CHAPTER 2

THE FUTURE OF COLLECTIVE BARGAINING AND ITS IMPACT ON DISPUTE RESOLUTION

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The long-term decline of the organized labor movement in the United States has carried with it a number of institutions and organizations associated with the field of labor-management relations. I have in mind university industrial relations and labor studies programs, the Industrial Relations Research Association, the Federal Mediation and Conciliation Service, traditional labor law firms, and a number of employer associations. These organizations, like the labor unions they deal with, are forced by dwindling membership and/or a declining customer base, to reexamine their fundamental mission, strategies, and programs.

The National Academy of Arbitrators (NAA), unfortunately, finds itself caught up in these trends. The field of labor arbitration, from which the Academy draws its members, historically has been closely tied to the practice of collective bargaining. The long-term decline in the unionized sector of the economy has thus been mirrored in a deterioration of the "vital signs" of the Academy, including a decade-long decline in membership, the high and rising age of the membership, the smaller number of traditional arbitration cases, and the sometimes heated debate inside the Academy over the appropriateness of doing arbitration work in nonunion firms.[1]

I have speculated elsewhere on the reasons for the decline of the labor movement, the prospect for revived union growth in the future, and the implication of these trends for some of the above-

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[1]Gruenberg, Najita & Nolan, The National Academy of Arbitrators: Fifty Years in the World of Work (BNA Books 1997).

named organizations.[2] In this paper I will do the same, but with a focus on the NAA.

Conflict and the Employment Relationship

If the founding members of a professional association are astute, they pick a subject of focus that is both widespread and permanent. The founders of the NAA have done well on two counts. First, the subject of conflict and its resolution is both ubiquitous and important to economic and social relationships. Elementary economics teaches us that conflict arises from two considerations that pervade individual and organizational life—scarcity of resources and divergent goals and needs. It also teaches us that the individual and social costs of resolving conflict through such traditional means as violence, war, and conquest are not only very high in terms of human suffering but also often destructive of the valued things in dispute. Finding ways to reduce conflict and to solve it in peaceful ways is thus a mission well-chosen.

Also well-chosen is the decision to focus on conflict in one particular dimension of life—disputes between employer and employee in the workplace. On one hand, the employment relationship is but one of many similar exchange transactions consummated between buyers and sellers in a market economy and, as such, has no special claim to uniqueness. A closer look, however, reveals that the labor contract is indeed quite special relative to other commercial contracts and that this characteristic both exacerbates the amount of conflict that arises between buyer and seller and gives it particular social significance.

The uniqueness of the employment relationship, and of the implicit or explicit labor contract negotiated between employer and employee, arises from three features:

1. *The incomplete nature of the employment contract.* It is typically impossible for buyer and seller to stipulate orally or in writing all the terms and conditions, owing to numerous complex and intangible aspects of work and the impossibility of anticipating every future contingency.

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[2]Kaufman, The Origins and Evolution of the Field of Industrial Relations in the United States (ILR Press 1993); Kaufman, *The Future of the Labor Movement: A Look at the Fundamentals*, 48 Lab. L.J. 474 (Aug. 1997).

2. *The at-will nature of the employment contract*. In most commercial contracts the buyer and seller cannot unilaterally abrogate the agreement once it is legally entered into. The employment relationship is different, however, since either the buyer or the seller can declare the contract null and void "at will"—subject, of course, to a growing number of legal restrictions in recent years.
3. *The authority relation between employer and employee*. In most forms of market exchange, the buyer and seller are treated as legal equals. But once the employment contract is agreed upon, the legal relationship between buyer and seller changes to that of "employer" and "employee" (or "master" and "servant") and the employee, as a condition of employment, agrees to submit to the authority of the employer and execute in good faith the employer's directives.

These three features of the employment contract, given conditions of bounded rationality, imperfect information, and large transactions costs, open the possibility for numerous points of disagreement, opportunism, and misunderstanding between employer and employee over both interests and rights.[3] These disputes, in turn, take on greater social significance than disputes over most other forms of economic exchange because of the nature of the good or service being exchanged. In particular, the service exchanged—"labor"—is embodied in a human being and thus the seller of labor, unlike a seller of a commodity such as coal or wheat, must accompany the labor to the employer's place of business and personally experience the conditions of work and authority exercised by management. While society has only a modest stake in the manner in which inanimate factors of production are treated in the workplace, the treatment of the nation's human resources—its people—bulks much larger as a matter of social concern.

Five Models of Industrial Relations

Although the potential for conflict in the employment relationship is ever-present, a century of efforts has been made to restructure and reform the employment relationship in order to reduce such conflict and its severity. The future of labor and employment

[3] *See* Dow, *The New Institutional Economics and the Employment Relationship*, in Government Regulation of the Employment Relationship, ed. Kaufman (IRRA 1997), 57.

arbitration thus depends, in part, on the success of such efforts and the direction reform has taken in years past and will take in the years ahead. In thinking about this matter, it is useful to distinguish five different models or paradigms of industrial relations.

Although conflict between employer and employee goes back in history to time immemorial, it only surfaced in our nation's history as an important, front-page news item approximately 120 years ago—at least for free wage labor. It was then, beginning in the 1870s and extending through the early 1910s, that the nation witnessed a series of bloody, large-scale strikes, such as the Homestead and Pullman strikes, that resulted in considerable property destruction, loss of life, and radicalization of emotions. These strikes, as well as other forms of dysfunctional behavior (e.g., sky-high rates of employee turnover), resulted in a search for some alternative way to structure the employer-employee relationship that would promote greater economic efficiency, equity and justice, and human development and self-realization. From this search emerged five alternative models of industrial relations.[4] Briefly, they are:

1. *Competitive markets and laissez faire.* In this view, conflict, inefficiency, and injustice at the workplace are the product of personal defects of character, organized interest groups that use monopoly power or violence to promote their ends, and government protection of special interest groups. The solution to improved industrial relations is to promote competitive product markets through antitrust enforcement and competitive labor markets by restricting labor monopolies (i.e., unions) and let competition reward the virtuous and penalize the weak and lazy. Competition, it is claimed will motivate employers to use labor efficiently and equitably lest employees quit and seek employment elsewhere, while free labor markets give employees the best opportunity to both protect and advance their interests (through quitting one employer for a better job at another). The disputes that arise are akin to other disputes over commercial contracts and are best handled in a court of law.
2. *Cooperative, unity of interests human resource management.* An entirely different model of improved industrial relations was

[4]Kaufman, The Origins and Evolution of the Field of Industrial Relations in the United States (ILR Press 1993).

developed shortly after the turn of the century by progressive management theorists and practitioners. They sought to reduce the amount of conflict between employer and employee by replacing the traditional adversarial employment relationship with one that features a unity of interest between labor and capital and by shifting from a commodity treatment of labor to one that emphasizes labor as a valued human resource. A unity of interest can be created by aligning employee interests with that of management through devices such as profit sharing, while the practice of human relations (e.g., supervisor training in interpersonal relations), provision of extensive employee benefits, and a formal system of employee representation and dispute resolution (e.g., a nonunion form of industrial democracy) can foster loyalty, employee job satisfaction, and a win-win problem-solving approach to disputes.

3. *Unions and collective bargaining.* A third model for improved industrial relations was centered on trade unionism and collective bargaining. In this view, conflict is inevitable when one party to the employment relationship—management—is given unilateral, largely unrestricted power over workers inside the firm and is motivated to take care of workers only to the extent it adds to profit. The inequality of power internal to firms is then exacerbated by a similar inequality in external labor markets where the individual worker is forced to bargain terms and conditions of employment with a large corporation, resulting in substandard wages, long hours, and poor conditions. The solution of these problems is to balance power both externally and internally through unions and collective bargaining and to set up formal grievance systems to adjudicate disputes over rights in a fair and equitable manner.
4. *Government labor legislation and regulation.* The fourth model is to use the powers of government to guarantee certain workplace rights and to establish procedures to resolve disputes. Government, for example, can legislate minimum standards, such as minimum wages and maximum hours, that are otherwise a bone of contention between employer and employees. Another function is to legislate certain types of employee benefits, such as old age and unemployment insurance, and to outlaw various antisocial acts, such as race and sex discrimination. Finally, government through the court and regulatory systems can provide a uniform, readily accessible forum for

dispute resolution that is not possible through collective bargaining, limited as it is to only a subset of workplaces.

5. *Socialism and syndicalism.* The fifth model seeks to improve industrial relations by doing away with the capitalist employment relationship altogether. Socialism, in this view, gets rid of the adversarial relationship between management and labor by having the state own the means of production and manage them in the interests of workers. Syndicalism abolishes the employment relationship—and possibly the wage system, too—by turning the enterprise into a worker-owned and cooperatively managed firm. When the capitalist employer is out of the picture and the profit motive is eliminated or substantially replaced, conflict and disputes will necessarily recede in number and severity.

All five models have waxed and waned in intellectual appeal and practical importance over the course of the 20th century. As indicated above, all five seek in various ways to reduce and more efficaciously resolve employment disputes. What is relevant for this discussion is that only one of these models was, and is, a heavy user of arbitration—the dispute resolution method of choice for this professional association. And that method, of course, is the third: unions and collective bargaining. It is this model of industrial relations, and its past and future trends, that I now examine in more detail.

The Rise and Decline of Collective Bargaining

John R. Commons, father of industrial relations and one of the most prescient observers of trade unionism, said in the early 1900s that the goals of unions are "wealth redistribution" and "protection and joint aggrandizement."[5] One can quibble about the fine points of this characterization of union behavior, but it captures in broad outline what I perceive unions to be about. The attraction of unions to individual workers, and the degree to which the electorate is swayed to give unions legal encouragement and protection, thus hinges on an assessment of: (1) the extent to which the function of wealth redistribution and protection and aggrandizement (WRPA) provided by unions is needed, (2) the ability of

[5]Commons, Labor and Administration (Macmillan 1913), at 121.

unions to successfully deliver WRPA, and (3) the extent to which the union function of WRPA serves the social interest in maximum productivity, justice in the workplace, and the development of the human potential.

The fortunes and public favor enjoyed by unions, and the extent to which collective bargaining supersedes the other four models as the primary mode of industrial relations, have fluctuated in direct proportion to the beliefs held by workers and the public-at-large regarding the degree to which conditions (1) through (3) are fulfilled. The small membership and indifferent-to-repressive stance of public policy toward unions in most years prior to the New Deal of the 1930s reflected the largely negative assessment on these three criteria. The dominant economic and social ideology of the period—combining elements of laissez faire economics, the legal doctrine of freedom of contract, and the social philosophy of Social Darwinism—saw unions as labor monopolies that used coercion and violence to gain special privileges for a small elite of native-born, largely skilled workers (the "aristocracy of labor").[6] Nor were the mass of workers drawn to unions, in this view, because of the exclusionary practices of unions toward the unskilled and foreign born and their obsolete craft structure that made organizing the mass production industries a nearly impossible task.

As we all know, the 1930s ushered in a near-revolution in the power and prestige of organized labor and in the stance of public policy toward it. Events such as the formation of the Congress of Industrial Organizations—the CIO—and, later, the entrance of America into World War II, clearly played a crucial role. But the rush to organize demonstrated by the millions of industrial workers during the 1930s, and the passage of the National Labor Relations Act with its declared intent of protecting and encouraging the practice of collective bargaining, would never have happened had not the mass of workers and the public-at-large suddenly come to regard the union goals of wealth redistribution, protection, and aggrandizement—formerly seen as monopolistic and elitist—as now serving both self-interest and the public interest.

Why the switch in opinion? The answer rests on the two dominating events of the 1930s—the calamity of the Great Depression and

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[6]Dickman, Industrial Democracy in America: Ideological Origins of National Labor Relations Policy (Open Court 1987).

the New Deal political program of the Roosevelt administration.[7] The Great Depression largely destroyed the credibility and power of the ideological underpinnings of the then-dominant models of industrial relations—an amalgam of the competitive, laissez-faire model and the unity of interest, cooperative HRM model (exemplified by the corporate practitioners of Welfare Capitalism). Similarly, the mass experience of prolonged unemployment, arbitrary layoff and discipline, relentless speed-ups, and authoritarian management methods brought widespread disillusionment and anger to the ranks of the working class. But it was only through the political and economic program put forward in 1933–1935 by the newly elected Roosevelt administration that collective bargaining was elevated practically overnight to the preferred model of industrial relations on the part of both tens of millions of workers and public policy. Unions and collective bargaining prospered under the New Deal because theory and practice both seemed to point toward the same conclusion—that union WRPA were essential ingredients for a full employment economy and justice and self-realization in the workplace.

The message of the New Deal was that the depression was due to growing maldistribution of income as profits outpaced wages, causing aggregate demand (spending) to lag behind aggregate supply (production). The solution, according to Roosevelt and his economic advisor Senator Robert Wagner, was first to stabilize wages in order to stop the ruinous processes of deflation and destructive competition, and then to boost wages faster than profits in order to augment household purchasing power, aggregate demand, and production and employment.[8] To accomplish this end, the centerpiece of the New Deal economic program was the National Industrial Recovery Act (NIRA), partially written by Wagner and enacted into law in June 1933. The NIRA contained the now-famous section 7(a) which, for the first time in the nation's history, stated in statute law that employers were enjoined from interfering with workers' rights to join unions and engage in collective bargaining. The economic purpose of section 7(a) was to jump-start a then-moribund labor movement in order that widespread unionization could accomplish the goals of wage sta-

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[7]*See* Bernstein, The Turbulent Years: A History of the American Worker, 1933–1941 (Houghton-Mifflin 1970); Kaufman, *The Wagner Act: Reestablishing Contact With Its Original Purpose,* in Advances in Industrial and Labor Relations, eds. Lewin, Kaufman & Sockell (JAI Press 1996), 15.

[8]Kaufman, *supra* note 7.

bilization and income redistribution from capital to labor. But section 7(a) had a social/political rationale too, which was to promote industrial democracy in order that workers could gain a form of constitutional government in industry—that is, the workplace protections and system of due process that go with a union contract.

The NIRA was declared unconstitutional in the summer of 1935, but it was quickly followed with the National Labor Relations Act (Wagner Act) and other companion pieces of legislation (the Social Security Act, the Fair Labor Standards Act). The NLRA was viewed by contemporaries of Wagner as a near-revolutionary piece of legislation that had little chance of passage. Yet, pass it did. And, as they say, the rest is history. The point I wish to stress is that the turnabout in the fortunes of organized labor was due to many specific factors, but fundamentally the turnaround was because union wealth redistribution, protection, and aggrandizement came to be viewed by workers and policymakers as serving, rather than harming, both the individual and collective interest.

From the vantage point of the immediate post–World War II years, collective bargaining was widespread across the major American industries and had become the most influential and powerful of the five industrial relations models previously listed.[9] At that time, over one-third of the work force was organized and the proportion in many key industries was 70 percent or more. This was also the beginning point of a 40 or so year "golden period" for the practice of labor arbitration. The War Labor Board had forced widespread arbitration on sometimes reluctant parties in order to prevent strikes and walkouts from crippling production. Once the war was over, labor and management threw restraint aside and engaged in an all-out brawl for several years, witnessed by strikes of unprecedented size, numbers, and duration. Many of these strikes were over contract renegotiations, but what is lost in the fog of time is that one-quarter or more were intracontractual strikes—often of the "wildcat" variety—over working conditions, unresolved grievances, and other festering problems. Once the parties discovered that each was here to stay, they too found a self-interest in promoting stability and a greater degree of peace in collective bargaining relationships. So, in the 1950s we saw two major developments that transformed dispute resolution. The first was the development of

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[9]*See* Kochan, Katz & McKersie, The Transformation of American Industrial Relations (Basic Books 1986).

the 3-year agreement—pioneered in the 1948 General Motors-United Auto Workers negotiations and soon copycatted by other unions and companies; the second was the development of elaborate multistep grievance resolution procedures to settle intracontractual disputes over rights in a way that avoids striking. And, as we all know, the final step of this new grievance process was binding arbitration, utilizing a third-party neutral to hear the evidence and render a decision.

Over the next several decades the arbitration of unresolved grievances became one of the pillars of the American collective bargaining system. The number of arbitration cases multiplied by the thousands, an elaborate body of precedent and case law evolved, and the profession of labor arbitration became increasingly complex and lucrative. All of which spelled the need for a professional association to set standards, provide a forum for debate, and promote the interests of the profession and its practitioners. It is not surprising, therefore, that the NAA saw steady growth in its membership, prestige, and influence in the world of industrial relations.[10] It was riding the crest of the wave unleashed by the spread of collective bargaining in the New Deal and World War II years.

If we now fast-forward several more decades to the year 2000, how different things look. Since the late 1970s, the size, power, and influence of unions and collective bargaining have steadily eroded. At the turn of the century, union density (proportion of the work force organized) has fallen to roughly 16 percent and is less than 10 percent among private-sector workers—a level roughly equivalent to what it was in the years immediately before the New Deal of the 1930s. Not only has the proportion of the work force sharply declined, for nearly 20 years unions have seen their raw number of members also slip by several million. In recent years unions have managed to organize fewer than 100,000 new members each year through NLRB elections, a number more than offset by membership losses from plant closings, layoffs, and downsizings at unionized employers, and by decertifications.

The NAA has not escaped these trends—although its fortunes have not been as adversely affected as many of the unions and some of the other labor-management associations and organizations mentioned earlier. The Academy's membership is down about 10 percent over the last decade, the average age of the membership

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[10]Gruenberg, Najita & Nolan, *supra* note 1.

is high and rising, and the amount of traditional arbitration work has trailed off sharply. The natural question that arises from these trends is what to do—a question that has divided the NAA's membership and generated some heated debate.

One option is to wait things out and hope that unions and collective bargaining revive, thus precluding the necessity for more fundamental and wrenching change. This is a poor bet, however, since I foresee over the next decade continued slipping and sliding in the size and economic power of organized labor. (Political power appears more robust but must inevitably follow, too.) Here is why.

To assess the future of organized labor, we need to proceed in two steps. The first is to examine the future of unions assuming no change in the basic legal framework that governs collective bargaining and union-joining. I am talking principally about the National Labor Relations Act and related public-sector laws. Then, in the second step, we assess the prospects for change in the nation's labor law in ways that promote the cause and success of organized labor. First step one.

Any reasonably nuanced and informed assessment of the future of unions in this country has to recognize that there are both pluses and minuses in the picture.[11] On the plus side are a number of things. One, for example, is the finding from several large-scale surveys that roughly 30 percent of nonunion workers would vote for a union if given the opportunity.[12] This represents a large pool of people and is concrete evidence that unions are still in demand in many organizations. The large union density in public-sector employment reveals much the same. Also indicative of this fact are several recent large-scale organizing victories by unions, such as the health care workers in California. There are also economic and social trends that favor the cause of organized labor. The 1990s, for example, has seen a deterioration in job security for many workers of all collar colors, a stagnation in real earnings for workers at the lower end of the skill and occupational ladder, and a widening gap in the distribution of income.[13] Also deserving mention is the syndrome of the "angry white male" and the continued lag in pay and treatment received by many women and members of minority

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[11]*See* Kaufman, *The Future of the Labor Movement: A Look at the Fundamentals,* 48 Lab. L.J. 474 (Aug. 1997).

[12]Freeman & Rogers, What Workers Want (ILR Press 1999).

[13]Mishel, Bernstein & Schmitt, The State of Working America, 1998–1999 (Economic Policy Inst. 1999).

groups. Finally, unions have initiated a number of strategic and tactical changes—including new and more dynamic leadership, renewed emphasis on organizing, more sophisticated corporate campaign tactics, and greater coalition-building and community outreach, all in an effort to turn things around.

These efforts will slow the decline in the size and power of organized labor but will not reverse it, in my opinion. Among the factors that bode ill for union revival are these:

1. Weaknesses in the labor law, coupled with growing management sophistication in, and resources devoted to, union avoidance make it very difficult for all but the most determined private-sector workers and unions to organize successfully. Although unions do not face the same obstacles in the public sector, the opportunity for further growth there is modest absent legislative action in a number of states to expand public-sector collective bargaining rights.
2. Evolutionary improvements in the nature of work will continue to reduce workers' job dissatisfaction and, hence, desire for union representation. Work in auto assembly plants, paper mills, and on scaffolding 20 stories up is still far from a picnic, but it is also in most cases significantly less onerous, unpleasant, and unsafe than 30–40 years ago. Advances in engineering, computer and information technology, and ergonomics can be expected to maintain if not accelerate this trend, as will continued shifts in industrial structure away from blue-collar, industrial work toward white-collar jobs in service, trade, finance, and information industries.
3. Nonunion workplaces are, by and large, better managed than they were several decades ago. The managers, as a class, are more professional and responsible and human resource management practices are more advanced and equitable. This is not to say that no problems exist (many do), but only that the trend is toward a more satisfied nonunion work force.[14]
4. Government has usurped many of the traditional services provided by unions. Without laws dealing with antidiscrimination, pension-vesting, occupational safety and health, family medical leave, and so on, the demand for unions would

[14]Farber & Krueger, *Union Membership in the United States: The Decline Continues,* in Employee Representation: Alternatives and Future Directions, eds. Kaufman & Kleiner (IRRA 1993), 105.

undoubtedly be much larger. I see further incremental growth in such types of labor legislation.

5. The macroeconomy has in the last two decades operated closer to full employment than since the 1950s and certainly far ahead of the Depression decade of the 1930s. Full employment undercuts the appeal of unions on several fronts—it induces management to be more careful and considerate with employees, opens up more opportunities for pay and career advancement, and makes the quitting option when dissatisfied more effective and less costly.
6. The deregulation and globalization of markets has undercut the ability of unions to raise wages and win other improvements in the conditions of work. Workers are increasingly afraid that organizing will result mainly in capital disinvestment, a shift of production overseas, or the subcontracting of work. The union's main source of bargaining power, the strike, has also lost much of its effect for these reasons, as well as for the ever-present threat of striker replacement.
7. The adversary nature of collective bargaining does not appeal to many modern-day workers, and they continue to shy away from unions because of concerns with image, lack of membership control, and corruption. Unions, in many peoples' eyes, are a form of negative social status. The more strident, left-wing, class-conscious tone that seems to be spreading in parts of the labor movement also works against mass appeal and approval.

These factors, among others, make me believe that the forces leading to union decline outweigh the positive factors leading to union revival. But this assumes that certain things are "givens," which may not be "given" at all. I refer, in particular, to the legal framework that regulates collective bargaining and union organizing. And laying behind these laws is an even larger but more imponderable force—the weight of public opinion regarding the social merits of trade unionism. So, might not the labor law be reformed to make it easier for unions to organize new members and win gains at the bargaining table, and might not public opinion move toward a more sympathetic, even supportive perspective of unions?

With one caveat, my forecast says the chances are modest to slim. To explain why, I have to hark back to Commons' theme of union

wealth redistribution, protection, and aggrandizement.[15] The gist of the paragraphs just preceding is that the union function of WRPA has, for a variety of reasons related to improved management, increased government regulation of work, fuller employment conditions, and so on, waned in appeal to the majority of nonunion workers—either because they no longer see as much of a need for these union services or doubt that unions can effectively deliver them in today's environment. Part of the reason, of course, that unions are not able to deliver protection and aggrandizement as effectively these days is because the labor law of the nation in various ways has become either less supportive or more restrictive of union activities. This is due to an amalgam of statutory change, judicial and administrative interpretation, and management cleverness and subterfuge. So a persistent political demand of organized labor is "labor law reform," where "reform" means card check elections, mandatory arbitration of first contract impasses, larger financial penalties for anti-union discrimination, and so on.

Organized labor actually won a majority vote in both houses of Congress for labor law reform in 1978 but lost it in a filibuster. Twenty years later, the chances that a similar labor law reform package could get a majority "yes" vote in the Congress are much smaller. There is simply not any groundswell of public support for substantial labor law reform (or more expansive public-sector laws in most states), despite the evidence from polls that Americans continue to support collective bargaining in general principle. The reason, I believe, is that unions have conspicuously failed to convince the public that their program of WRPA sufficiently serves the public interest to warrant further legislative support. My reading of the situation is that the public continues to feel that unionization is a necessary and desirable option that should be available to nearly all workers as a bulwark against injustice and exploitation in the workplace. But the public also perceives that unions have an internal political dynamic that causes them to push for "more, more, more," with the result that the initial improvement in wealth distribution, protection, and aggrandizement that they see as serving the public interest (by eliminating injustice and exploitation) over time turns into increasingly exorbitant wages, restrictive practices, and other noncompetitive practices that work against the social interest. Thus, I think a majority of the public, and hence their legislators, do not support labor law reform and

[15]Commons, *supra* note 5.

expanded public-sector collective bargaining because they see the end product as too often serving the interests of the few at the expense of the many. Of course, everyone could belong to a union à la Scandinavia, and then all workers advance together, but such a scenario is wildly unrealistic and at odds with the American temperament.

My bearish forecast for organized labor's near-to-medium term prospects is thus partly predicated on my belief that the chances for union-oriented labor law reform are modest. There is one caveat I should mention, however, as forgetting to do so made one other labor economist look foolish seven decades ago. I refer to George Barnett, a highly respected labor economist and president of the American Economic Association (AEA) in 1932. In his presidential address to the AEA that year, he predicted continued decline of the labor movement—a prediction that only a few short years later looked to be spectacularly ill-informed.[16] Since I have no desire to follow in Barnett's footsteps on that score, let me state the one caveat he missed. That is, the only development I see that could fundamentally change the future prospects of organized labor, including labor law reform, is some sort of economic crisis along the lines of a depression or other such calamity that appears to be caused by growing income inequality. If such occurs, unions—like they did in the 1930s—will again be presented with a golden opportunity to secure themselves a broader and deeper place in the American industrial relations system by making their self-interested goal of WRPA a servant of the larger public good. However, at the present time and in the present economic and social milieu, this argument is only academic and unions find themselves in a hard swim against the tide of public suspicion and indifference to their cause.

Implications for Dispute Resolution

In summary, I foresee continued decline in the size and power of organized labor in the years ahead. Since collective bargaining has been the primary user of arbitration as a dispute resolution device, I believe the implication for the National Academy of Arbitrators is clear-cut. If the Academy continues to make arbitration in a labor-management context its primary mission and focus,

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[16]Barnett, *American Trade Unionism and Social Insurance,* 24 Am. Econ. Rev. 1 (Mar. 1933).

it should be prepared for further declines in membership, personal income, and professional relevance and prestige.

But the future for the Academy need not be this doom and gloomish. Here is why.

We have four other models of industrial relations, and as collective bargaining recedes in importance one or a combination of the other four will expand to fill in the gap. On the face of it, none of the other four models are as propitious with respect to the use of arbitration to resolve employment disputes. As I earlier noted, the competitive deregulated labor market option solves disputes by "exit" rather than "voice," while the cooperative, unity of interest HRM model seeks to reduce the volume of disputes through goal alignment and to resolve disputes through less judicial (and independent) means, such as open-door policies, mediation, and peer review. Then there is government regulation, which tends to shift disputes to regulatory agencies and courts. Finally, socialism is a moot issue in this country, and syndicalism—in its modern guise of employee stock ownership plans (ESOPs)—remains a fringe movement.

I believe in the years ahead the trend will be toward an industrial relations paradigm that promotes greater voluntarism and consensus and less external intervention in the resolution of employment disputes and, indeed, in the determination of all the terms and conditions of work. Where possible, therefore, public policy will try to shift the locus of dispute resolution back to the workplace and out of the courts and regulatory agencies. But given the trends outlined above, shifting disputes back to the workplace means, increasingly, back to a nonunion workplace—which is to say the cooperative, unity of interest HRM paradigm. And here we confront an issue that has bedeviled scholars, policymakers, and members of the NAA for many years. And that is the issue of unequal power and structural sources of worker inequality that accompany this paradigm.

The vice of unions and collective bargaining is that the drive for "more" exacerbates adversarialism and inhibits competitiveness, but their great virtue is that they level the playing field for individual workers and ensure that the average employee gets a square deal from the employer. Of course, some (many) nonunion firms are also rife with adversarialism—only it is suppressed or hidden from public view—so I do not want to overemphasize this point as a virtue of the nonunion firm. But nonunion firms do have an advantage in the competitive marketplace relative to their union-

ized competitors because they have (on average) lower costs, greater flexibility, and—at least in the better-run nonunion firms—a more cohesive, team-oriented culture. These competitive advantages come at a cost, however. Management has a dominant power position vis-à-vis front-line workers—a power position that in well-run firms is usually used in benign fashion and for the good of all—but which in poorly run firms (and in some of the best firms during periods of crisis) can be used in ways that are exploitative and unjust.

The great challenge for public policy, and for associations such as the NAA, is to devise new structures and policies for dispute resolution in nonunion firms that protect worker interests and follow well-accepted canons of due process while, at the same time, recognizing that a source of competitive advantage for these firms is their ability to speak and act with one voice—albeit a management-dominated voice. Skeptics doubt that this is possible or sustainable in a nonunion environment. But I take a more optimistic view—one that accords with the position taken by Commons[17] in the 1920s.

The prerequisite for justice in the workplace, Commons says, is not a union or some democratic system of voting but, rather, what he called "constitutional government in industry."[18] Commons was quite explicit that a constitutional form of government can be built in a nonunion workplace and he saw the newly developed employee representation plans of that period as the most visible and promising forms. The prerequisite for constitutional government in a nonunion workplace, whatever its specific form, is that management be required to obey the rules and procedures even when it is not in management's self-interest and, secondly, that the rules and procedures be structured in ways that are fair in terms of both procedure and outcome. Some nonunion companies unilaterally put in place dispute resolution systems that meet these conditions, but the numbers are relatively few. Rather, the tendency too often is to seek some sort of compromise or expedient solution that gives the façade of constitutional government and some of the accoutrements, but that ultimately preserves management's unilateral power. This is not what Commons or I have in mind.

An alternative model is to use the power of government to set minimum standards for dispute resolution systems that all compa-

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[17]Commons, Industrial Government (Macmillan 1921).
[18]*Id.*

nies must meet. Following along the suggestions of economist Richard Edwards, one approach may be to require that all nonunion employers over a certain size have employee handbooks, which meet certain minimum standards and are considered binding contracts in a court of law.[19] One of these minimum standards would detail the elements of procedural due process that all nonunion dispute resolution systems must meet, such as those outlined in the final report of the Dunlop Commission or in the guidelines developed by the NAA.[20]

Another option, quite possibly complementary to the former, is to change public policy to encourage formal nonunion employee representation committees.[21] The experience of the 1920s was that these committees, in the better-run firms, developed formal systems of dispute resolution—sometimes including binding arbitration—that did a good job in resolving disputes and bringing greater justice to the workplace. A similar outcome has been observed in contemporary nonunion representation plans in Canadian companies.[22]

I now come to my final thought. Evidence from nearly a century of industrial relations in this country shows that government compulsion is, by itself, a blunt and not always effective instrument for improving workplace conditions. The more efficacious approach is to convince management that treating employees better is in its self-interest. Two instruments are available. One is full employment, which, through the threat of labor scarcity and turnover, motivates management to "do the right thing." The other is the threat to profits and management control from union organization. Full employment cannot always be counted on, so this reed is a potentially weak one. The result is to open an additional value-added role for unions, which can provide them

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[19]Edwards, Rights at Work: Employment Relations in the Post-Union Era (Brookings 1993).

[20]Commission on the Future of Worker-Management Relations, Report and Recommendations (U.S. Dep't of Labor & U.S. Dep't of Commerce, Dec. 1994), at 31–33; *Appendix B: A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship,* in Arbitration 1995: New Challenges and Expanding Responsibilities, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), 298.

[21]*See* Kaufman & Taras, eds., Nonunion Employee Representation: History, Contemporary Practice and Policy (M.E. Sharpe 2000); Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies: A Reassessment,* 17 Yale L. & Pol'y Rev. 729–811 (1999).

[22]Kaufman & Taras, *supra* note 21.

the more compelling social justification that they so desperately need.

That is, unions will gain greater public support if they advocate movement of dispute resolution from government and the courts to inside firms—union *and* nonunion. As part of the package, government must mandate certain minimum standards all nonunion dispute resolution systems must meet, but beyond this nonunion firms should be free to innovate and structure the systems as they will. Now, what keeps these nonunion systems legitimate and balanced in terms of power and process? Part of the answer is minimum standards mandated by government, part is the pressures of full employment, but another part is the threat of unionization. To be compelling and effective, however, the threat of unionization must be greater than it is today—hence the case for labor law reform. In effect, I advocate that unions take on another explicit goal—watchdog of the nonunion workplace and of nonunion dispute resolution systems. In so doing I think over the long run they will secure a brighter and more prosperous future. My reasoning is that the managers in many nonunion firms have neither the expertise, professionalism, nor steadfast ethics to operate a formal dispute resolution procedure the right way. Hence, their employees will end up dissatisfied and interested in union representation. This may seem fanciful, but there is considerable evidence from Canada that exactly this result occurs when the law allows nonunion companies to operate formal, large-scale employee representation plans.[23]

As dispute resolution shifts to the nonunion workplace, arbitration will be complemented by other alternative dispute resolution (ADR) techniques. At first blush, this development, coupled with the expansion of the nonunion sector of the work force, seems to augur a bleak future for traditional labor arbitration. But the future is much brighter, I think, if we think strategically. And the strategic direction I advocate casts arbitration as a central component of a new form of constitutional government in industry—a form of government that is nonunion in many cases but which relies to a greater extent than is true today on a reinvigorated labor movement to ensure that minimum standards are maintained and all workers have ready access to justice and due process in the workplace.

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[23]*See* Kaufman & Taras, *supra* note 21; Kaufman, *supra* note 21.