Can Unions Survive?

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NOTES

I. OVERVIEW

12. Labor organizations indirectly affect working conditions in nonunion shops because many employers provide benefits and working conditions comparable to those of organized business entities in an effort to prevent unionization by their own employees.


21. Ibid., 43.


28. Ibid., 150–53.

29. Ibid., 94–110.


2. THE HISTORICAL FOUNDATION OF AMERICAN LABOR


4. Ibid., 87.
6. Ibid., 111.
9. Ibid., 1136.
12. 47 Stat. 70 (1932).
13. 313 U.S. 177, 187 (1941).
16. Ibid.
17. Ibid., 271.
18. Ibid.
22. 254 U.S. 443 (1921).
27. Ibid.
28. Ibid., 166.
33. Ibid., 135.
35. Ibid., 419–20.
40. 38 Stat. 103 (1913).
41. 41 Stat. 456 (1920).
3. The Extent and Causes of the Decline

42. 44 Stat. 577 (1926).
43. 49 Stat. 1189 (1936).
44. 48 Stat. 198 (1933).
45. 295 U.S. 495 (1935).
47. 301 U.S. 1 (1937).
48. The industrial unions generally ignored the female clerical personnel working in these industries.
52. 306 U.S. 240 (1939).
54. C. G. Conn, Ltd. v. NLRB, 108 F.2d 390 (7th Cir. 1940).
57. 346 U.S. 464 (1953).
60. 61 Stat. 136 (1947).
64. Ibid., 661.
73. Thomas Edsall, The New Politics of Inequality, 156.

3. THE EXTENT AND CAUSES OF THE DECLINE

3. Ibid., 10 Table 1.
3. The Extent and Causes of the Decline


5. Michael Goldfield, The Decline of Organized Labor in the United States, 10 Table 1.

6. Ibid.
7. Ibid., 11 Table 2.
8. Ibid.
9. Ibid., 23 Figure 4.
10. Ibid., 16 Table 3.

13. Ibid.
14. Ibid., B–10 Table 2.
15. Ibid., B–8.
17. Ibid., D–1.
18. Ibid., A–2.
19. Ibid., D–2.

28. Ibid.
35. Staff of Senate Special Committee on Aging, 101st Congress, 1st Session, Aging America: Trends and Projections (Committee Print, 1988), 8.
37. Ibid., 15.
3. The Extent and Causes of the Decline

38. Staff of Senate Special Committee on Aging, 101st Congress, 1st Session, Aging America: Trends and Projections, 39 Table 2–1.
39. Ibid., 47–48 Table 2–5.
46. Ibid.
62. Ibid.
68. United States International Trade Commission, Tariff Schedules of the United
3. The Extent and Causes of the Decline


70. Swasti Mitter, Common Fate, Common Bond, 54.


75. Ibid., 122.

76. Ibid.


79. Ibid., 61–62.

80. Swasti Mitter, Common Fate, Common Bond, 8–9.


84. Ibid., 842–45.


87. E.g., In re Jacobs, 98 N.Y. 98 (1885) (striking down New York law prohibiting cigar manufacturing in tenement dwellings); Ritchie v. People, 155 Ill. 98, 40 N.E. 454 (1895) (invalidating Illinois eight-hour law); Adair v. United States, 208 U.S. 161 (1908) (voiding federal law proscribing yellow-dog contracts).


89. The constitutionality of the NLRA was sustained in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).


93. Ibid., 238 n. 18.

94. 29 U.S.C. § 158(a)(3) prohibits employer discrimination intended to encourage or discourage support for labor organizations.


96. Paul Weiler, Governing the Workplace, 238–39.
3. The Extent and Causes of the Decline

98. Paul Weiler, Governing the Workplace, 239 n. 19.
102. Ibid.
104. Ibid., 69–75.
107. Ibid., 190.
117. Ibid., 10–11.
119. Ibid., 140–41.
121. C. Wright Mills, White Collar, 319; Stanley Aronowitz, False Promises, 292–93.
124. C. Wright Mills, White Collar, 63.
4. THE NEED FOR LABOR UNIONS

22. See generally Paul Osterman, “Elements of a National Training Policy,” *New Developments in Worker Training: A Legacy for the 1990s* (Louis Ferman, Michele Hoyman, Joel Cutcher-Gershenfeld & Ernest Savoie, eds.) (Madison, Wis.: Industrial Relations Research Association, 1990), 257.

25. The Drug Free Workplace Act currently indicates that rehabilitation may constitute a "sanction" for workers found to be abusing drugs or alcohol. 41 U.S.C. § 702(a)(1)(F). This provision could be modified to require rehabilitation for all first time abusers.


27. Sar Levitan & Frank Gallo, "Uncle Sam's Helping Hand: Educating, Training, and Employing the Disadvantaged," *New Developments in Worker Training: A Legacy for the 1990s* (Louis Ferman, Michele Hoyman, Joel Cutcher-Gershenfeld & Ernest Savoie, eds.), 226.

28. Ibid.


36. Ibid., 206–7.


51. Ibid.

52. 444 U.S. 672 (1980).


54. The inappropriateness of the Yeshiva decision is discussed in Chapter 6, below.


62. Ibid., 112.


65. Ibid.


68. Ibid., 270–72.

69. Ibid., 260, quoting Yuri Kuwahara.


4. The Need for Labor Unions


75. Many employers have intentionally transferred production to southern states or have opened new facilities in that region because of the limited degree of unionization among southern workers. Jonathan Axelrod, “Common Obstacles to Organizing Under the NLRA: Combatting the Southern Strategy,” North Carolina Law Review 59 (1980): 148.


80. Ibid., 303–4.


85. Ibid.

86. Ibid., 48.


89. See generally Diane Balser, Sisterhood and Solidarity (Boston: South End Press, 1987), 151–61.


4. The Need for Labor Unions


101. Under the Age Discrimination in Employment Act, as amended, companies may no longer require the involuntary retirement of employees. See 29 U.S.C. § 631(a).


107. Ibid., 525, 534–35.


112. Ibid., 204.

113. Ibid., 214.


119. Anthony Giddens, *The Class Structure of the Advanced Societies* (New York:
4. The Need for Labor Unions


125. C. Wright Mills, White Collar, 301–2, 312.


127. 29 U.S.C. § 159(a) provides that “[r]epresentatives designated or selected ... by the majority of the employees in a unit ... shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .”


130. C. Wright Mills, White Collar, 139.


4. The Need for Labor Unions

140. 925 F.2d at 481.

5. ENHANCING ORGANIZED LABOR’S POWER

1. Section 8(d), 29 U.S.C. § 158(d).
16. Ibid., 891–94.


42. Giles Radice, *The Industrial Democrats*, 123.


5. Enhancing Organizing Labor’s Power


50. See generally Hem Jain, Worker Participation.


52. Ibid.


57. Ibid., 400–401.


63. Ibid., 41–51.

64. Ibid., 31–40.


5. Enhancing Organized Labor's Power


72. Ibid., 34.


81. Act on Codetermination by Jobholders of May 4, 1976, I BGBL 1153 (W. Ger.).


95. 29 U.S.C. § 152(5).

96. 29 U.S.C. § 164(a).


100. 308 U.S. at 251.


102. 360 U.S. at 204.

103. 360 U.S. at 211–14.

104. 503 F.2d 625 (9th Cir. 1974).

105. 503 F.2d at 630.

106. 503 F.2d at 631.

107. 691 F.2d 288 (6th Cir. 1982).

108. 691 F.2d at 289.

109. 691 F.2d at 295.


111. 231 N.L.R.B. at 1121.


113. 231 N.L.R.B. at 1234.

114. 231 N.L.R.B. at 1235.


119. Ibid., 147–48.

120. 29 U.S.C. § 186(b)(1).


122. Section 501(a) also obliges union officers and agents to account to their respective labor organizations for any profits received in connection with transactions conducted on behalf of their respective unions. See generally Comment, “Serving Two Masters: Union Representation on Corporate Boards of Directors,” Columbia Law Review 81 (1981): 642–44.

123. 29 U.S.C. § 186(c)(3).

124. U.S. Department of Labor, U.S. Labor Law and the Future of Labor-


132. Ibid., quoting letter from Assistant Attorney General Sanford Litvack to UAW General Counsel John Fillion (dated February 26, 1981).


137. Ibid., 948–49.


5. Enhancing Organizing Labor's Power 179

146. James Furlong, Labor in the Boardroom, 45, 131.
150. Ibid., 84.
151. Ibid., 147.
152. Ibid., 149.
159. 29 U.S.C. § 186(c)(5).
165. 29 U.S.C. § 158(e).
169. Ibid., 71–74.
170. Ibid., 66–71.

172. Ibid., 739–42.

173. Ibid., 775–77.


178. Ibid., 193–94.


188. 29 U.S.C. § 152(5).


191. Deborah Olson, "Union Experiences with Worker Ownership: Legal and Practical Issues Raised by ESOPs, TRASOPs, Stock Purchases and Co-Operatives," Wisconsin Law Review 1982 (1982): 801–2. If representative labor organizations and worker-owned enterprises act in good faith to further the legitimate interests of the employees and do not enter into collective bargaining arrangements designed to restrain trade, their cooperative conduct should be exempt from antitrust liability. Ibid., 803–8.

192. Daniel Zwerdling, Workplace Democracy, 100.

193. Ibid., 101.


5. Enhancing Organizing Labor's Power

199. Ibid., 98.
201. Daniel Zwerdling, Workplace Democracy, 103.
207. 42 U.S.C. § 1981, which guarantees all persons the same right to make and enforce contracts, including contracts of employment, as is enjoyed by white citizens.
216. Ibid., 7.
217. Ibid., 3.
218. Ibid.
5. Enhancing Organized Labor's Power


239. Ibid., 560.

240. International Labour Office, Multinational Enterprises and Social Policy, 68.

6. THE NEED TO REFORM


5. 38 Stat. 730 (1914).


7. 47 Stat. 70 (1932).

8. 48 Stat. 198 (1933).


11. 49 Stat. 449 (1935). The NLRA, as amended by the Labor-Management Re-
6. The Need to Reform


12. Ibid.
13. Ibid.
16. Ibid.
17. Section 8(d), 29 U.S.C. § 158(d).
28. E.g., Conair Corp., 261 N.L.R.B. 1189 (1982). The D.C. Circuit Court refused to enforce this portion of the Board’s remedial order, since it concluded that any departure from the principle of majority rule should be left to Congress. Conair Corp. v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1241 (1984).
32. 420 U.S. 251 (1975).
33. 262 N.L.R.B. 1010 (1982).
35. 29 U.S.C. § 158(d).
37. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).
41. NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967).
43. NLRB v. Boss Mfr. Co., 118 F.2d 187 (7th Cir. 1941).
44. United States Gypsum Co., 94 N.L.R.B. 112, amended, 97 N.L.R.B. 889 (1951),
modified on other grounds, 206 F.2d 410 (5th Cir. 1953), cert. denied, 347 U.S. 912
(1954).
46. Comment, "Subjects Included Within Management's Duty to Bargain Collectively,"
47. 388 U.S. 175 (1967).
49. 388 U.S. at 181.
52. 351 U.S. 225 (1956).
54. 304 U.S. 333 (1938).
55. 304 U.S. at 345–46.
57. Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969),
58. 29 U.S.C. § 159(c)(3).
60. 675 F.2d 926 (7th Cir. 1982).
61. The Giddings & Lewis approach continues to be followed today. Aqua-Chem,
Inc. v. NLRB, 910 F.2d 1487 (7th Cir. 1990), rehearing denied, 922 F.2d 403 (7th Cir.),
64. 29 U.S.C. § 160(1).
67. Section 8(e) of the NLRA, 29 U.S.C. § 158(e).
68. 29 U.S.C. § 158(b)(7).
70. 404 U.S. 157 (1971).
71. NLRB v. Yeshiva University, 444 U.S. 672 (1980).
73. 265 N.L.R.B. 295 (1982).
74. 140 N.L.R.B. 221 (1962).
75. Julius Getman, Stephen Goldberg & Jeanne Herman, Union Representation
76. 228 N.L.R.B. 1311 (1977).
77. 228 N.L.R.B. at 1313. In General Knit of California, Inc., 239 N.L.R.B. 619
(1978), a new 3–2 Board majority overruled Shopping Kart and reinstated the Hol­
lywood Ceramics test, but four years later, another 3–2 majority overruled General
Knit and returned to the "sound rule" that had been enunciated in Shopping Kart.
78. E.g., Fiber-Lam, Inc., 301 N.L.R.B. No. 9, 136 L.R.R.M. 1147 (1991); Tri-Cast,
6. The Need to Reform

82. 268 N.L.R.B. 1044 (1984), affirmed, 765 F.2d 148 (9th Cir. 1985).
84. 452 U.S. at 678–79.
86. 409 U.S. 213 (1972).
90. 111 S. Ct. 1950 (1991). Even though the Lehnert case involved a public sector union, the parameters set forth in that decision will undoubtedly be applied to private sector labor organizations.
93. 29 U.S.C. § 152(3).
97. Compare NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981), wherein the Supreme Court limited the Labor Board’s “confidential” employee exclusion to those individuals who actually have access to confidential labor relations information. The Court refused to permit the exclusion to be applied to individuals who have access to other forms of confidential company information.
100. 140 N.L.R.B. 221 (1962).
104. 304 U.S. 333 (1938).
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123. 29 U.S.C. § 8(d).
134. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
136. Ibid., 1795 & n. 94.
138. Once such Labor Board bargaining orders are judicially enforced, continued contumacy by employers would subject them to contempt liability.
139. 29 U.S.C. § 216(b).
140. See generally Note, “Nonmajority Bargaining Orders: The Only Effective
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142. 29 U.S.C. § 160(c) empowers the Labor Board to issue remedial orders that will effectuate the policies of the NLRA.


144. 112 N.L.R.B. 1080 (1955).

145. 112 N.L.R.B. at 1082.


147. 268 N.L.R.B. at 574.


150. Section 203(d) of the LMRA, 29 U.S.C. § 173(d), provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."


152. 228 N.L.R.B. 808 (1977).