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September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act

By Anne Marie Lofaso

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I. Introduction

Labor rights in countries with predominantly free market economies have generally passed through three stages—repression, tolerance, and recognition.[1] In the United States, nineteenth-century state and federal governments *repressed* labor unions by making conduct, such as workers banding together for higher wages, subject to criminal penalty and civil liability.[2] Courts paved the way for *tolerating* labor unions by overruling repressive precedents.[3] By the early twentieth century, Congress followed suit by legislatively exempting unions from certain legal liabilities.[4] In 1935, Congress enacted Section 7 of the National Labor Relations Act ("NLRA"), marking the first formal federal government *recognition of* employees' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining and other mutual aid or protection."[5]

One wonders whether labor rights in the United States has diverged from the repression-tolerance-recognition pattern, or whether the pattern is merely starting anew. Notwithstanding the fundamentally progressive nature of Section 7, the protective power of the original NLRA, as enacted in 1935 (popularly called "the Wagner Act"), has been eroded by congressional amendments, coupled with successive interpretations of the courts and the National Labor

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*Associate Professor, West Virginia University College of Law. I wish to thank Luke Boso, Ellen J. Dannin, Michael Gooen, Jim Heiko, and Jeff Hirsch for their invaluable comments on this Paper. Special thanks to Bob Bastress for enduring several conversations with me on this topic, to John Bowman and Kace Legg for their research assistance, and to the Hodges Foundation for its support of research that informed the historical sections of this paper. All views and errors are the author's.

[1] *See* Antoine Jacobs, *Collective Self Regulation*, *in* THE MAKING OF LABOUR LAW IN EUROPE: A COMPARATIVE STUDY OF NINE COUNTRIES UP TO 1945 (Bob Hepple ed., 1986).

[2] For example, state courts often repressed union activity by upholding indictments for criminal conspiracy against workers who banned together for some benefit. *See*, *e.g.*, People v. Melvin, 2 Wheeler Crim. Cas. 262 (N.Y. 1810) (holding that trade unions are criminal conspiracies designed for the illegal purpose of raising the wages of their members). Employers also brought civil actions against unions for damages arising from early union activity. These actions often resulted in injunctive relief. *See* Vegelahn v. Guntner, 44 N.E. 1077 (Mass. 1896) (enjoining striking employees from patrolling the sidewalk in front of their employer's business in an effort to deter the hiring of replacement workers).

[3] *See, e.g.*, Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (Mass. 1842), essentially overruling *Commonwealth v. Pullis* (The Philadelphia Cordwainers Case) (Phila. Mayor's Ct. 1806) (holding that membership in a union constituted criminal conspiracy to illegally raise wages). *See also* Walter Nelles, *The First American Labor Case*, 41 YALE L. J. 165 (1931).

[4] In 1914, Congress enacted the Clayton Act, which exempted organized labor from antitrust laws. 15 U.S.C. § 17. In 1932, Congress enacted the Norris-LaGuardia Act, which removed federal courts' jurisdiction and authority to grant restraining orders or temporary or permanent injunctions in any "case involving or growing out of a labor dispute." 29 U.S.C. § 101.

[5] 29 U.S.C. § 157 (West 2008). Indeed the Supreme Court, in upholding the constitutionality of the NLRA, went so far as to characterize the rights granted under Section 7 as "fundamental." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937). The NLRA also marked formal recognition of the right to strike. 29 U.S.C. § 13.

Relations Board ("the NLRB")—the very agency tasked by Congress with protecting workers' rights. By weakening the NLRA's protective power, all three branches of the government have legally and economically disempowered unions and thus weakened their capacity to protect the working class.

This paper focuses on several of the sixty-one decisions issued by the NLRB's five-member Board in September 2007.[6] The labor community has come to regard the Board's September 2007 decisions as the "September Massacre."[7] The term "massacre" suggests an indiscriminate and instantaneous destruction of a large number of longstanding labor doctrines. But, upon closer study it becomes clear that many of the September decisions fit into a long history of legislative, administrative, and judicial cutbacks to the original NLRA.

The September Massacre, then, is more accurately viewed as the latest, and perhaps most serious, attack on workers' rights—this time by a Board controlled by appointees of President George W. Bush ("the Bush Board"). Nevertheless, the characterization of the September decisions as a "massacre" is arguably accurate for two reasons. First, in many instances, the Bush Board's September 2007 decisions cumulatively chip away at the NLRA's protections more vigorously than during previous administrations. Second, while historically the courts and Congress have been responsible for much of the NLRA's erosion, the September Massacre was wrought by the very administrative agency charged with protecting Section 7 rights (i.e., the rights of working people to band together collectively for mutual aid and protection).

Section II of this paper discusses the aggregate, weakening effect on the NLRA by both the Bush Board and prior governmental action. Section III of this Paper examines one of the most prominent (and perhaps most damaging) of the September 2007 decisions—*Dana Corporation*. Section IV of this Paper concludes with some remarks on what the labor movement can do to regain economic and political power.

II. The Decisions Composing the September Massacre Constitute Part of a Half-Century Trend of De-Radicalizing the NLRA[8]

A. Reading Certain Subclasses of Employees out of the Act's Protection

In *Toering Electric Company*, the Bush Board held that paid union organizers, or salts,[9] are not statutory employees in circumstances where the salt does not intend to accept a job if

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[6] At that time, the Board was comprised of five members: three Republicans—Chairman Roberts J. Battista and Members Peter C. Schaumber and Peter N. Kirsanow—and two Democrats—Wilma B. Liebman and Dennis P. Walsh.

[7] I first heard the term "September Massacre" applied to the Board's September 2007 decisions at the ABA Labor and Employment Law meeting in Philadelphia on November 8, 2007. During the panel, "A Dialogue with the National Labor Relations Board," former Board member Sarah M. Fox vigorously defended labor's use of that term.

[8] *See generally* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).

[9] Some believe that the term salt "may be derived from the phrase 'salting a mine,' which is the artificial introduction of metal or ore into a mine by subterfuge to create the false impression that the material was naturally occurring." Tualitan Elec., Inc. v. NLRB, 84 F.3d 1202, 1203 n.1 (9th Cir. 1996). *See also* Victor J. Van Bourg & Ellyn Moscowitz, *Salting the Mines: The Legal and Political Implications of Placing Paid Union Organizers in the Employer's Workplace*, 16 HOFSTRA LAB. & EMP. L.J. 1, 5 & n.12 (1998).

offered.[10] The Bush Board based its decision on several arguments that fly in the face of Supreme Court and other case precedent. As an initial matter, the Bush Board, mischaracterizing Supreme Court precedent that discusses the NLRA's "striking[ly] broad" definition of employee,[11] asserted that it need not "extend[] the protections of statutory employees to all other workers who are not specifically excluded"[12] from the statute's definition. The Bush Board then cited its own relatively recent previous cases to justify its argument that such a broad definition of employee would be contrary to precedent, ignoring the fact that more longstanding precedent from previous Boards would dictate another result.[13]

After narrowly interpreting *Phelps Dodge Corporation v. NLRB*—a Supreme Court case famously holding that job applicants are treated as statutory employees under the Act[14]—the Bush Board next questioned whether "job applicants who lack a genuine interest in seeking an employment relationship are not [statutory] employees."[15] The Bush Board held that "an applicant for employment entitled to protection as a Section 2(3) employee is someone genuinely interested in seeking to establish an employment relationship with the employer. . . . [and] . . . that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to establish an employment relationship with the employer."[16] The Bush Board thereby circumvented Supreme Court cases *Phelps Dodge* and *NLRB v. Town & Country Electric*[17] by creating an unpersuasive distinction between job applicants who genuinely seek an employment relationship with an employer and those who do not.

The Bush Board based its holding on several factors. First, with little discussion of the NLRA's purposes or its legislative history, it viewed a "relationship between an employer and a putative job applicant who has no genuine interest in working for that employer" as not being "the economic relationship contemplated and protected by the Act."[18] Ignoring its own question—whether such individuals are statutory employees (not whether they are entitled to a remedy in the limited circumstances described)—the Board then rested its conclusion on its remedial authority, arguing that statutory policies against "windfall and punitive backpay awards" supported its holding. Citing *Jefferson Standard*—a Supreme Court case holding that employees engaged in disloyal conduct lose the NLRA's protection[19]—the Board next suggested that salts—who seek only to provoke unfair labor practices by applying to employers who are hostile to unionization—are disloyal because "such conduct manifests a fundamental conflict of

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[10] Toering Elec. Co., 351 N.L.R.B. No. 18 (Sep. 29, 2007).
[11] *See*, *e.g.*, Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) ("The breadth of 2(3)'s definition is striking: the Act squarely applies to "any employee."); NLRB v. Town & Country Elec., 516 U.S. 85 (1995) (upholding the Board's "broad, literal interpretation" of Section 2(3) as consistent with the NLRA's plain language, the statutory purposes, and interpretative case law).
[12] 351 N.L.R.B. No. 18, slip op. 4.
[13] Slip op. 4 (citing Brevard Achievement Center, Inc., 342 N.L.R.B. 982, 982 (2004); Brown University, 342 N.L.R.B. 483, 483 (2004)). The Board also cites a Clinton Board decision, WBAI Pacifica Foundation, 328 N.L.R.B. 1273, 1274-75 (1999), a case easily distinguishable as involving *unpaid* staff positions.
[14] *Phelps Dodge Corp.*, 313 U.S. 177, 185 (1941).
[15] 351 N.L.R.B. No. 18, slip op. 5.
[16] *Id.*, slip op. 4.
[17] NLRB v. Town & Country Elec., 516 U.S. 85, 92, 96-98 (1995) (unanimously upholding the Board's interpretation of NLRA Section 2(3) as including paid union organizers).
[18] 351 N.L.R.B. No. 18, slip op. 4.
[19] NLRB v. IBEW Local 1229, 346 U.S. 464, 472 (1953).

interests *ab initio* between the employer's interest in doing business and the applicant's interest in disrupting or eliminating this business."[20] In the same vein, the Board held that denying the NLRA's protection to workers involved in these litigation-based salting campaigns is not inconsistent with *Town & Country Electric*, the Supreme Court case that expressly rejected the argument that salts are inherently disloyal.[21]

It is noteworthy that the Bush Board essentially disenfranchised salts in the face of circuit precedent unanimously upholding backpay awards to salts. As the Second Circuit, quoting *Phelps Dodge*, recently pointed out in upholding the Board's backpay award to a salt:

> "Discrimination against union labor in the hiring of [workers] is a dam to self organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which . . . . is recognized as basic to the attainment of industrial peace."[22]

The Bush Board's willingness to read a certain subclass of employees out of the NLRA's protection is part of its trend toward restricting worker access to the NLRA's fundamental protections by narrowing the statutory definition of employee. For example, the Bush Board has held that teaching and research assistants at private universities are students and therefore are not statutory employees,[23] and that "severely disabled" employees working as janitors are not statutory employees because their employment was primarily rehabilitative rather than economic.[24]

By contrast, previous Boards have generally interpreted statutory exemptions to the NLRA narrowly. This is particularly apparent when examining the history of the Board's attempt to construe the statutory supervisory exemption in the context of the nursing profession. NLRA Section 2(11) defines supervisor as "any individual having authority, in the interest of the employer, to . . . assign . . . or responsibly to direct [other employees] . . . if in connection with the foregoing the exercise of such authority . . . requires the use of independent judgment." In *Doctors' Hospital of Modesto, Inc.*, a case decided in 1970, the Board determined that a hospital's registered nurses were not supervisors, even though they directed other, less-skilled employees. In the Board's view, the nurses' "daily on-the-job duties and authority in this regard are solely a product of their highly developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their [e]mployer."[25] In 1992, in

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[20] Toering Elec. Co., 351 N.L.R.B. No. 18, slip op. 7.
[21] NLRB v. Town & Country Elec., 516 U.S. 85, 92, 96-98 (1995) (upholding the Board's interpretation of NLRA Section 2(3) as including paid union organizers).
[22] NLRB v. Ferguson Elec. Co., Inc., 242 F.3d 426, 436 (2d Cir. 2001) (quoting *Phelps Dodge Corp.*, 313 U.S. 177, 185 (1941)). *See also* Tualitan Elec. Inc. v. NLRB, 253 F.3d 714 (D.C. Cir. 2001) (upholding backpay award to salt); Aneco Inc. v. NLRB, 285 F.3d 326 (4th Cir. 2002) (same but cutting back on the amount of that award).
[23] Brown University, 342 N.L.R.B. 483, 483 (2004). For a powerful discussion of just how destructive the *Brown* case is, *see* Ellen J. Dannin, *Graduate Students' Right To Organize*, Working Life (Labor Reserarch Association: April 29, 2008), available at http://www.workinglife.org/blogs/view_post.php?content_id=7986.
[24] Brevard Achievement Center, Inc., 342 N.L.R.B. 982, 982 (2004).
[25] 183 N.L.R.B. 950, 951 (1970), enforced, 489 F.2d 772 (9th Cir. 1973).

Health Care and Retirement Corporation of America (*HCR*), a Board made up of predominantly Republican appointees, had no trouble applying its long-standing precedent to conclude that the nurses in that case were employees, not supervisors.[26] But the Supreme Court in a 5-4 decision reversed, finding that the Board's patient care analysis "created a false dichotomy. . . between acts taken in connection with patient care and acts taken in the interest of the employer."[27]

In *Providence Hospital*, in response to the Supreme Court's decision in *HCR*, the Clinton Board, under the leadership of Chairman William B. Gould IV, defined the term "independent judgment" in a manner that attempted to reconcile NLRA Section 2(11)'s exclusion of supervisors with Section 2(13)'s definition of professional employees.[28] A divided Supreme Court also rejected that interpretation.[29]

Any further attempts to continue the fight to narrowly construe the supervisory exemption ended with the Bush Board. In addition to the decisions handed down in the September Massacre, the Bush Board, following the Supreme Court's rejection of the Clinton Board's construction of independent judgment, has contributed to congressional and judicial deterioration of the NLRA's protective cover by issuing a series of cases that further broaden the supervisory statutory exemption in light of those Supreme Courts rulings.[30]

While these cases are troubling, one could argue that this trend did not start with the Bush Board. In fact, the most apparent sources of this trend come from congressional amendments to the NLRA and from the court decisions interpreting those amendments. Most famously, through the 1947 Taft-Hartley amendments to the original NLRA, it was Congress—not the Court and not the Board—that excluded both independent contractors[31] and supervisors[32] from the otherwise "striking[ly] broad" definition of the statutory term "employee."[33] Indeed, Congress created these exemptions—i.e., disenfranchised these workers—in reaction to the Supreme Court's approval of Board precedent extending the Act's protections to such employees.[34] As explained above, in the last half-century, the Supreme Court has contributed to this trend and broadened the supervisory exemption by twice rejecting the Board's interpretation of that statutory term.[35]

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[26] 306 N.L.R.B. 63, 63 n.1 (1992), *enforcement denied*, 987 F.2d 1256 (6th Cir. 1993), *affirmed*, 511 U.S. 571 (1994).
[27] NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 577 (1994).
[28] 320 N.L.R.B. 717 (1996).
[29] NLRB v. Kentucky River Community Care, 532 U.S. 706, 713-21 (2001) (5-4 decision).
[30] Oakwood Healthcare, Inc., 348 N.L.R.B. No. 37 (2006); Croft Metals, Inc., 348 N.L.R.B. No. 38 (2006); Golden Crest Healthcare Center, 348 N.L.R.B. No. 39 (2006).
[31] 29 U.S.C. § 152(3) (West 2008).
[32] 29 U.S.C. § 152(3), 2(11).
[33] NLRA Section 2(3) defines the term "employee" to include "any employee," unless expressly excluded by the NLRA. The Supreme Court has repeatedly characterized this statutory definition as "broad." *See supra* note 11 and accompanying text.
[34] Taft-Hartley Act of 1947, 29 U.S.C. § 501, *legislatively overruling* Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947); and NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944).
[35] NLRB v. Health Care & Ret. Corp., 511 U.S. 571, 578-80 (1994) (rejecting the Board's interpretation of "in the interest of the employer" prong of three-prong statutory test for "supervisor" set forth in NLRA); NLRB v. Kentucky River Cmty Care, Inc., 532 U.S. 706, 712-22 (2001) (rejecting the Board's interpretation of "supervisor" in the context of "professional employees," " by rejecting the Board's interpretation of the ambiguous term "independent judgment").

These governmental acts—Congress' enactment of statutory exemptions, the Supreme Court's refusal to accept narrow interpretations of those statutory exemptions, and the Bush Board's broader than necessary interpretation of those exemptions—demonstrate the extent to which each branch of government has contributed to narrowing the NLRA's protective coverage.[36] This is significant: If a worker does not come within the statutory definition of employee, that employee is not protected by the NLRA. Workers who are not protected by the NLRA are generally at-will employees who can be fired for any reason, including the bad reason of engaging in protected activity. For example, an employer remains free to fire a non-statutory worker who merely asks the boss for a cost-of-living raise on behalf of an entire plant.[37]

B. Assault on Salts—Rights Without Remedies[38]

The Bush Board's decision in *Toering Electric Company* comes on the heels of another Bush Board decision designed to limit the backpay remedy available to salts. In *Oil Capitol Sheet Metal*,[39] the Bush Board held that it would "no longer apply a presumption of indefinite employment" in the context of an employer's discriminatory discharge of a union salt. This has the effect of attacking the remedy (by sharply restricting backpay) that might attach to a violation of a statutory right, rendering it a right without a remedy. As with other cases handed down during the September Massacre, the Bush Board's right-without-a-remedy doctrine is once again part of a larger trend. In *Hoffmann Plastic Compounds, Inc.*, the Supreme Court held that congressional policies underlying the federal immigration laws foreclosed the Board from awarding backpay to undocumented aliens who have never been legally authorized to work in the United States, even though those workers are employees under the NLRA.[40] In *Hoffmann*, the Supreme Court rejected the NLRB's argument that the backpay award deters employers from violating both labor and immigration laws.[41]

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[36] *See also* NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 289 (1974) (upholding the Board's exclusion of managerial employees from NLRA protection) *and* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) (upholding the Board's "labor nexus" test for excluding from the NLRA confidential employees who "assist and act in a confidential capacity to persons who exercise 'managerial' function in the field of labor relations").

[37] Indeed, the Court's interference with workers' right to organize has been so deeply felt by the labor community that it has taken the bold step of filing a complaint with the International Labor Organization. Complaint by the American Federal of Labor and Congress of Industrial Organizations to the ILO Committee on Freedom of Association Against the Government of the United States of America for Violation of Fundamental Rights of Freedom of Association and Protection of the Right To Organize and Bargain Collectively Concerning Employees Classified as "Supervisors" Under the National Labor Relations Act, filed Oct. 23, 2006, *available at* http://www.aflcio.org/joinaunion/voiceatwork/upload/ilo_complaint.pdf. The ILO recently ruled in the AFL-CIO's favor. See 349th Report of the Committee on Freedom of Association (March 2008), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_091464.pdf.

[38] In a case of first impression, the Second Circuit initially observed that failing to award backpay to salts was essentially granting a right without a remedy. NLRB v. Ferguson Elec. Co., Inc., 242 F.3d 426, 430, 436 (2d Cir. 2001) (upholding the Board's backpay award to the salt).

[39] 349 N.L.R.B. No. 118, slip op. 6 (May 31, 2007).

[40] 535 U.S. 137 (2002).

[41] *Id.* at 154-57 (articulating this argument) (Breyer, J., dissenting).

Coupling *Toering Electric* with *Oil Capitol*, it becomes obvious that the Bush Board has "cut off the remedy, just in case there is any right remaining."[42] Again, this is part of a larger trend grounded in Supreme Court jurisprudence. In 1956 in *NLRB v. Babcock & Wilcox Company* and again in 1992 in *Lechmere, Inc. v. NLRB*,[43] the Supreme Court ruled that the NLRA does not grant nonemployee union organizers access to employer-owned property. The Court held that Section 7 rights generally yield to employers' property rights, even though Section 7 "necessarily encompasses the right effectively to communicate at the jobsite."[44]

Of course, one union response to these cases was the "inside" employee organizer or salt, as discussed above. Because nonemployee union organizers do not have access to employees at the jobsite, unions have relied on what the management community viewed as a "Trojan Horse" strategy of infiltrating the enemy from within.[45] Management viewed salts as the foot soldier in that war.[46] The unions' strategy was effective. As explained above, the management community turned to the courts for help but lost in *Town & Country Electric*—where a unanimous Supreme Court upheld the Board's construction of the NLRA as protecting salts. More important than its holding is the reasoning of that decision. There, the Supreme Court reaffirmed the point of *Phelps Dodge* (that organizing is not disloyal and that the Trojan Horse metaphor is ultimately wrong), emphasizing that there is no inconsistency between being a good employee and engaging in union organizing activity. Since *Town & Country Electric*, the management community has fought back and, with the Bush Board, found a government entity willing to do its bidding.

Toering and *Oil Capitol* make it much harder for unions and the General Counsel to investigate and to prove their cases. And the harder it is to prove a case, the more cases fall by the wayside. Cutting down on reinstatement and backpay also effectively blunts salting. The more reinstatement and backpay remedies are weakened, the less an employer has to fear by treating salts unlawfully.

Board decisions are reviewed on a case-by-case basis, so courts are likely to miss the larger picture—the systematic undermining of the NLRA's policies. While this picture might be

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[42] Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 61 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975040.

[43] NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). The *Babcock-Lechmere* approach is subject two limited exceptions. *See*, *e.g.*, *Babcock*, 351 U.S. at 112 (explaining that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution").

[44] Beth Israel Hosp. v. NLRB, 437 U.S. 539, 543 (1978).

[45] *See* Judd H. Lees, *Hiring the Trojan Horse: The Union Business Agent as a Protected Applicant*, 42 LAB. L. J. 8, 14 (1991); Sunland Constr. Co, 309 N.L.R.B. 1224, 1232 (1992) (Member Oviatt, concurring) (stating that salts are "reminiscent of the Trojan Horse whose innocuous appearance shields a deadly enemy"); Michael H. Gottesman, *Labor, Employment and Benefit Decisions of the Supreme Court's 1995-96 Term*, 12 LAB. LAW. 325, 331 & n.23 (1997).

[46] For additional explanations about what historical events in the development of NLRA case law encouraged the practice of salting, *see* Victor J. Van Bourg & Ellyn Moscowitz, *Salting the Mines: The Legal and Political Implications of Placing Paid Union Organizers in the Employer's Workplace*, 16 HOFSTRA LAB. & EMP. L.J. 1, 9-16 (1998).

clearer to the Supreme Court, which does routinely entertain policy arguments, the reality is that the Supreme Court has accepted, on average, less than one NLRB labor case per year in the last decade.[47] This trend has not gone unnoticed by academics, who have the luxury of surveying the entire landscape.[48] The *Babcock/Lechmere* doctrines, together with the Bush Board's view of salting campaigns (as affirmed in *Toering Electric)*, contravene the purpose of the NLRA—to "protect[] by law . . . the right of employees to organize and bargain collectively."[49]

C. Weakening Union's Economic Weapons

The Board's recent readiness to weaken economic weapons is also part of a longstanding tradition of eroding unions' economic power. In *Jones Plastic and Engineering*, the Bush Board chipped away at the economic power behind the employees' statutory right to strike, holding that employers may treat striker replacement workers as permanent even when hired "at will."[50] Until recently, the employer bore the burden of proving the permanent status of the replacements by "showing that there was a mutual understanding between the employer and the replacements that the nature of their employment was permanent."[51] In particular, the employer was required to establish "that the replacements were hired in a manner that would 'show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis.'"[52]

Unless *Jones Plastic* is interpreted to mean that an employer always satisfies its burden of showing a "mutual understanding" merely by showing that it hired replacement workers "at will," then *Jones Plastics* is a relatively minor change in the law. Seen in a different way, though, there is a larger historical trend at play, in which unions' economic weapons have been blunted almost beyond recognition. Nothing in the plain text of the NLRA supports the right of employers to combat a strike by hiring replacement workers: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."[53] Yet, in its brief to the Supreme Court in *Mackay Radio*, the Board itself conceded that point:

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[47] The Supreme Court has passed on only four NLRB cases (all of which the Board lost) in the past ten years and another nine cases (most of which the Board won) in the previous ten years. BE&K Constr. Co. v. NLRB, 536 U.S. 516 (2002) (reversing Board); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (reversing Board); NLRB v. Ky. River Cmty Care, Inc., 532 U.S. 706 (2001) (reversing Board); Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998) (reversing Board on substantial evidence grounds); Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781 (1996) (upholding Board); Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996) (upholding Board); NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995) (upholding Board); NLRB v. Health Care & Ret.t Corp. of Am., 511 U.S. 571 (1994) (reversing Board); ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317 (1994) (upholding Board); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) (reversing Board); Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991) (reversing Board in part); Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) (uphold Board); NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990) (upholding Board).

[48] *See generally* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LABOR LAW & POL'Y J. 221 (2005).

[49] 29 U.S.C. § 151.

[50] 351 N.L.R.B. No. 11, slip op 1 (Sept. 27, 2007).

[51] Target Rock Corp., 324 NLRB 373 (1997), *enforced*, 172 F.3d 921 (D.C. Cir. 1998).

[52] *Id.* at 373 (quoting Georgia Highway Express, 165 NLRB 514, 516 (1967), *affirmed sub nom*. Truck Drivers & Helpers Local 728 v. NLRB, 403 F.2d 921 (D.C. Cir. 1968)).

[53] 29 U.S.C. § 163.

> The Board has never contended, in this case or any other, that an employer who has neither caused nor prolonged a strike through unfair labor practices, cannot take full advantage of economic forces working for his victory in a labor dispute. The Act clearly does not forbid him, in the absence of such unfair labor practices, to replace the striking employees with new employees or authorize an order directing that all the strikers be reinstated and the new employees discharged. Admittedly the strikers are not "guaranteed" reinstatement by the Act. . . . Admittedly an employer is fully within his rights under the statute in refusing to reinstate striking employees when he has legally filled their positions . . . . The Board did not question that right in this case.[54]

Blunting economic weapons, then, had an early start. As the quote above shows, in 1938, one year after the Supreme Court declared the Wagner Act constitutional, the NLRB—the administrative agency charged by Congress with administering that Act—paved the way for the Supreme Court to dilute labor's most powerful economic weapon. It comes as little surprise, then, that the Supreme Court subsequently observed that an employer may maintain operations during an economic strike by employing permanent replacement workers: "The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled."[55]

But the damage did not stop with replacement workers or with the Board and reviewing courts. Congress also raided labor's economic arsenal. Most significantly, subsequent amendments to the NLRA took away labor's right to engage in secondary boycotts (e.g., the union's legal right to picket any employer with which the union does not have a primary labor dispute), and, in most cases, to enter into hot cargo agreements (e.g., a contractual provision permitting employees to refrain from handling products from struck or non-union firms).[56] Couple those amendments with the Supreme Court's refusal to recognize constitutional protection of labor picketing[57] and we witness the depletion of labor's economic power within a generation. It is no wonder that many labor advocates recommend keeping disputes away from the Board and out of courts.

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[54] NLRB Reply Br. at 15-18 (*available at* 1939 WL 48681), NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938). Professor Samuel Estreicher argues that this interpretation of the NLRA is supported by the Act's legislative history. Samuel Estreicher, *Collective Bargaining or "Collective Begging"?: Reflections on Antistrikebreaker Legislation*, 93 Mich. L. Rev. 577, 584 (1994).

[55] *Mackay Radio & Telegraph Co.*, 304 U.S. at 346.

[56] 29 U.S.C. §§ 158(b)(4), 158(e). The right to enter into hot cargo agreements is still permitted in the construction and garment industries. *See* 29 U.S.C. § 158(e).

[57] *See*, *e.g.*, NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 618-19 (1980) (Stevens, J., concurring) (explaining why labor picketing is not entitled to full free speech protection). The Court's current jurisprudence essentially overrules its former more protective approach to picketing. *See* Thornhill v. Alabama, 310 U.S. 88, 99 (1940) (holding unconstitutional a statute that had been applied to ban all picketing without regard to the number of picketers, the peaceful character of the picketers, the nature of their dispute with the employer, or the character and the accurateness of the messaged used in notifying the public of the facts of the dispute).

D. Weakening Remedies

The NLRA's weak remedial scheme is well understood. The Supreme Court has held that the NLRA's remedial powers are not punitive.[58] Accordingly, one might think that the Board would use all of its limited remedial authority to deter wrongdoers—employers and unions who engage in unfair labor practices.[59]

To the contrary, the Bush Board has sought to diminish the already insufficient remedial powers afforded by the Act as interpreted. Not surprisingly, the Board refused to issue a *Gissel*[60] bargaining order—a bargaining order issued in cases where an employer engages in pervasive misconduct that tends to undermine the union's majority support, thereby making a free and fair election or rerun election unlikely. In *Intermet Stevensville*, despite noting most of the employer's numerous unfair labor practices committed during and after the election campaign, the Board nevertheless reversed the judge's recommended *Gissel* bargaining order.[61] Perhaps from the disenfranchised employees' point of view, the lack of *Gissel* bargaining orders is nothing new, as the Board has sometimes had trouble enforcing these bargaining orders in court.[62] But the sting here is that the agency charged with protecting workers' rights is not even trying to issue these orders.

The Bush Board also refused to issue a special remedy in a case involving a recidivist employer. In *Albertson's, Inc.*,[63] the Bush Board upheld most of the judge's findings that the employer violated the NLRA by refusing to furnish information to the employees' bargaining representatives, but did not agree with the judge's characterization of those violations as "egregious or widespread misconduct" sufficient "to demonstrate a general disregard for the employees' fundamental statutory rights," which would have merited special remedies. Rather, the Board found that the employer's "failure to respond to the Unions' information requests that were routinely generated in the course of investigating and pursuing grievances" were "unlawful and a persistent problem," but did not rise to the level of "egregious or widespread misconduct."[64] The Bush Board further found that the employer's "information request violations were not so numerous, pervasive, and outrageous that special or extraordinary

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[58] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 208-09 (1941) (collecting cases). For a discussion of how the courts have judicially amended the NLRA to dilute the Board's remedial powers and for some ideas of how to strengthen the Board's remedial powers without amending the NLRA, see Ellen J. Dannin, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 5, 52-55, 144-45 (2006)

[59] Indeed, NLRB General Counsel Ron Meisburg has expressed his willingness to seek tougher remedies, at least in first contrast cases when unions are at their most vulnerable. See Additional Remedies in First Contract Bargaining Cases, GC Memorandum 07-08 (May 29, 2007).

[60] NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

[61] 350 N.L.R.B. No. 94 (Sep. 17, 2007) (Intermet I) (Walsh dissenting). *See also* Intermet Stevensville, 350 N.L.R.B. No. 93, (Sep. 17, 2007) (Intermet II) (reversing judge's Section 8(a)(5) findings based on the *Gissel* bargaining order that the Board reversed in *Intermet I* and reversing most of the judge's additional Section 8(a)(3) findings) (Walsh dissenting).

[62] *Compare* Douglas Foods Corp. v. NLRB, 251 F.3d 1056, 1062, 1065-67 (D.C. Cir. 2001) (refusing to enforce *Gissel* bargaining order despite upholding the "bulk" of the Board's unfair labor practice findings) *with* Garvey Marine, Inc. v. NLRB, 245 F.3d 816, 826-29 (D.C. Cir. 2001) (upholding Board's issuance of *Gissel* bargaining order).

[63] 351 N.L.R.B. No. 21 (Sep. 29, 2007).

[64] *Id.*, slip op. 7.

remedies are needed to dissipate fully the coercive effects of these violations." Accordingly, the Bush Board issued a narrow cease and desist order and a notice posting.

The Bush Board also has used procedure to prevent substantive employee gains. In *St. George Warehouse*, the Bush Board held that the unlawfully discharged employee and the General Counsel, on his or her behalf, now bear the burden of coming forward with evidence that the employees took reasonable steps to search for work after being fired.[65] And in *Domsey Trading Corporation*, the Bush Board reduced the backpay award of workers unlawfully discharged for striking, based primarily on the statements or omissions from unsworn compliance forms that the General Counsel gives discriminatees for internal purposes, forms used to help the Board's Regional Offices keep track of the discriminatees' efforts to find employment. The Board found that these internal records automatically override sworn and credited testimony by the discriminatee.[66]

Perhaps the most interesting instance where the Bush Board weakened administrative remedies is provided by *The Grosvenor Resort*.[67] There, the Bush Board, in the context of evaluating a backpay award to striking employees who were lawfully picketing to protest their own unlawful discharge for participating in a protected strike, held that those employees were required to begin search for alternative employment within two weeks of their unlawful discharge. The Board established this requirement even though the employment search would require the employees to abandon the very protected activity for which they were fired—participating in the picket line—and an activity which the judge determined "constituted a mass application for work." Ostensibly applying long-settled principles governing the sufficiency of unlawfully discharged employees' efforts for obtaining interim earnings (which includes evaluating the backpay period as a whole rather than mechanically dissecting isolated portions of that period), the Board concluded that any other result would reward "idleness." In so concluding, the Board effectively declared "idle" those engaged in the fundamental right to strike.

The significance of this declaration—equating Section 7 activity with idleness—is difficult to overstate. Historically, the idle scrounger is the image used by policymakers to withhold benefits from those perceived by some as undeserving of our charity. By equating strikers with the idle, the Board has dealt a fundamental blow to the right to strike despite the Act's plain-language protection of that right from "interfere[nce] . . . imped[iment] or diminish[ment] in any way." Utilizing the idle scrounger metaphor, the Board in this case conflates the strikers' efforts to secure their old jobs with the inaction of those who refuse to work because they are lazy. This conflation depicts the strikers as unworthy of our charity, rather than protecting them from "interfere[nce] . . . imped[iment] or diminish[ment]" of their fundamental right to strike. More significantly, the Board is importing a dubious metaphor into

[65] 351 N.L.R.B. No. 42 (Sep. 30, 2007).
[66] 351 N.L.R.B. No. 33 (Sep. 30, 2007).
[67] 350 N.L.R.B. No. 86 (Sep. 11 2007).

its analysis—one that has its genesis in Elizabethan poor laws and that has infiltrated twentieth century American social security laws, including unemployment benefits.[68]

The Board's declaration further diminishes the right to strike by making it a less effective weapon in the workers' arsenal. Striking workers who have been discharged for utilizing a lawful economic weapon must now choose between continuing to fight the employer's unlawful conduct and surrendering to search for work. Surrendering to search for work allows the worker to earn interim earnings and reduce the employer's backpay liability. The Board, in one fell swoop, has effectively mandated that strikers finance the employer's unlawful activity, a burden the Board has refused to place upon employers.[69]

The extent of the Board's willingness to require employees to finance the employer's unlawful conduct is extreme. In addition to requiring employees to attempt to secure interim earnings immediately, the Board further requires those employees who found interim employment to seek "'interim interim' work while waiting for their new jobs to start."[70]

III. Dana Corporation: The "Massacre" in the September Massacre?

Several of the Bush Board's recent decisions show its predilection not only for making unionization more difficult but also for making decertification easier. This hard-in/easy-out approach further frustrates the NLRA's main policy of promoting industrial peace and stability through the process of collective bargaining.[71]

A. The Bush Board's Decision To Undermine Voluntary Recognition

In keeping with a hard-in theme, the Bush Board most notably changed its rules governing voluntary recognition. Until recently, a union receiving voluntary recognition from an employer enjoyed an irrebuttable presumption of majority status for a reasonable period of time to enable the parties to reach agreement on a first contract.[72] That changed in *Dana Corporation*, where the Board removed this "voluntary recognition bar" for the first forty-five days following employer recognition.[73] The Board's new rule also requires employers and unions to notify employees of their newly minted right to file a decertification petition or election petition within forty-five days of receiving notice that their employer has recognized the union under a

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[68] For a more thorough discussion of this metaphor, *see* Anne Marie Lofaso, *British and American Legal Responses to the Problem of Collective Redundancies* (July 1996) (unpublished D.Phil. dissertation, University of Oxford) (on file with author). *See also The Autonomous Dignified Worker*, *supra* note 42, at 12-13.

[69] *See* E.L. Wiegand Div. v. NLRB, 650 F.2d 463, 468 (3d Cir. 1981) (employers need not pay striking employees during strike because such activity effectively compels the employer to finance the employees' strike against itself), *cert. denied*, 455 U.S. 939 (1982).

[70] 350 N.L.R.B. No. 86, slip op. 13 (Sep. 11 2007).

[71] The NLRA's policy of industrial peace and stability cannot be overstated. During the 1960s, the Supreme Court felt so strongly about this underlying policy that it was willing to waive a union's statutorily protected right to strike in cases where the union had agreed to a grievance-arbitration proceeding. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

[72] Keller Plastics E., 157 N.L.R.B. 583, 587 (1966).

[73] 351 N.L.R.B. No. 28, slip op. 8 (Sep. 29, 2007).

neutrality or card-check agreement.[74] Under the new rules, a recognition bar is erected only if "45 days pass from the date of notice without the filing of a validly [] supported petition."[75]

In recent years, voluntary recognition has served as an alternative for unions frustrated with the Board's election rules, which have given employer advantages such as captive-audience speeches. The Board's modified approach diminishes the value of that alternative and assaults the principle of majority rule: a decertification petition supported by thirty percent of the employees trumps a card-check agreement supported by seventy percent of the employees, thereby forcing an election.

B. The Significance of Dana Corporation

Until *Dana Corporation*, there was very little erosion of the Board's long-standing approach to voluntary recognition. *Dana Corporation* stands as perhaps the most revolutionary decision among the September Massacre for two reasons. First, *Dana Corporation*'s new voluntary recognition rules are themselves revolutionary. As former NLRB Board Member Sarah Fox recently pointed out, the rules mark the first time the Board requires a nonremedial posting.[76] Second, and more significantly, *Dana Corporation* highlights the cumulative effect of the Bush Board's hostility to unions. The *Dana Corporation* rules, combined with the *Lechmere*/*Babcock* doctrine excluding nonemployees from organizing on employer's private property and the Bush Board's new approach to salts, undoubtedly make it significantly harder to organize the workplace. In that sense, *Dana Corporation* symbolizes the Bush Board's vigorous resistance to union organization and perhaps even signals a new era of government repression of unionization.

IV. Conclusion

This paper provides an initial review of the Bush Board's September 2007 decisions, and their place in NLRA history. Much more analysis must be done to determine the actual deleterious effects of the Bush Board's actions on the rights of the working class. Perhaps a little more time (and court review) is needed to determine whether the Bush Board's most recent assault on those rights is a massacre, part of a slow erosion of those rights by all branches of government, or a little bit of both.

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[74] During the 2007 ABA Labor and Employment Law meeting, former Board Member Sarah M. Fox pointed out that this is the first time in the Board's history that the Board has required employers who have not violated the law to post an official government notice in workplace advising employees of their rights under the Act. She noted that the only right mentioned in those notices was the right of those who wish to decertify—not the right of the majority who wants the union to represent their interests for purposes of collective bargaining. *See supra* note 7. The only Board notice to come close to such a requirement is the Board's *Notice of Election*, which requires employers to notify workers of balloting details through a notice posting three days for a Board-conducted election. see *Notice of Election*, Casehandling Manual (Representation Proceedings), § 11314, available at http://www.nlrb.gov/nlrb/legal/manuals/CHMII/Sections11300-11350.pdf. The Beck notice instituted by President Bush through an Executive Order was is not a Board-required notice. See Executive Order 13201.

[75] *See supra* note 73.

[76] *See supra* note 74.

Whatever the final analysis shows, it surely will show this: The September Massacre reveals a Board willing to erode the protections provided for workers using the very law that was intended to safeguard these protections. In the wake of *Lechmere*, salts became an effective organizing tool for unions. So when the Supreme Court affirmed that union tactic, the Bush Board stepped in to weaken it. Voluntary recognition is claimed by unions to be an effective organizing tool—a way that unions could avoid repressive employer tactics, such as captive audience speeches and administrative delay. So the Bush Board stepped in and repressed that union tactic.

One obvious cure for the damage wrought by the September Massacre is, of course, a new Presidential administration. Oscillation of NLRA policies is a part of our national labor policy. A Board with a pro-worker majority is likely to reverse much of this precedent.[77] But if the September Massacre is, to a large extent, part of a greater trend toward chipping away at the Board's unique protections for workers, a change in administration may not be enough. Instead, fundamental reform may be needed.

First, Congress must be willing to enact legislative changes, both substantive and procedural, to the NLRA. Unfortunately, as this article shows, congressional change has been predominantly harmful to unions. So any proposed amendment—even pro-worker amendments—could backfire by opening the legislation up to anti-worker provisions.

Second, Board members must be willing to enforce the NLRA and promote the policies underlying the Act. Unfortunately, that strategy is helpful only if the President appoints a pro-law enforcement Board. Moreover, with the Board's oscillation, the results are often short-lived.

Third, courts must be willing both to defer to Board decisions in the appropriate circumstances and to reverse the Board when it acts to repress union organizing and collective bargaining in contravention of the NLRA's express protections. This point is complex. As a threshold matter, if a Board hostile to workers' Section 7 rights is clever, it can escape judicial review by chipping away at those rights through adjudication and then using its own precedent to further erode those rights guaranteed by the NLRA. Federal courts decide individual cases and controversies; courts reviewing the adjudicated decisions of administrative agencies have a much smaller policymaking role than courts reviewing cases involving other federal questions. Given judicial deference to administrative decisions in the form of *Chevron* and *Universal Camera* deference, reviewing courts may feel hamstrung to do much about such decisions.

Fourth, labor advocates must be willing to use what's left of the Act to push forward a pro-union agenda.[78] But labor advocates are wary of such an approach. If anything, labor advocates are often persuaded by the arguments of the legal abstentionists[79] and have nearly

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[77] Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 175-77 (1985) (advocating the use of rulemaking to overturn prior precedent to make oscillation more difficult).

[78] For a discussion of how this might be done, *see* ELLEN J. DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS (2006).

[79] "Collective laissez-faire" or legal abstentionism is the theory that employees' rights are best protected by respecting freedom of contract with as little state support or legal intervention as possible. Adherents of that theory believed that government regulation of labor relations—even policies of recognition—could hurt labor in the long run by re-subjecting unions to judicial repression of legally gained rights. Under that view, subjecting unions to

abandoned the NLRA. That would be an effective strategy—if the NLRA did not have primary and oftentimes exclusive jurisdiction over labor-management disputes.[80] But because the Board may regulate labor-management relations, and often may preempt others from regulating those relationships, an anti-union Board can create rules that force the parties to use its processes and then stack those rules in favor of de-collectivization. Such is the legacy of *Dana Corporation*.

Fifth, academics must be willing to teach and write about labor law so that when these branches of government and private advocates are ready and willing to effect change they can draw upon a coherent well-developed set of ideas.[81] Unfortunately, labor programs in law schools are dwindling. Many laws schools no longer teach labor law as a separate course, if at all. And the less labor law is taught, the less likely law professors will write in the area.

A quick glance at recent federal labor case law and the September 2007 NLRB decisions might suggest that legal abstentionists may have had a point—at least to the extent that legal processes appear to have diluted Section 7 rights. Unions, through their lobbying efforts in the political sphere, are responsible for most legislation that constitutes the floor of rights upon which our working class walks. That includes health and safety regulations, minimum wage and maximum hour laws, child safety laws, and hundreds of other government acts that prevent the exploitation of workers upon whose sweat (and sometimes blood) our society relies to enjoy a high standard of living. However, labor advocates must not surrender by entirely abandoning the courts and the NLRB. While true liberation of workers might largely come through economic and political channels, we ignore the courts and administrative agencies at our own peril.

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legal regulation made it possible for judges, who come predominantly from the property owning and capitalist class, to cut back on rights gained through the legal process. It was thought that cut backs were less likely to occur where unions were given regulatory immunity—permitted to wield their economic power without being subject to legal regulation. Sir Otto Kahn-Freund, the Austrian-born professor of comparative law at Oxford, is usually credited with developing the theory of collective laissez-faire and applying that theory to British labor relations. *See* Otto Kahn-Freund, *Labour Law*, *in* SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN (Oxford: Basil Blackwell 1954).

[80] For a discussion of three examples where this has been effective, *see* Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. POL'Y REV. 375 (2007).

[81] For some discussion of this issue, *see* Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL. J. 789 (2002).