workers were treated to a drama of subjugation, with management in the role of active sovereign and the union in the role of passive subject with no recourse other than

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85. ARNOLD S. TANNENBAUM & ROBERT L. KAHN, PARTICIPATION IN UNION LOCALS 222 & tbl.46 (1958).

86. George Strauss, *The Shifting Power Balance in the Plant*, 1 INDUS. REL. 65, 90 (1962); see also LEONARD R. SAYLES & GEORGE STRAUSS, THE LOCAL UNION 108, 165-66 (rev. ed. 1967) (concluding that, in a study of 20 local unions, membership participation usually developed at the level of the work group, and that it could be sustained only when workers experienced it as being effective). For a detailed account of these dynamics in a large Teamsters Local, see SAMUEL R. FRIEDMAN, TEAMSTER RANK AND FILE 42 (1982) (summarizing Friedman's account of the positive effects on worker morale and participation of direct action by work groups).

87. Strauss, *supra* note 86, at 90; see also SAYLES & STRAUSS, *supra* note 86, at 161.

petitioning higher authority. A subsequent arbitration victory could not erase the experience of seeing one's contractual rights disappear at the employer's whim during the interim.<sup>88</sup> By the late 1950s, there were "signs that some managements, having tasted victory, have become obsessed with power for its own sake and are now seeking to reduce the unions to ineffectiveness."<sup>89</sup>

Along with diminished participation and union loyalty came reduced attachment to the norm of solidarity. The workers' common law had been, as John R. Commons observed, "formulated in assemblies or groups while dealing with violations and deciding disputes as they arise."<sup>90</sup> When the locus of action and decision-making moved upward in the union hierarchy and outward to grievance and arbitration procedures, workers lost touch with this process. According to Tannenbaum and Kahn, the vitality of solidaristic norms varied directly with the level of membership participation, which—in turn—depended heavily on joint decision-making by stewards and rank-and-file members.<sup>91</sup> Active members were more likely to respect, propagate, and enforce norms governing such topics as union meeting attendance and picket line duty.<sup>92</sup> "They are more loyal to the union, and will tend therefore to adopt and support union norms."<sup>93</sup> The growing number of inactive members, on the other hand, tended to evade the solidaristic promptings of the shrinking number of union activists. By the 1980s, the norm of solidarity had eroded to the point that even employers in heavily unionized sections of the country could contemplate replacing strikers and maintaining production during strikes.<sup>94</sup>

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88. The significance and effect of such mundane dramas has since been described and analyzed in JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* (1990); JAMES C. SCOTT, *WEAPONS OF THE WEAK* (1985).

89. Strauss, *supra* note 86, at 96.

90. COMMONS, *supra* note 1, at 301-02.

91. TANNENBAUM & KAHN, *supra* note 85, at 206-15.

92. *Id.* at 210 & tbl.40.

93. *Id.* at 205.

94. See CHARLES R. PERRY ET AL., *OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENTAL REGULATIONS* 39-40 (1982).

At the time, the decline of unilateral worker lawmaking was considered “natural” by many industrial relations experts. Beginning with Beatrice and Sidney Webb, labor experts argued that unilateral worker lawmaking was a “primitive” practice that would fade once unions “matured.”<sup>95</sup> There was, however, nothing “natural” about its decline. Progressive lawyers, social scientists, and politicians actively sought its suppression, favoring autocratic, business unionism over more democratic and participatory practices.<sup>96</sup> Red scares following World Wars I and II served as pretexts for conservative union leaders to eliminate not only Communists and other radicals, but all proponents of shop-floor activism.<sup>97</sup> As we have seen, the rules of *Elk Lumber* (at least in the courts of appeal), *Ford Motor Company*, and *Fansteel*—all products of contingent value judgments rather than natural evolution—were in place by the early 1940s. Nevertheless, many industrial workers continued to make rules governing the pace of work, conditions on the shop floor, and the obligations of solidarity, enforcing them with sit-downs, slow-downs, and other forms of partial strikes.<sup>98</sup> As many as half of all CIO local unions resisted blanket no-strike and management prerogative clauses into the 1950s.<sup>99</sup> Even in the steel industry, where the union had enthusiastically enforced no-strike obligations from the outset, industry reported 788 wildcat actions during 1956-58. Writing in 1960,

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95. RICHARD A. LESTER, AS UNIONS MATURE (1958); David Montgomery, *Industrial Democracy or Democracy in Industry?: The Theory and Practice of the Labor Movement, 1870-1925*, in INDUSTRIAL DEMOCRACY IN AMERICA, *supra* note 81, at 20, 29-30; Sidney Webb & Beatrice Webb, *Primitive Democracy in British Trade-Unionism*, 11 POL. SCI. Q. 397 (1896).

96. See, e.g., KIM MOODY, AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM 29-30 (1988); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

97. JOSEPH A. MCCARTIN, LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912-1921, at 206-08 (1997); MOODY, *supra* note 96, at 45-51.

98. See TOMLINS, *supra* note 25, at 240-42; Pope, *supra* note 17, at 76-77.

99. Judith Stepan-Norris & Maurice Zeitlin, “Red” Unions and “Bourgeois” Contracts?, 96 AM. J. SOC. 1151, 1186 tbl.4 (1991) (concluding that, in a study of collective bargaining agreements in California, although the incidence of such provisions did increase over time, it remained below fifty percent through the first half of the 1950s).

Sumner Slichter, the leading labor scholar of his time, reported that “[r]ules may be enforced by older unions unilaterally” and that the newer industrial unions were even more likely to engage in on-the-job slowdowns and protests.<sup>100</sup> Illustrating the possibility of alternative paths, workers in Great Britain retained far greater freedom to legislate standards and engage in shop-floor bargaining—a freedom that might not be unrelated to the fact that union density there did not begin to decline until the 1980s, a quarter century later than the U.S.<sup>101</sup>

### B. *Reinforcing Unilateral Lawmaking by Employers*

If Commons was right, and the workplace is a site of conflict between two competing normative regimes, then it would seem obvious that excluding one of them would give the other a commanding advantage. As a framework for assessing this hypothesis, consider Edward Rock and Michael Wachter’s analysis of norm generation in non-union enterprises. Although their central concern is economic efficiency, and economic efficiency is not the central concern either of this essay or of the NLRA, their analysis bears instructively on our question.<sup>102</sup> Rock and Wachter compare the non-union workplace to the Shasta County range country studied by Robert Ellickson in his

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100. SUMNER H. SLICHTER ET AL., *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 667, 670 (1960).

101. See, e.g., RALPH DARLINGTON, *THE DYNAMICS OF WORKPLACE UNIONISM: SHOP STEWARDS’ ORGANIZATION IN THREE MERSEYSIDE PLANTS* (1994); J.F.B. GOODMAN & T.G. WHITTINGHAM, *SHOP STEWARDS IN BRITISH INDUSTRY* (1969); David Brody, *Workplace Contractualism in Comparative Perspective*, in *INDUSTRIAL DEMOCRACY IN AMERICA*, *supra* note 81, at 176, 183-84; Andy Charlwood & David Metcalf, *Appendix: Trade Union Numbers, Membership and Density*, in *TRADE UNIONS: RESURGENCE OR DEMISE?* 231 fig.A3 (Sue Fernie & David Metcalf eds., 2005); Steven Tolliday & Jonathan Zeitlin, *Shop-Floor Bargaining, Contract Unionism and Job Control: An Anglo-American Comparison*, in *THE AUTOMOBILE INDUSTRY AND ITS WORKERS* 99 (Steven Tolliday & Jonathan Zeitlin eds., 1986).

102. On the place of efficiency in the statutory purposes of the NLRA, see Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 *TEX. L. REV.* 921, 924 (1993) (observing that the NLRA expressly prohibited discrimination against unionists in spite of the fact that such discrimination tended to reduce labor costs).

influential book, *Order Without Law*.<sup>103</sup> Ellickson shows the ranchers making choices that tend toward the development of efficient norms for the resolution of disputes about cattle and land use. But a precondition for this happy process is the ranchers' membership in a "close-knit group," in which "each group member, or his reliable allies, [has] some of the resources of power."<sup>104</sup> Nearly all of Ellickson's ranchers owned productive property, possessed the right to advocate and organize openly without fear of retaliation, enjoyed equal access to county officials—including participation in face-to-face public meetings—and had the capacity to engage in forms of self-help that could communicate their displeasure with norm-violators. All of these resources came into play in the disputes recounted by Ellickson and each played an important role in at least one.<sup>105</sup> What made the norm-generation process free and efficient was the reciprocal ability of the ranchers to force each other to consider the costs of their actions.<sup>106</sup> "There is no reason for supposing," warns Ellickson, "that norms will evolve to serve the powerless."<sup>107</sup>

Rock and Wachter contend that the relationship between non-union workers and their employer is significantly similar to the relations among Ellickson's ranchers. They argue that the condition of roughly equal power is satisfied in the non-union workplace because employers can sanction workers with discharge, and workers can sanction employers with gossip (loss of reputation), covert slow-downs, and the threat of

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103. Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1920-21 (1996); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

104. ELLICKSON, *supra* note 103, at 178-79.

105. *See id.* at 29-120.

106. *See id.* at 181 ("[D]epartures from conditions of reciprocal power . . . are likely to impair the emergence of welfare-maximizing norms."); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1697, 1727 (1996) ("[H]ighly unequal endowments of group members may be evidence of inefficient norms. The more powerful members may prefer and enforce norms that redistribute wealth to them, even when those norms are inefficient.").

107. ELLICKSON, *supra* note 103, at 179 n.43; *see also* Jean Ensminger & Jack Knight, *Changing Social Norms: Common Property, Bridewealth, and Clan Exogamy*, 38 CURRENT ANTHROPOLOGY 1, 9-12 (1997) (observing that norms tend to serve the interests of relatively powerful groups).

unionization. Unfortunately, Rock and Wachter make no attempt to determine whether the non-union workers' sanctions are, in practice, comparable in effectiveness to the employer's. Instead, they assume parity from the fact that employers provide workers with considerably better treatment than the law requires, including protection against unjust discharge that the authors claim—incredibly, and without any apparent awareness that evidence might be needed to prove the point—is equivalent in content and force to that provided in collectively bargained just-cause provisions. They also assume, again without evidence, that the threat of discharge does not deter workers from applying the sanctions of reduced productivity and unionization.<sup>108</sup> Yet, employers fire or otherwise retaliate against 1 out of every 18 workers who support a union organizing campaign, and, in a national poll, 79 percent of American workers agreed with the statement that it was “very” or “somewhat” likely that “workers would be fired for trying to organize a union.”<sup>109</sup> Moreover, employers enjoy the property right to enact rules governing the workers' choice for union representation. American labor law permits employers unilaterally to enact rules that would be unimaginable in a political contest, for example requiring voters to attend speeches by the incumbent party (the employer), excluding the leaders of the challenging party (the union) from the most important forum (the workplace) altogether, and requiring voters to hear one-on-one anti-challenger appeals from the supervisors who sit in judgment on their job performance and prospects of promotion.<sup>110</sup> By contrast, Ellickson's cattle ranchers enjoyed equal rights of participation, and if one faction gained control of the local government, it would be prohibited from using official powers for campaign purposes.

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108. See Rock & Wachter, *supra* note 103, at 1920-21, 1931.

109. See David Brody, *Free Labor, Law, and American Trade Unionism*, in *TERMS OF LABOR: SLAVERY, SERFDOM, AND FREE LABOR* 213, 238 (Stanley L. Engerman ed., 1999); Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 *EMP. RTS. & EMP. POL'Y J.* 317, 330 (1998) (analyzing NLRB records).

110. See, e.g., LANCE COMPA, HUMAN RIGHTS WATCH, *UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* 19-22 (Cynthia Brown ed., 2000); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 *MINN. L. REV.* 495, 557-60, 564-65 (1993).

Even in the union workplace, sanctions are far from equivalent. *Elk Lumber* and its progeny remove all gradations of inside work reduction, other than those that can be categorized as “presenting grievances” to the employer, from the protection of the statute. Meanwhile, employers—including lawbreaking and contract-breaking employers in the period before an official ruling—retain the full range of flexibility that comes with the exclusive authority to govern. Provided that the employer acts without provable “antiunion motivation” and its tactics are not “inherently destructive” of Section 7 rights—a narrow category—it may transfer, demote, discipline or discharge worker leaders, reduce wages, or lay off employees.<sup>111</sup>

Rock and Wachter’s approach represents a huge advance over theories that trace the determination of non-union wages and working conditions to “bargaining” between individual workers and employers. Unlike most economists, they recognize that workplace norms are generated by non-market as well as market processes, and that efficient outcomes require rough equality of power among the participants. However, their assumption that the relationship between a non-union employer and its employees resembles in any way the relationship among the ranchers studied by Ellickson strains credulity. The state grants the employer unilateral lawmaking authority over the workplace. To enforce its rules, the employer can call in the police to evict non-complying workers from the workplace. The workers, on the other hand, face discharge if they try to enact rules of their own. It is as if one of the ranchers studied by Ellickson were empowered to enact rules binding all of the others on pain of deprivation of livelihood. One wonders why Rock and Wachter, who elsewhere embrace the general economic assumption that individuals act rationally, here assume that workers freely stage slow-downs and choose union representation despite the threat of discharge and the obstacle posed by unilateral employer campaign rules. Abandoning that assumption, it would seem that permitting workers to respond to employer rules with rules of their own would help to equalize the available sanctions, thereby increasing the likelihood of efficient norm generation.

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111. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967); Stone, *supra* note 6, at 1546.

## CONCLUSION

During the first half of the twentieth century, American workers sustained vigorous practices of unilateral lawmaking. They promulgated norms and, where possible, formal rules governing such matters as the pace of work, the length of the working day, the proper attitude toward the boss, and the obligations of solidarity. Instead of campaigning for majority support in a one-shot card-check or representation election, unions emerged organically from the process of norm creation and enforcement. Once a collective bargaining agreement was in place, workers interpreted and enforced it on their own. They took the same position on official law, implementing their own interpretations instead of deferring to the employer's. Through these activities, workers experienced first-hand the power of solidarity. Partly as a result, many workers were passionately loyal to their unions, attended union meetings, and participated in union activities.

Initially, it appeared that unilateral worker lawmaking would be protected against employer retaliation under Section 7 of the National Labor Relations Act, which guaranteed the workers' right to engage in "concerted activities for the purpose of mutual aid or protection." However, courts, labor arbitrators, and—eventually—the NLRB came to agree that employer property rights trumped worker norm enforcement inside the workplace. Unions and workers may enact rules and attempt to enforce them from outside the workplace—for example, by staying home until the employer agrees to comply—but they may not implement their rules inside without sacrificing the protection of the labor law. Gradually, these rulings undermined the practice of unilateral worker lawmaking and, along with it, the participation, loyalty, and commitment of union members.

This result was neither desired nor anticipated by the decision-makers who developed the legal doctrines. They believed that their rules would produce a stable system in which unions and employers could bargain on a basis of mutual respect. As unions "matured," they thought, "force" and emotional appeals to solidarity would give way to reasoned collective bargaining. They assumed that the norm of solidarity would remain strong, that the outside strike would give industrial unions a rough equality of

bargaining power with employers, and that workers would continue to engage in self-enforcement if grievance and arbitration procedures became unresponsive. Unfortunately for workers, they failed to recognize that the generation of solidaristic norms and practices was an accomplishment that could not be sustained without constant re-enactment by workers. With the decline of the workers' law, employers no longer had any incentive to share power with union leaders. Instead of rewarding union leaders for their "responsibility" in helping to suppress worker lawmaking, a new generation of managers sensed weakness and launched a full-scale assault on unionism.

In recent years, some unions have begun to revive the tradition of unilateral worker lawmaking. Instead of campaigning for a majority vote in a one-shot representation "election," workers develop and enforce norms of fair treatment and solidarity. Organizing committees begin to function like unions without waiting for employer recognition. Once a collective bargaining agreement has been negotiated, workers strive to enforce it on their own. Unfortunately for workers and unions, the old doctrines continue to constrain such activities despite the erosion of their supporting assumptions.