All Over But the Shouting?
Some Thoughts on Amending the Wagner Act by Adjudication Rather Than Retirement

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I. INTRODUCTION

Like parents who curse Little League umpires, labor law scholars like to shout at federal appellate judges. We blame them for having screwed up the Wagner Act, and with it, the American labor movement.¹ Desperate to halt the precipitous slide in the union density rate, some of us have gone so far as to claim the real problem is the structure of the National Labor

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Relations Act (NLRA) itself. And though few academics have actually taken up the cheer of labor leaders who say the statute should be retired—after all, it turns seventy this year—plenty of us have proposed legislative amendments that, whatever their merits, would be dead-on-arrival if anyone in Congress bothered to introduce them.

So it is more than a little surprising to learn Professor Ellen Dannin is proposing something far out of synch with much of our recent scholarship: an articulate, passionate, even romantic defense of the nation’s basic labor law. Even more surprising, her proposal turns out to be attractive. Why? In no small measure, because she would place substantial responsibility for rejuvenating the NLRA, if not the entire trade union movement, on the shoulders of labor scholars. Instead of tolerating our shouting from the sidelines about how lousy this ump is, Professor Dannin would have us school-him on how to call a better game. She wants labor law professors to help formulate and implement creative strategies for persuading the Act’s official enforcers to restore its promise of fostering workplace democracy through collective action.

II.
THE DANNIN PROJECT

A. Two Tasks

As Professor Dannin sees it, the project is twofold. The first task is to mount a sort of re-education campaign to raise awareness among decision makers of the Wagner Act’s original purposes, which are embodied in section 1. Neither the Board nor the judiciary cites section 1 with any regularity. Yet section 1 lists at least eight core labor rights, rights that are the true stuff of the Wagner Act. Section 1 principles are “grand and ennobling, for they propose the extension of freedom and democracy into industrial life.” Therefore, they ought to inform even routine applications of the law. Among other things, section 1 encourages or protects:

- Equalizing bargaining power between employees and employers

The friendly adjustment of grievances and labor disputes
The practice and procedure of collective bargaining
The exercise by workers of full freedom of association
Self-organization by employees
Designation of representatives of employees' own choosing
Negotiating terms and conditions of employment
Engaging in other mutual aid or protection

But over the past seventy years, layers of interpretive paint have covered up these core labor rights. The “painters” have been the federal courts, especially the United States Circuit Courts of Appeals, which have responsibility for reviewing and enforcing orders of the National Labor Relations Board (NLRB), and the Supreme Court, which has the last word on whether the circuit courts got it right. Unfortunately, the interpretive layers—not the law's original words—are now understood as codifying national labor policy. We law professors have sealed the deal by faithfully teaching our law students about the judicial gloss rather than the text of the statute. In the process, all those layers have acquired a distinct legitimacy. Yet so many of them are illegitimate. They are untrue, not only to the original intent of section 1, but also to modern canons of statutory interpretation. In case after case, the Supreme Court has articulated and applied rules that cannot be reconciled with the plain meaning of the NLRA.

One notorious example affecting union organizing is *Lechmere, Inc. v. NLRB.* In that case, the Court held the employer did not violate the Act by excluding from its private parking lot non-employee union organizers who sought to distribute handbills to consumers. Unlike consumers, who were invited to enter the lot, park their cars, and do business inside, the organizers could be confined to sidewalks adjoining the public highway, far from the consumers, who were the target audience. Speaking through Justice Thomas, the Court drew a sharp distinction between union organizers who did not work for the employer and union organizers who did. Whereas the former were “non-employees,” and could be barred as trespassers, the latter were true “employees,” and therefore, were permitted to pass out union literature in appropriate areas of the workplace.

7. A thoughtful literature exploring the history of these decisions has emerged. See, e.g., James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales,* 103 MICH. L. REV. 518, 518-19 (2004) (identifying five erroneous judicial statements about the NLRA that have had a "devastating impact on the American labor movement").
The distinction between non-employee and employee organizers makes sense in the common law world, where employers exercise sovereign-like control. But it makes no sense under the Wagner Act and its amendments, which anticipate workers’ taking group action to improve their working conditions, whether or not they happen to be in the same workplace. To reach the result it did, the Supreme Court had to define “employee” as the employee of a specific employer—namely, the employer owning or controlling the property to which access is sought. But section 2(3), which provides the Act’s only definition of “employee,” says just the opposite. It defines “employee” as including “any employee,” and it adds that the meaning of the term “shall not be limited to the employees of particular employer.”

“How is it hard to believe that justices of the Supreme Court are incapable of reading the plain language of a statute,” Professor Dannin writes about Lechmere. “The only other explanation is that they decided to judicially ‘amend’ the NLRA.” For this reason, Professor Dannin promotes an education campaign to explain why this method of statutory construction is no more acceptable under the Wagner Act than it would be under any other federal statute.

Decisions like Lechmere undermine core labor rights by defining those rights more narrowly than the plain meaning of the statute. Majority opinions in these cases fail or refuse to recognize the transformative power of the NLRA, which was adopted to modify the application of free market principles to the workplace by granting workers access to the counterbalancing power of collective bargaining.

To Professor Dannin, the Wagner Act was a full-scale assault on the master-servant relationship as codified by the common law. Whereas under the common law “the workplace belongs solely to the employer, and the employer must have the sole right to control workplace terms,” in the Wagnerian world “employers and employees are to co-determine” those terms. That is, jobs are to be treated as a form of property, partly if not wholly owned by employees. Part of her mission is to remind judges that Congress intended the law “to establish a relationship between employers and employees ... different from how most people, even more than sixty


11. ELLEN J. DANNIN, TAKING BACK THE WORKERS’ LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS (forthcoming 2006) (manuscript at 13, on file with author). In offering this commentary, I have had the benefit of reviewing a complete draft of Professor Dannin’s forthcoming book on the subject. I refer to it herein.

12. Id. at 14.
years after its enactment, think about employer and employee rights and obligations. In the process, she hopes to dissuade decision makers from defaulting to the common law perspective on the employment relationship, in which employers were masters who retained unilateral power to impose terms on the employees, who were their servants.

Professor Dannin's second task is to map out a legal strategy to overturn judicially developed doctrines that fail the goals of section 1. She advocates "borrowing from and building on the methods used by the Civil Rights Movement, and in particular, the NAACP [National Association for the Advancement of Colored People] Legal Defense Fund, to recapture union power." The strategy that once targeted segregation of the races in public accommodations, including education, employment, and housing, would now be deployed to attack retrograde interpretations of the Act. And like the Civil Rights Movement of another generation, the rejuvenated labor movement would rely not only on litigation, but also on complementary activism, including strikes, consumer boycotts, corporate campaigns, and other forms of concerted activity.

Of course, as Professor Dannin understands, hers is "no trivial esoteric quibble" about how the Wagner Act has been interpreted over the past seventy years. It is a serious indictment of the Act's interpreters, not the law they are interpreting. She is charging them, especially the federal judges having responsibility for enforcing NLRB orders, with "lawless actions." Borrowing a weapon so often deployed by conservative critics of the judiciary, she is accusing these judges of practicing a form of judicial activism, of having rewritten the NLRA into "a law that is diametrically opposed to the language of ... Congress’ clear intent and purpose."

The charge calls into question the legitimacy of NLRA jurisprudence in several fundamental areas. These include not only the aforementioned access rules promulgated by the Court in *Lechmere*, but also rules

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13. *Id.* at 11.
14. The statute’s author may have taken a somewhat more pragmatic view of his own handiwork: Senator Wagner primarily saw the Act as a weapon against the Depression, which he attributed to underconsumption caused by too unequal a distribution of wealth. Collective bargaining, he thought, would both restore an element of fairness and industrial democracy to the workplace, and redistribute wealth in such a way as to reinvigorate the economy.
16. DANNIN, *Supra* note 11, at 5.
17. *Id.* at 6.
18. *Id.*
permitting employers to hire permanent strike replacements, limiting secondary activity by labor organizations, regulating bargaining impasses, and fashioning make-whole rather than punitive remedies.

If Professor Dannin has her way, labor scholars will be put to work figuring out how to persuade the Board and the courts to get rid of the precedents that created these restraints. We will be crafting litigation strategy, borrowing from social science research (or conducting our own), testifying as expert witnesses, and drafting amicus briefs for years to come.\footnote{This strategy must be adopted with caution. For example, a number of years ago, I wrote an amicus brief in a case pending before the NLRB. The brief argued the cost of organizing a union employer's non-union competition in the same industry is "germane" to collective bargaining, and therefore, may be charged to agency fee payers in the organized bargaining unit. For proof, the brief borrowed extensively from the empirical work of labor economists. But the Board's acting executive secretary rejected the filing of my brief as untimely, even though no deadline had been set and the case would remain pending for another year before a decision was issued. So I turned the brief into a law review article making the same argument. See Christopher David Ruiz Cameron, \textit{The Wages of Syntax: Why the Cost of Organizing a Union Firm's Non-Union Competition Should Be Charged to "Financial Core" Employees}, 47 CATH. U. L. REV. 979, 993-1003 & tbl.1 (1998). I sent the article to a number of federal appellate judges. Eventually, the U.S. Court of Appeals for the Ninth Circuit published an opinion adopting my argument, but ignoring my article. See UFCW Local 1036 v. NLRB, 307 F.3d 760 (9th Cir.), \textit{cert denied}, 537 U.S. 1024 (2002). I do not know if any judges read or considered my argument. Ironically, the court did cite a separate article I had written, but for a relatively minor point. \textit{See id} at 773 n.17 (citing Christopher David Ruiz Cameron, \textit{The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers}, 53 U. MIAMI L. REV. 1089, 1103 (1999) \textsuperscript{[hereinafter Cameron, Labyrinth of Solidarity]}, to show union density rate declined from peak of 38\% in 1954 to less than 10\% by 1999).}

\textbf{B. Why Invoking the Plain Meaning of the NLRA Makes Sense}

For at least three reasons, I like Professor Dannin's proposal. But I also offer a caveat about how her NLRA litigation strategy fits into a much larger workplace governance picture.

First, this strategy—reclaiming the Wagner Act incrementally in pursuit of its promise of workplace democracy—offers one of the few paths to reform that is open for the foreseeable future. Except for some narrow but significant amendments affecting the treatment of collective bargaining agreements in reorganization proceedings passed in 1984,\footnote{See Bankruptcy Amendments and Federal Judgeship Act of 1984, 11 U.S.C. §§ 1113-1114 (2000). The statute restricted the power of a debtor-employer unilaterally to abrogate all or part of a collective bargaining agreement during the midterm—curiously, by amending Chapter 11 of the Bankruptcy Code, not the NLRA. \textit{See Christopher D. Cameron, How "Necessary" Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113, 34 SANTA CLARA L. REV. 841, 867-75 (1994)}.} Congress has enacted no reforms of federal labor policy since 1959.\footnote{The major amendments to the original National Labor Relations (Wagner) Act of 1935, which created the framework we know today, were the Labor Management Relations (Taft-Hartley) Act of 1947, which outlawed unfair labor practices by unions as well as by employers, and the Labor Management Reporting and Disclosure (LMRDA or Landrum-Griffin) Act of 1959, which regulated}
performance cannot guarantee future results, but a status quo lasting over forty-five years does not portend big changes anytime soon. Legislative inertia of this type is hardly surprising. Employers do not like being regulated in any way, especially not in the workplace. They can be expected to oppose any reforms proposed by advocates of collective bargaining. By its very nature, a litigation strategy would bring about incremental reforms, which do not present opponents with the sort of easy-to-hit "hard target[s]" that legislative proposals would.\textsuperscript{22}

Perhaps more to the point, the external pressures for legislative reform that produced the Wagner Act during the mid-1930s simply do not exist today. At the same time it became clear that the Act’s predecessor, the National Industrial Recovery Act of 1933, had no teeth, the country became engulfed “in virtual class warfare.”\textsuperscript{23} In April 1934, industry-wide strikes spread from automobile workers in Toledo to truck drivers in Minneapolis to longshoremen in San Francisco to textile workers in the South.\textsuperscript{24} As the language of section 1 suggests, the enactment of the Wagner Act owed much to a national desperation to give these strikers a good reason to go back to work.\textsuperscript{25}

Surely Professor Dannin is right to question whether workers would have fewer enforceable rights without the NLRA—and by extension, without the labor organizations the statute legitimizes—than they do now:

If there were no unions, how long would the [other] laws we have exist? Would new laws be enacted to meet new problems? Would they be updated as the need arises? How can a system of individuals come together to exercise the power and vision that makes this happen? Who would do the unions’ internal governance and secondary activities. Most of these provisions are codified at 29 U.S.C. §§ 151-169 (2004).


24. Id.

25. Section 1 is replete with references to the labor unrest caused by workers not having the eight core labor protections mentioned above. For example: “The denial by some employers of the right of employees to organize... lead[s] to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce ....” 29 U.S.C. § 151.

Another example:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association, substantially burdens and affects the flow of commerce, and tends to aggravate recurring business depressions, by depressing wage rates and the purchasing power of wage earners in industry and preventing the stabilization of competitive wage rates and working conditions within and between industries.

Id.

And finally: “Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption ....” Id.
lobbying and the research? Who would get out the vote for sympathetic legislators? The answer would seem to be: no one.26

Perhaps incomplete protection for collective bargaining, supplemented incrementally through advocacy before the Board and in the courts, is better than no protection at all.

Second, the Dannin approach recognizes a phenomenon I have identified elsewhere: the federal courts have already filled the void created by Congress’ decades-long repose in labor affairs. Today, federal judges, not Members of Congress, are setting national labor policy.27 It makes sense to petition them for truer interpretations of the law, because they are occupying the field anyway.

The Supreme Court has stepped into this role with particular gusto. Since 1958, whenever it has been presented with apparent conflict between the NLRA and some other federal statutory scheme, the Court has not hesitated to subordinate federal labor policy to federal interstate commerce, antitrust, bankruptcy, or immigration policy.28 Worse, it has rarely deferred even to the NLRB’s reasoned attempts to reconcile these policies. In these cases, workers’ rights under the NLRA always finish second to other rights.

The Justices offered their most recent example of this de facto policy making role in Hoffman Plastic Compounds, Inc. v. NLRB.29 Speaking through Chief Justice Rehnquist, the Court held that an undocumented alien who is fired in blatant violation of his right to join a union is not entitled to collect backpay, the only effective remedy available. So it refused to enforce a Board order that Jose Castro, the discriminatee, be awarded $66,951 in backpay. Why? Because awarding him back pay “not only trivializes the immigration laws, it also condones and encourages future violations.”30 Neither the Board’s proposal of a remedy attempting to accommodate both statutory schemes,31 nor the employer’s probable violation of the Immigration Reform and Control Act (IRCA) by hiring Castro in the first place, made any difference. No words in either statute

26. DANNIN, supra note 11, at 9.
28. Id. at 11-24.
30. Id. at 150.
31. The Board would not simply have handed Castro a check for $66,951. Instead, it would have cut off the company’s backpay liability as of the date of the enforcement hearing, during which Castro admitted his true immigration status. That date is when the employer knew or should have known he was ineligible to work under IRCA. The Board would have also reduced Castro’s back pay by his interim earnings, which he was obliged to pursue under well-settled mitigation principles. The Court rejected this balanced approach to the supposed conflict between the NLRA and IRCA. See Cameron, Borderline Decisions, supra note 27, at 33-34.
forbade an award of backpay for violating section 8(a)(3) of the NLRA; the Court had to "judicially amend" the statute to reach this result.

The impact of such decisions is to allow the federal judiciary to exercise the sort of policy making discretion ordinarily left to the political branches of government. For example, Hoffman effectively enacted a new version of the hated old Bracero Program32 "because the decision places outside the law an underclass of low-wage Latino immigrants who are promised workplace rights in theory but not practice."33

Third, Professor Dannin’s project comes none too soon for the workers who would benefit most from a rejuvenated labor movement: immigrants, people of color, and women. Without the earnings-boosting power of collective bargaining, minimum wage jobs could consign these groups to permanent underclass status.34 As I have pointed out elsewhere, immigrant workers, particularly Latinos, increasingly form the backbone of our low-wage economy.35 But gaining union representation opens the door to the middle class by dramatically improving their economic position of these workers. For example, unionized Latino workers earn as much as 50 percent more than non-unionized Latinos performing the same jobs; unionized Blacks, about 40 percent more than non-unionized Blacks; and unionized Whites, about 30 percent more than non-unionized Whites.36

If Professor Dannin is right that "[l]ife is better when you have enough money to live on,"37 and if I am right that unions help make this possible for immigrant Latinos and other vulnerable workers, then anything that increases access to the institution of collective bargaining, even if only an incremental litigation strategy, is most welcome.

32. The Bracero Program is the name given to a complex blend of international agreements, federal regulations, and legislation under which an estimated 4.6 million Mexican nationals were temporarily admitted into the United States during the period 1942 to 1964 for the seemingly benign purpose of supplementing our agricultural labor pool. But braceros were really indentured servants who had few enforceable rights. Id. at 24. For a discussion of how Hoffman enacted a new Bracero Program, see id. at 2-4 & n.3, 24-28.

33. Id. at 24.

34. See, e.g., Ricardo Alonso-Zaldivar, Many New Jobs Going to Noncitizens, L.A. TIMES, June 16, 2004, at A15 (reporting Pew Hispanic Center study finding that "while Latino immigrants were gaining jobs, the weekly earnings of Latinos as a whole . . . had declined in comparison to those of whites and African Americans").

35. Cameron, Labyrinth of Solidarity, supra note 19, at 1090, 1095-98.

36. Id. at 1102.

37. Dannin, supra note 11, at 1.
III.
A CAVEAT: THREE OTHER MODELS OF WORKPLACE GOVERNANCE

Although I applaud Professor Dannin's project, I must offer a caveat. It is a qualifier that her work raises in only the most cursory way: collective bargaining, the centerpiece of the workplace envisioned by the Wagner Act, follows from but one of four models of workplace governance that have emerged during the past century. In their approximate chronological order of appearance, these models are: (1) individualism, as embodied in the common law master-servant relationship; (2) co-determination, as preserved in the Wagner Act and its amendments, and in private and public sector labor laws modeled on the Wagner Act; (3) government regulation, as codified in the alphabet soup of state and federal laws governing employment discrimination, fair labor standards, occupational safety and health, and the like; and (4) best practices, as articulated in human rights law, international labor conventions, and industrial codes of good business conduct.

Attractive as it may seem to labor law scholars, the co-determination model—at least as expressed in the form of collective bargaining through labor unions—has its limits. First, co-determination is not the only effective model of workplace governance. Even during its heyday, much of the U.S. labor movement failed or refused to accept women and people of color as members, much less help fight their battles. Until the advent of government regulation in the form of Title VII of the Civil Rights Act of 1964, which outlawed employment discrimination by employers and labor organizations alike, few unions lived up to their responsibilities to these constituencies on any grand scale.

Second, it is far from clear that most American workers would choose this model, even if the NLRA were restored to give them unimpeded access to it. In their groundbreaking survey, Professors Richard Freeman and Joel Rogers asked what single form of workplace governance employees would pick if they were free to do so. Only twenty-three percent would choose unions, although this is at least twice the percentage having union representation today. But sixty-one percent would choose joint employee-management committees—a form of workplace governance that is not officially recognized in this country. Indeed, the employer's role in such a system could constitute unlawful domination of a labor organization under

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38. See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 151 (1999).
section 8(a)(2). The survey suggests workers want more participation in firm management, but it is unclear whether or how the incumbent regime of co-determination can provide it.

Finally, the expectation that co-determination should or could be the lodestar of workplace governance is one of the past. If the steep decline in the number and percentage of private sector unionized workers is not proof enough, then the pressure on long-term employment relationships exerted by the increasing mobility of capital is. Whether or not future litigation reforms the Wagner Act, collective bargaining is unlikely to be revived on a scale resembling its heyday in the 1950s. Absent pressure from global unions, global corporations can replace with low-wage employees all but a few of even the most organized high-wage employees.

Inevitably, even a successful litigation strategy for reforming the Wagner Act must address two difficult questions. The first question is, “What will happen to workers who gain free access to collective bargaining, only to turn it down?” The second question is, “What will happen if workers do choose co-determination, only to have their jobs disappear from the U.S. and reappear overseas?”

Perhaps the answers depend on how the other three models of workplace governance give workers a stake in the enterprises for which they labor. That is to say, a strategy to ensure effective access to the co-determination model of workplace governance should be complemented by a strategy to help workers gain effective access to other models of workplace governance.

A. Individualism Model

In the eyes of the common law, the master-servant relationship is a contract between equals. Like all contracts, it is to be governed not by federal government fiat, but by the free market as protected under state law. Any bargaining power a party brings to the table is the result of having exploited her freedom to gain and wield such power, whether by acquiring capital or special skills or knowledge. Underlying this legal model is a sort of rugged individualism, which is embodied in the at-will rule: because a

41. Here I assume—perhaps wrongly—that most Americans are unprepared to embrace compulsory co-determination in the form of the statutorily mandated work council found in countries like Germany—a phenomenon Professor Weiler calls the “constitutive model.” See, e.g., PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 283-95 (1990).
worker is free to terminate the employment contract at will, the employer must be free to do likewise. In short, an employer may fire an employee for a good reason, bad reason, or no reason at all.

Whether the individualism model accurately reflects the true dynamics of the employment relationship—section 1 of the Wagner Act, of course, suggests it does not—is beside the point. Whatever its merits, at-will remains the "default" rule of common law employment. Accordingly, while waiting for Professor Dannin's NLRA litigation strategy to work its magic, we would do well to help the ninety percent of the private sector workforce lacking access to collective bargaining to exercise whatever rights they might have under other models of workplace governance. If there is any shelter from the harsh climate of the common law individualism model, then these folks surely could use it.42

In the last generation, state courts have begun to build the foundations of that shelter in the law of wrongful termination. In states like California, state judges undertook modification of the at-will rule in ways that filled the tenure gap for some non-union workers. Due to their efforts, many jurisdictions today require that an employer have "just cause" to terminate, either because the presumption of at-will status can be overcome by proof of an expressly negotiated tenure,43 or because tenure can be implied-in-fact44 or imposed by public policy.45 Thus, the emergence of wrongful termination law created a new version of the individualism model, one that might be called "individualism revitalized."

But a major roadblock now stands in the path of workers seeking protection under this revitalized model of individualism. Notwithstanding the state law character of wrongful termination law, federal rather than state judges are mainly responsible for erecting the roadblock. It takes the form of recent Supreme Court decisions interpreting the Federal Arbitration Act46 to require the enforcement of mandatory pre-dispute arbitration agreements.47 Enforcing these adhesive covenants does not eliminate meritorious claims altogether, but does effectively deny employees access to judicial forums where their claims might be successfully prosecuted. Without a judicial forum there can be no right to jury trial. The result is a strategic advantage for employers, who through arbitration can now unilaterally reduce their exposure to the time and expense of defending

42. See, e.g., Corbett, supra note 22, at 152-61.
43. See CAL. LAB. CODE § 2922 (West 2004) (creating presumption that employment contract for indefinite term is terminable at will of either party).
wrongful termination litigation in court, and the uncertainty of predicting a jury's verdict. Even more significant, workers can be forced to give up this strategic advantage long before they realize they have it.

Unfortunately, Professor Dannin's project cannot spring the common law traps that the individualism model still sets for the unwary non-union workforce. If we care about their fortunes, too, we must consider strategies for avoiding and removing these traps by participating in the developing common law of the workplace as modified by the applicability of pre-dispute arbitration agreements under the Federal Arbitration Act.

B. Regulatory Model

The co-determination model, as codified in the Wagner Act, was not the New Deal's only contribution to workplace governance. Beginning with the Fair Labor Standards Act (FLSA) of 1938, Congress enacted a series of statutes regulating discrete terms and conditions of employment, either by prescribing acceptable minimum practices (as with the payment of minimum wages under the FLSA) or by proscribing unacceptable maximum practices (as with the scheduling of work not to exceed forty hours per week under the FLSA, or as with discrimination based on race under Title VII). In many cases, state legislatures have followed suit or led the way by enacting similar legislation. The effect of these statutes has been to erect a workers' "safety net" that protects employees irrespective of whether they have successfully gained access to collective bargaining or negotiated favorable terms in their individual employment contracts. Because this model is imposed externally, by government rather than through private agreement, we may accurately characterize it as a regulatory model.

The passage of such laws, whether by Congress or the state legislatures, has been continuous. At the federal level alone, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Employee Retirement Income Security Act of 1974, the Worker Adjustment, Retraining and Notice (WARN) Act of 1988, the Americans With Disabilities Act of 1990, and the Family and Medical Leave Act of 1993 are just a few of the more well-known statutes setting floors and ceilings on working conditions in the private sector.

It is important to remember that the NLRA does not regulate the precise terms and conditions of employment as the above statutes do. The NLRA regulates the process, but not the product, of collective bargaining. The negotiation of the actual contract is left to the parties. The parties are not individual employees and their employers, but representatives of individual employees and their employers. In short, that is the meaning of co-determination. The American Federation of Labor - Congress of Industrial Organizations (AFL-CIO) anticipates that these negotiations will be conducted in a free market, but one in which bargaining power has been equalized. The NLRB will not write a collective bargaining agreement for parties unable or unwilling to do so themselves.

It is no coincidence that the explosive growth in the number and type of statutory schemes regulating terms and conditions of private employment parallels the decline of the American labor movement. In the 1950s, when American labor enjoyed its greatest strength, relatively few federal statutory schemes regulated the workplace. As labor began to weaken, gradually at first during the 1960s, and then more rapidly during the 1970s, the pace at which new federal regulatory schemes were enacted also accelerated. To be sure, the AFL-CIO supported the passage of all these statutes. But not every union practiced what the labor federation preached. When organized labor as a whole proved unable or unwilling to represent women and people of color on the job, civil rights groups demanded and received Title VII and similar legislation. When organized labor could no longer organize the unorganized, it lobbied Congress to pass Employee Retirement Income Security Act to protect pensions and the Americans with Disabilities Act to protect disabled workers.

As many and as varied as these laws are, they are far from comprehensive in their protection of employees. To take but one example, the Worker Adjustment and Retraining Notification (WARN) Act requires an employer to give at least 60 days’ notice of a plant closing. But the statute doesn’t reach an employer who employs fewer than 100 employees, which effectively exempts most employers who carry out mass layoffs.

Moreover, not everyone has welcomed the enactment of so many regulatory schemes. Many feel that, if anything, the workplace is over-regulated. Even the employees that Professors Freeman and Rogers surveyed believe the workplace is regulated enough; only sixteen percent say they want “more laws.” Whatever its merits, this view makes the

55. See, e.g., Cameron, supra note 20, at 874.
58. FREEMAN & ROGERS, supra note 38, at 151.
passage of new labor standards and workers’ rights legislation less likely now than in the past.

Organized labor may have to work with what is already available by building coalitions with the plaintiffs’ bar and other workers’ rights advocates who bring claims to enforce statutory rights. Adopting Professor Dannin’s NLRA reform strategy alone, limited as it is to the Wagner Act and subsequent amendments, cannot ensure that existing regulatory rights will be vindicated.

C. Best Practices Model

American workers who are denied access to workplace governance under the co-determination model, or who freely reject union representation, may still enjoy alternative forms of workplace governance under the revitalized individualism and regulatory models. But employees who lose their jobs to low-wage workers abroad—or who face the threat of losing them if they do not back down from their demands for higher wages or just cause protection of their tenure—have few options. Domestic labor standards rarely apply overseas. As one commentator has put it, the “fundamental problem” posed by globalization is that “there is no global legislature, no global labor court or inspectorate or administrative tribunal, no global regulatory regime . . . [of] empowering labor legislation.”

This is slowly but finally changing. In the new frontier of workplace governance, labor law scholars have begun to persuade government officials and labor leaders, if not the general public, that U.S. companies should adhere to international labor standards, even if these standards are not enforceable in the traditional legal sense. I call the model embracing these standards the “best practices” model because the laws in question are hortatory rather than obligatory in nature. Notwithstanding the absence of global legislatures or global labor courts, a nation governed by section 1 of the Wagner Act cannot seriously claim immunity from International Labor Organisation (ILO) conventions guaranteeing employees the rights to freely associate, organize unions, and bargain collectively. Whether or not binding in the common law sense, international labor standards are respected because they represent the collective wisdom of various countries expressed over many years. A company who failed to follow them would invite unwanted grievances by workers, not to mention unwanted publicity in the court of world opinion.


If every U.S.-based employer were subject to minimum labor standards no matter where in the world it operated or employed people, then an individual company would feel less pressure to relocate its operations to low-wage economies outside our borders anytime its American workforce demanded adherence to such standards.

At least three legal developments encourage the application of minimum labor standards to all workers, regardless of where and for whom they happen to work. We cannot ignore them if we are to address the second question Professor Dannin’s work inevitably raises: “What happens to workers who choose collective bargaining, only to have their employer ship, or threaten to ship, their jobs overseas?”

First, the American labor movement is getting the message that international law, particularly as codified in Convention Nos. 87\(^{61}\) and 98\(^{62}\) of the ILO, binds not only other nations, but also the United States. Under settled principles of international law, all civilized nations are bound by the ILO Conventions, even if they have not individually ratified them. Citing the ill effects of the Supreme Court’s *Hoffman* decision on immigrant workers,\(^{63}\) AFL-CIO President John Sweeney filed a complaint\(^{64}\) charging the United States with violating ILO Conventions Nos. 87 and 98, which protect both immigrant and citizen workers “without distinction whatsoever.”\(^{65}\) The complaint also charged the United States with violating a separate declaration on fundamental human rights.\(^{66}\)

Second, the United States is a signatory to an increasing number of international treaties and covenants that require adherence to minimum labor standards. The prime example is the North American Agreement on Labor Cooperation (NAALC), also know as the Labor Side Accord to the North American Free Trade Agreement (NAFTA). Among the minimum standards agreed to by Canada and Mexico, as well as the United States, is the duty to recognize the rights of workers to form and join labor
As long as the United States enters freely into such agreements, we should follow the rules of law incorporated into them.

Third, at the behest of trade unions, workers' rights advocates, and consumer groups, multinational employers based in the United States are increasingly willing to adopt codes of conduct governing the treatment of their overseas workers. Although such codes are not enforceable in traditional courts, they can be powerful tools in the court of world opinion. They are especially important in industries that rely on long chains of production and that include various subcontractors scattered across the globe.

For example, Oregon-based Nike Corp., the maker of so many popular models of athletic shoes, relies heavily on Asian subcontractors. Stung by criticism that some of these subcontractors were subjecting their employees to sweatshop conditions, Nike adopted a code of conduct requiring the company and its international business partners to commit to best practices in the following areas:

1. Management practices that respect the rights of all employees, including the right to free association and collective bargaining.
2. Minimizing our impact on the environment.
3. Providing a safe and healthy work place.
4. Promoting the health and well-being of all employees.

Such codes of conduct can help achieve the same goals that collectively bargained terms or official government regulations seek: voluntary compliance with minimally acceptable labor standards in the workplace.

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69. Included among these rights are the following core labor standards, which are also found in the ILO Conventions: not employing forced labor, not employing child labor, paying minimum wages or prevailing industry wages, providing legally mandated benefits, and observing local limits on working hours. Id.
IV. CONCLUSION

For the foregoing reasons, Professor Dannin's project to revitalize the Wagner Act through litigation is most welcome. It makes a lot more sense than shouting at the umpire, and it may be one of the few available paths to reform of the nation's basic labor law. But organized labor would do well to undertake the effort as part of a larger strategy of promoting democracy on the job under all four models of workplace governance: individualism, co-determination, government regulation, and best practices.