Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*

Karl E. Klare†

I. Introduction

This article discusses a newly emerging historiography of post-New Deal United States collective bargaining law. Critical labor law will be depicted primarily by highlighting its main lines of attack on

* © Copyright 1981 by Karl E. Klare.
† Professor of Law, Northeastern University School of Law. This article is a revised text of a paper presented to the Tenth Annual Meetings of the American Society for Legal History (ASLH), Philadelphia, Pennsylvania, October 25, 1980.


In addition to the works cited, I have learned much from discussions with, and the unpublished work of, James Atleson, Alan Hyde, Howard Lesnick, Staughton Lynd, Theodore Lieberman, Ira Sils and Katherine Stone. In its original conception, this paper was intended to be a "report" to ASLH on the critical labor jurisprudence, and I wish to acknowledge that some of the ideas and approaches to collective bargaining law presented here derive from the work of the people listed. However, the scholars I have associated with the critical labor law hold a widely divergent spectrum of views on legal and political questions. Readers are therefore advised that I assume sole responsibility for the formulations contained herein, and that the presentation of critical labor law in this paper is heavily oriented toward my own approaches and research priorities.

450
traditional learning. Most contributions to the literature of collective bargaining law are overwhelmingly doctrinal and rule-focused in emphasis. They are written, explicitly or implicitly, from the perspective of beliefs and values about the social function of collective bargaining drawn or inferred from the stated purposes, the legislative history of and judicial glosses upon the major federal labor statutes. This literature takes as given and unquestioned the desirability of maintaining the basic institutional contours of the liberal capitalist social order.

By contrast, although the critical labor jurisprudence exhibits widely divergent political views, it tends to challenge or at least to question the adequacy of established social institutions to protect the needs and interests of working people, particularly with respect to the openness of those institutions toward worker participation in the decisions affecting their industrial lives. Likewise, critical labor law is skeptical that the stated purposes and received wisdom of federal labor law adequately explain either the developmental path of collective bargaining law itself or its broader social functions.

Critical labor law has therefore attempted to reconstruct the ideological content and political and institutional implications of collective bargaining law by "decoding" its doctrinal literature. By this I mean that critical labor law focuses on analysis of important texts within their social and historical settings. The effort is to uncover the constellation of assumptions, values and sensibilities about law, politics and justice these texts evince, to reveal their latent patterns and structures of thought about legal and industrial issues and about the possibilities of human expression in the workplace. An underlying assumption of this

---

2. See generally Atleson, Values and Assumptions, supra note 1.
3. See note 1 supra.
4. Although the primary purpose of this paper is to explore the premises upon which our collective bargaining system has been built rather than to make the case for an alternative vision of workplace democracy, the reader is entitled to disclosure of the basic political premises I bring to this enterprise. Again I speak here for myself, although these beliefs are shared, to a greater or lesser extent, by others working within critical labor law. My fundamental assumptions include a belief in the feasibility of democratic self-management of the workplace by workers; a belief in the justice and desirability of giving a dominant voice respecting the organization and purposes of work and the disposition of the products of labor to those who perform work; a belief that work can and should provide dignity and meaning to life, that it can and should be a mode of expression, development and realization of the human self; and a belief that the highest aspiration of a democratic culture should be to generate, nurture and encourage in all people the capacity for self-governance and the fulfillment of human potential. My political premises are further disclosed at text accompanying note 18 infra.
methodology is that the intellectual history of labor law is a significant and neglected component of the social and political history of the American working class since the New Deal. Another is that because it is such a powerfully integrated structure of thought, deeply resonant with other aspects of the hegemonic political culture and closely articulated with important collateral developments in intellectual history (e.g., in political and managerial theory), liberal collective bargaining law is itself a form of political domination.\footnote{6}

Despite sharp differences on other matters, two common themes run throughout critical labor jurisprudence. First, we argue that collective bargaining law articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace. The second theme is that collective bargaining law has evolved an institutional architecture, a set of managerial and legal arrangements, that reinforces this hierarchy and domination. Viewed as a component of public policy, the two central goals of the collective bargaining laws are to integrate the labor movement into the mainstream contours of pressure-group politics and to institutionalize, regulate and thereby dampen industrial conflict. Viewed as a component of managerial practice, the collective bargaining laws seek to formalize industrial dispute-resolution and thereby to reinforce management control over enterprise goals and the direction of the work process. In fulfilling its public policy and managerial functions, collective bargaining law frequently aims to restrain labor unions from serving as vigorous, uninhibited representatives of employee interests. Rather it seeks to place unions in the uncomfortable position of serving as fiduciaries of an imagined societal interest in industrial peace\footnote{7} and of serving specific managerial\footnote{8} and disciplinary\footnote{9} functions. I believe that a primary initial achievement of the critical labor jurisprudence is its demonstra-

\footnote{6. It must be acknowledged that an important limitation of the critical labor law approach is its relative neglect, thus far, of the important task of drawing out empirically the interrelationships and connections between the intellectual history of collective bargaining law and the social history of the post-World War II labor movement.}

\footnote{7. See, e.g., Republic Steel Corp. v. UMW, 570 F.2d 467, 479 (3d Cir. 1978): [unions] simply must bear certain obligations if [they are] to continue to be entitled to the rights and benefits accorded by our national labor policy. To the extent that any union . . . refuses to enforce appropriately authorized union discipline upon recalcitrant members [for engaging, e.g., in wildcat strikes] that union can be said to have abrogated a proportion of valued rights granted to the union under our national labor policy. See generally Judicial Deradicalization, supra note 1, at 319-20.}

 any industrial enterprise must have a system of rules . . . . Collective bargaining can serve many useful functions for management in connection with the formulation and administration of these rules. First, it establishes a mechanism by which employee consent to these rules can be obtained. . . . [T]he collective agreement serves a second function for the management of a complex enterprise: to the extent that rules are embodied in a collective agreement, the grievance procedure operates as a mechanism by}
tion that the doctrine of collective bargaining law has been systematically fashioned, particularly at the Supreme Court level, to serve these goals.\textsuperscript{10}

However, the intellectual history of the field is complicated by the fact that from its outset modern collective bargaining law has endorsed and to some extent has actually engendered the democratic participation of employees in workplace governance. Quite apart from their manifest achievements in improving the working and living conditions and economic security of organized workers, labor unions protect employees from unilateral and arbitrary dictates of management. Unions provide an institutional context within which workers can formulate and express their aspirations, aggregate their voices and experience the dignity that comes with having some power to affect the decisions governing one's life. Since the battles of the New Deal period, labor law has grown up in a national political climate that mandates legal acknowledgment, authorization and legitimation of economic conflict and that requires recognition by our institutions of the fact that workers do and should have power.\textsuperscript{11}

which higher management polices compliance with its orders by lower ranks in the hierarchy.


(b) by negotiating the modified seniority clause to control promotion decisions, the union has limited management in an area regarded by management as one of its most important prerogatives. This limitation on management has shifted some of the burden for making promotions onto the union.


10. See generally works cited at note 1 supra.

11. Great dissents of another time recall an epoch in which the very legitimacy of labor conflict was not juridically acknowledged. \textit{See, e.g.,} Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n of North America, 274 U.S. 37, 65 (1927) (Brandeis, J., joined by Holmes, J., dissenting) (citations omitted):

[i]f, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds one of involuntary servitude. The Sherman Law was held in \textit{United States v. United States Steel Corporation} to permit capitalists to combine in a single corporation 50 per cent. of the steel industry of the United States dominating the trade through its vast resources . . . . It would, indeed, be strange if Congress had by the same act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers.


If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class, competing for the same end . . . . One of the eternal conflicts out of which life is made up is that between the effort of every man
The internally contradictory roles and setting of collective bargaining law have precipitated two great challenges to theorists guiding and fostering its development from the traditional liberal perspective. The first is to explain how and why collective bargaining law simultaneously encourages and represses workers' self-expression through the medium of industrial conflict. While the collective bargaining laws on the one hand invite and authorize workers to voice and advance their needs through self-organization and collective action, they at the same time limit worker self-expression through industrial conflict by establishing a coopting, atomizing, struggle-dissipating framework that narrowly circumscribes the lawful boundaries of collective action. That is, the ultimate impact of collective bargaining law in many settings may well be to impede solidarity and mutual aid and to narrowly channel collective action into limited, institutionalized forms.

Traditional liberal theorists of collective bargaining law have had to explain, secondly, how this body of law simultaneously authorizes and limits employee participation in workplace governance. For, although the collective bargaining laws acknowledge the justice of worker participation in the industrial decisions affecting their lives,
they also carefully control and restrict this participation. Collective bargaining law limits worker participation in workplace governance by deflecting the intervention of workers' power away from such concerns as the organization of the work process, enterprise management and goals, and the internal direction of labor unions. Rather, the legitimate exercise of workers' power is generally confined to occasional conflict outside the workplace, in the market for the sale of labor power, i.e., to the economic strike.\(^{16}\)

In sum, traditional liberal labor law thinking has confronted the enormously complex challenge of inducing organized workers to consent to and participate in their own domination in the workplace.\(^{17}\) In this sense, the development of collective bargaining law is paradigmatic of all public policy in liberal capitalism. I believe liberal capitalism is a social order founded upon enormous inequality and historically unnec-

---

\(^{16}\) The most significant doctrinal manifestation of this point is the distinction between so-called "mandatory" and "permissive" subjects of collective bargaining, particularly given the limitations imposed upon the scope of mandatory bargaining by the triumph of the concurrence in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., joined by Douglas & Harlan, JJ., concurring) (managerial decisions "which lie at the core of entrepreneurial control," decisions concerning the commitment of investment capital and the basic scope of the enterprise, are not mandatorily bargainable). Although not usually looked to for this proposition, the well-known case of NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952), in effect holds that such rights to "co-participation" in the direction of the enterprise as employees are granted under the NLRA are not "inalienable." On the contrary, employers may use their bargaining leverage to carve out a sheltered area of unreviewable prerogative beyond the reach of employee input. The narrow scope of participatory rights guaranteed by law in internal union affairs is illustrated, e.g., by Aikens v. Abel, 373 F. Supp. 425, 436 (W.D. Pa. 1974) ("the government of the [union] is not a pure democracy, but rather a republic, a representative democracy. As in any representative democracy, be it the [union] or the United States, actions taken by elected representatives [here, decision taken without ratification by membership to waive the right to strike and to submit unresolved contract issues to arbitration] are valid and legally irreproachable, even without the participation or informed consent of the representatives' constituencies . . . ").

\(^{17}\) The emphasis of this paper is on the most sophisticated liberal approach to collective bargaining, a view that has preached acceptance of unions (at least in the private sector) and focused on shaping collective bargaining into a means of coopting the labor movement into a "junior partnership" role with management. I believe this perspective profoundly influenced the development of the law since World War II. While the prospects for the future of collective bargaining is a topic beyond the scope of this paper, I would be seriously remiss if I failed to note the continuing existence of significant countervailing business attitudes toward collective bargaining. In particular, there has been a recent resurgence in business and government circles of a more repressive posture toward labor organization. Notable indicators of this perhaps fundamental shift away from the liberal consensus are President Reagan's ferocious reaction to the Air Traffic Controllers Strike of 1981; the implacable opposition of business—even corporate interests one might have thought had long ago reconciled to collective bargaining—to the exceedingly moderate Labor Reform bill of 1978; and the rise of a highly-refined union-busting technology utilized primarily in the white-collar sector.
ecessary constraints upon human freedom, coexisting with political institutions and a political culture premised on democratic ideals.\textsuperscript{18} Public regulation of class struggle through collective bargaining law replicates the role assigned to the state in the classics of liberal political theory, namely to manage and contain conflicts said to inhere in the sphere of social and economic activity ("civil society"). The philosophy of collective bargaining law, elaborated since the 1930's in doctrine, law review commentary and management literature, is an important effort to conceptualize, justify and legitimate the modern, regulatory state in the period of advanced industrial capitalism. As such it is a premier mode of elite ideological practice and an enduring contribution not just to law but to liberal political theory generally.\textsuperscript{19} It is this fact which opens

\textsuperscript{18} See note 4 supra.

\textsuperscript{19} At its most powerful and synthetic moments, collective bargaining law addressed the central problems of liberal political theory in the United States since World War II. Among them are the following:

(a) The first is the problem of distinguishing between "public" and "private" or, in the terminology of classical political theory, between "state" and "civil society." The doctrinal formulation of this problem in American constitutionalism is the "governmental action" requirement of the fifth and fourteenth amendments.

What might be called the "public/private problem" constantly recurs in the efforts of liberal political theory to justify governmental "regulation" of private conduct. The "public/private problem" is that, on the one hand the distinction between public and private is ideologically necessary to liberal thought and, on the other hand, the rise of the regulatory state constantly erodes the meaningfulness of this distinction. The public/private distinction is necessary in order to justify the private appropriation of socially-created wealth, to sanction private control of investment and resource-allocation decisions of societal consequence, and generally to legitimize the "free" market as an institution. On the other hand, the meaningfulness of the distinction has been undermined by the spectacular expansion since the New Deal of governmental responsibility for management of the economy and of governmental regulation of "private" economic transactions. The conceptual distinction between public and private has also been pushed to the breaking point by the phenomenon of "corporativism," that is, the emergence and primacy of vast corporate entities (e.g., corporations, unions, universities) whose internal procedures and external contractual relationships constitute a species of law-making. Such entities, though regulable, are ordinarily treated at law as "private," although their de facto power rivals or even supersedes that of public agencies and although their actions are of societal consequence.

The courts have struggled with the public/private problem in collective bargaining cases. There is, for example, no clear answer to the question of whether a labor union is a "public" or "private" entity. See text accompanying notes 73-83 infra. See also, e.g., Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (on the theory that a union is a private organization, it may set its own membership rules, even if they are race-discriminatory; yet on the theory that the exclusive bargaining activity of a union is cloaked with the imprimatur of public power, race-discrimination is barred in union's bargaining conduct). Similarly, a frequent refrain of collective bargaining law is that freedom of contract and private-ordering are fundamental to the scheme of the NLRA, see H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), and that therefore the National Labor Relations Board and the courts may not intrude into the substantive aspects of collective bargaining. See generally H.K. Porter; NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). Yet it is perfectly clear that countless routine actions of the Board and courts directly impact on the substantive outcomes of the collective bargaining (for example, bargaining unit determinations and the development by the federal courts of law governing the enforcement of collective bargaining contracts). As I will attempt to show, the most successful effort within collective bargaining law to cope with the pub-
the greatest promise to critical labor jurisprudence, affording us the op-

lic/private problem is the theory of grievance arbitration. See text accompanying notes 63-64 infra.

(b) A second problem of post-World War II liberal political theory revolves around the treatment of social conflict. Almost all versions of classical liberal political theory are premised on the notion that economic and social conflict is endemic to civil society. The idea of the “social contract” is that all citizens share an overriding interest in maintaining certain fundamental groundrules after observance of which each person is free to pursue self-interest to the limit. The state is posed as the expression or guarantor of the minimal, interest-neutral groundrules for the conduct of social life and economic conflict.

Socialist thought challenged the liberal description of the state by arguing that state power is in fact “captured” by private interests and that the state ratifies and perpetuates class domination and inequality in social life. The appeal of socialism widened during the Great Depression and World War II, although more so in Western Europe than in the United States. A central task of liberal theory in the post-War period was therefore to provide a plausible explanation of why economic conflict is not symptomatic of class domination and therefore does not implicate fundamental issues of the political organization of society. A significant approach to this problem, developed under the rubric of the “end of ideology,” was to argue that economic conflict is grounded in the technological imperatives of industrial society as such. It was then possible to acknowledge the reality of economic conflict but to claim that conflict is a malady treatable by the judicious intervention of neutral technocrats, see note 26 infra, operating within a neutral institutional framework. These claims were in turn used to support the idea of a general, societal consensus around process-oriented dispute-resolution mechanisms. Labor arbitration presented liberal theory with a model of universal significance.

(c) A third problem for post-War liberal thought was to explain the unabated persistence of hierarchy and meaningless work in the context of the heightened life-profile expectations and the unbounded technological possibilities of the “affluent society.” At least until the civil rights revolution of the 1960’s led to the “rediscovery” of poverty and the exclusion of “marginal” groups from the American Dream, the problem of liberal thought was to explain the successes of capitalism, not its failures. That is, to paraphrase Harry Braverman, what had to be justified was the dehumanizing quality of the work capitalism provides when it is successful in providing employment, and the appalling human and environmental effects of capitalism’s productive might when that might is operating at full capacity. H. Braverman, Labor and Monopoly Capital 14 (1974). On this problem, see generally Block & Hirschhorn, New Productive Forces and the Contradictions of Contemporary Capitalism: A Post-Industrial Perspective, 7 Theory and Society 363 (1974). Collective bargaining law responded to this problem by using the rhetoric of industrial democracy to induce worker consent to hierarchy. See text accompanying notes 27-32 infra.

(d) Finally, post-War liberal political theory confronted the problem posed by the epochal shift over the course of the twentieth century in judicial thinking about the nature of “rights.” The trend is away from a notion of rights as shields standing between the individual and the exercise of governmental power toward a conception of rights as ingredients of public policy. Compare, e.g., Lochner v. New York, 198 U.S. 45 (1905) (due process clause prevents improper intrusion of governmental power into the protected realm of free contract) with Mathews v. Eldridge, 424 U.S. 319 (1976) (scope of due process protections measured in part by governmental interest in providing due process). The collective bargaining cases have provided a major contribution to the development of contemporary rights theory. Yet a major argument of this paper is that collective bargaining law contains no coherent theory of rights. See text accompanying notes 67-113 infra.

The Constitution protects some substantive rights, such as the values associated with freedom of expression and the norm of forbidding certain types of state-fostered inequality. Contemporary jurisprudence of course contains other notions of substantive entitlement, e.g., minimal levels of public assistance, minimum wage and maximum hours protections, public education and so on. (Such entitlements derive from positive law; with rare exceptions they are not constitutionally mandated.) For the most part, however, rights in the regulatory state are not substantive but they are either procedural rights vis-à-vis public agencies or representational rights within the corpora-
portunity to make a contribution to political theory as well as to historiography and doctrinal analysis.

II. THE POLITICAL THEORY OF COLLECTIVE BARGAINING LAW

The affinity of collective bargaining law to political theory is underscored by the preeminence in the former of the legislative metaphor. The analogy of collective bargaining to legislation directly invokes the image of the political process. An early but critical judicial expression of the legislative analogy appears in the great 1944 civil rights case of Steele v. Louisville & Nashville R.R. Co. The analogy became a pervasive explanatory paradigm by the time of the Supreme Court’s 1960’s decisions in the Steelworkers’ Trilogy and Vaca v. Sipes. As Justice Douglas wrote in the Trilogy:

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . The collective agreement . . . calls into being a new common law—the common law of a particular industry or of a particular plant. . . . A collective bargaining agreement is an effort to erect a system of industrial self-government.

The strategy of analogizing the collective bargaining process to a lawmaking function enables its theoreticians to respond to several of the challenges posed to liberal political theory by the emergence of activist entities that govern our lives. Such rights are “balanced” against public policy considerations and “tailored” by the exercise of discretion by public agencies or corporativist entities. These themes—i.e., the primacy of procedural and representational over substantive rights and the modulation of rights according to the needs of the state and corporativist power—are central to collective bargaining law. They are, for example, powerfully illustrated by the well-known duty of fair representation case of Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). At the same time that procedural and representational conceptions of rights flourish, the right to utilize self-help and self-organization so as to enhance group status suffers serious eclipse. See generally note 14 supra.

The significance of the legislative metaphor in collective bargaining law was highlighted to me by Katherine Stone’s paper presented to the Third Annual Conference On Critical Legal Studies, San Francisco, California, November 10, 1979. Stone’s ideas are elaborated in her article, supra note 1, which traces the intellectual origins of the analogy between collective bargaining and legislation.

20. The significance of the legislative metaphor in collective bargaining law was highlighted to me by Katherine Stone’s paper presented to the Third Annual Conference On Critical Legal Studies, San Francisco, California, November 10, 1979. Stone’s ideas are elaborated in her article, supra note 1, which traces the intellectual origins of the analogy between collective bargaining and legislation.

21. Steele, 323 U.S. at 198 (1944) (“[f]or the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its powers to deny, restrict, destroy or discriminate against the rights of those for whom it legislates . . . .”). I discuss the Steele case and the import of its version of the legislative analogy in my forthcoming paper The Quest For Industrial Democracy and the Struggle Against Racism, supra note 1.


23. Vaca v. Sipes, 386 U.S. 171, 191 (1967) (rationale of holding that individual employee lacks an absolute right to have grievance taken to arbitration turns on union’s role as “coauthor” of the law of the shop).

highly interventionist state and of a heavily regulated economy in the period of advanced capitalism. First, the legislative analogy seeks to induce worker consent to the authoritarian character of the modern enterprise and to the prerogative of private capital to control the production process and dispose of the products of labor. Second, as we shall see, conceiving of collective bargaining as a type of legislative process provides a basis for claiming that there is a universally shared social interest in the use of certain technocratic methods—notably grievance arbitration—for resolving economic conflicts. Third, this argument is in turn used to vindicate an active governmental role in regulating economic behavior of societal consequence while at the same time theoretically maintaining the "private" character of industrial decision-making. The particular role carved out for government under this interpretation of the collective bargaining laws is one that institutionalizes and dampens class conflict.

The legislative analogy appeals directly to the democratic aspirations embodied in the Wagner Act. By invoking the democratic image of parliamentarism, the analogy elicits worker consent to the hierarchical and authoritarian character of the workplace. The analogy promises a modicum of democratic participation to encourage worker acceptance of the supposedly "inevitable and eternal separation of industrial men into managers and the managed." But collective bargaining law is only marginally concerned with worker input or participation in significant industrial decisions. Its real preoccupations are with efficient management of the enterprise, with establishing a governance process that "promote[s] industrial stabilization," "achieve[s] industrial peace," and maintains "uninterrupted pro-

25. See note 19 supra.

26. As used here "technocratic" means the belief that economic conflict resolution is amenable to the intervention of scientific technique and neutral experts, and indeed that expertise should therefore be rewarded by privileged social status and access to power. Technocratic thinking comported with the effort to denude economic conflict of enduring political significance.

27. Klare, Judicial Deradicalization, supra note 1, at 284, 289-90. See also note 15 supra.


Where collective bargaining is the practice, wages and other conditions of employment are the product of consent, for they are governed by a collective bargaining agreement negotiated between the employer and the representatives of the employees instead of being established by the employer's fiat.

(Emphasis added).

duction.\textsuperscript{31} The legislative analogy, with an accent on "industrial self-government" rather than "industrial democracy," contains the premise that the workplace is not a forum for workers to express themselves and to realize their creative potential and capacity for self-governance,\textsuperscript{32} either in work or in collective labor struggle. Rather the workplace is above all a place that must be governed. In short, the core theoretical function of the legislative analogy is to justify the necessity of hierarchical government of modern industrial operations through a command structure embodied in a system of rules.

Liberal management theory assumes that the modern industrial enterprise cannot function without a hierarchical organization based on a highly elaborated structure of rules.\textsuperscript{33} This "web of rules"\textsuperscript{34} is said to be necessary for several reasons: for an enterprise to achieve any operating capacity, employee conduct must be guided by rules; rules are needed to obtain, through the norm of consistency, at least minimal employee reconciliation to and cooperation with management; and rules are required to maintain the ordering of authority, responsibility and command, the bureaucratic organization of the workplace, necessary for it to operate at peak efficiency and productivity.\textsuperscript{35} Therefore, as David Feller has written, the:

larger significance [of collective bargaining] is the creation of a system of private law to govern the employer-employee relationship. . . . Collective bargaining is not, then, the occasion for introducing rules into the employment relationship. It is, rather, a method by which the employees participate in what would otherwise be a system of unilat-

\begin{itemize}
\begin{quote}
The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government.
\end{quote}
\item \textsuperscript{32} See note 4 supra.
\begin{quote}
The labor organization which is common to all industrial societies is, however, of a relational sort. What we find everywhere is not some one vehicle or mechanism of labor organization but the efforts to define via a web of rule [sic] some structured role for the labor force in relation to the work process. . . . The contemporary labor theorist confronted with a variety of patterns of industrialization finds universality not in the "labor-movement" response but in labor organization in the sense of the structuring of a web of rules relating the work force to the work process.
\end{quote}
\item \textsuperscript{34} See J. Dunlop, \textit{Industrial Relations Systems} (1958); S. Slichter, \textit{Union Policies and Industrial Management} (1941); Feller, supra note 8, sources cited at 720-24; Korpi, \textit{Industrial Relations and Industrial Conflict: The Case of Sweden}, in \textit{Labor Relations In Advanced Industrial Societies} sources cited at 90-93 (B. Martin & E. Kassalow eds. 1980).
\item \textsuperscript{35} Feller, supra note 8, at 720-23.
\end{itemize}
eral management rulemaking and administration.\textsuperscript{36} Put another way, collective bargaining is a system for inducing workers to participate in their own domination by managers and those whom managers serve.

This view of collective bargaining law rests on "an acceptance of the authoritarian nature of the employment relationship."\textsuperscript{37} The need for authoritarian hierarchy and command in the workplace is said to be inevitable,\textsuperscript{38} to emanate from the very "nature of the modern industrial enterprise."\textsuperscript{39} It is argued that the modern complex enterprise not only is, but must be hierarchically and bureaucratically organized in order for it to operate efficiently.\textsuperscript{40} The theoretical purpose of modeling col-

\textsuperscript{36} Id. at 721-24.
\textsuperscript{37} Id. at 737.
\textsuperscript{38} Cf. Harry Shulman's classic arbitral opinion in Ford Motor Co. (River Rouge), 3 Lab. Arb. 779, 781 (1944):

The problems of adjustment with which we are concerned under the contract are problems which arise and require adjustment in the management of an enterprise under any form of economic or social organization. Any enterprise—whether it be a privately owned plant, a governmental unit, a consumer's cooperative, a social club, or a trade union—any enterprise in a capitalist or a socialist economy requires persons with authority and responsibility to keep the enterprise running. In any such enterprise there is need for equality of treatment, regularity of procedure, and adjustment of conflicting claims of individuals . . .

[A]n industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And some one must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision.

\textsuperscript{39} Feller, supra note 8, at 721.

\textsuperscript{40} From the premises described in the preceding paragraphs, Feller derives the conclusion that collective bargaining can be functional from a management standpoint. He points out that many non-unionized firms promulgate rule systems resembling those existing under the regime of collective bargaining, \textit{id.} at 723-24, and that many employers, at least in large, heavy industry, accept collective bargaining even though if they were really determined to resist or eliminate it they have the power to do so. \textit{id.} at 763-64. Feller argues that collective bargaining serves several important managerial ends:

(a) It reinforces employee consent and reconciliation to the rules of the shop, \textit{i.e.}, it legitimates the hierarchical, ruled structure of the workplace, \textit{see id.} at 764-66 (Feller calls this the "employee consent function" of the collective agreement, \textit{id.} at 768);

(b) Grievance arbitration procedures central to collecting bargaining operate "as a mechanism by which higher management polices compliance with its orders by the lower ranks in the hierarchy," \textit{id.} at 766; \textit{see id.} at 776-78 (Feller calls this the "management disciplinary" function of the collective agreement, \textit{id.} at 768). The effect of Vaca v. Sipes, 386 U.S. 171 (1967), in which Prof. Feller was union counsel, is to coopt unions into performing the critical management tasks of monitoring the workplace rule system, identifying significant and disruptive problems, and bringing such problems to the attention of the top levels of management for resolution;

(c) The collective agreement holds benefits steady for the term of the contract, thereby assisting long-range planning by the enterprise;

(d) The collective contract almost always operates to divest employees during its term of the right to engage in concerted activity to change workplace rules or to protest management's interpretation and administration of the rules, \textit{see id.} at 769-71. In this latter respect the doctrine of Goya Foods, Inc., 238 N.L.R.B. 1465, 99 L.R.R.M. 1282 (1978), operates to extend the managerial advantages of the collective contract beyond its term.
lective bargaining on the legislative paradigm is to conceive it as a system that performs the managerial function of constantly generating and revising the operating rules of the workplace while at the same time appearing to be a procedure to which the governed, the employees, have consented.

The technological determinism that informs the apologetic literature and decisional law of collective bargaining, e.g., the notion that certain hierarchical forms of workplace organization are mandated by the very "nature" of advanced industrial technology, underlies the explanation offered in traditional theory as to why industrial conflict is not a function of class domination and therefore does not implicate questions of the fundamental political and economic organization of society. Liberal management theorists argue that the "logic of advanced industrialization" constantly reshapes the labor force, vastly increasing the middle strata in particular and social mobility in general. The complexity of social stratification is magnified by the wide availability of higher education and technical skill training necessitated by advanced industrialism.

The increasingly complex occupational structure of industrial society is seen as forming the bases for a multiplicity of specific and competing interest groups, among which power is widely diffused and shared with the state. . . .

Unions are . . . assumed to become based on profession or occupation rather than on class and therefore to form sectional rather than class-based interest groups. Given a "pluralistic power structure of countervailing groups, conflicts of interest are recognized as inevitable . . . [yet such conflicts are] narrowed down to questions concerning the distribution of the results of

41. It is worthy of note that there is no convincing reason to believe that the authoritarian organization of the workplace is "necessary" in the sense that it flows from the very "nature" of modern industry. Persuasive evidence indicates that the organization of the modern enterprise is traceable to strategies devised by capitalist entrepreneurs and managers to wrest control of the work process from workers. The techniques we call "scientific management" were efforts to divest workers, particularly skilled workers, of power they exercised by virtue of their possession of specialized craft knowledge about production and by virtue of "codes of mutuality" through which they self-regulated the pace of production. A signal achievement of contemporary labor history has been to demonstrate that the so-called "nature" of modern enterprise organization is in fact an historically contingent product of generations of power struggle between capitalists and workers over control of the work process. See generally H. Braverman, supra note 19; R. Edwards, Contested Terrain: The Transformation of the Workplace in the Twentieth Century (1979); D. Montgomery, Workers' Control in America (1979); K. Stone, The Origins of Job Structures in the Steel Industry (paper presented to the Conference On Labor Market Segmentation, Harvard University, March 16-17, 1973), abridged in Radical America, Nov.-Dec. 1973, at 19.

42. Korpi, supra note 33, at 91 (emphasis added). I base this paragraph on Korpi's excellent summary of post-War liberal industrial relations theory, including the contributions of political theorists such as Robert Dahl and Ralf Dahrendorf, sociologists such as Raymond Aron and Daniel Bell, and management theorists such as John Dunlop.
production . . . . Thus, while conflict remains in industrial society, it is gradually rendered innocuous to society's basic organization.\textsuperscript{43}

Consistent with this vision is an emphasis on institutionalizing industrial conflict and upon discovering formalistic and technocratic modes of workplace dispute resolution. It is probably here that American collective bargaining has made its most extraordinary contribution: the development of the system of grievance arbitration. If the collective contract is the "charter" of industrial government, grievance arbitration becomes the continuous, developmental common law system for filling in the gaps in the industrial rule of law.

There is truth to the traditional view that labor and management autonomously developed grievance arbitration as a private dispute-resolution system to keep the law "out" of their affairs.\textsuperscript{44} But the force of law has also always been a critical factor in the encouragement and proliferation of grievance arbitration systems. Grievance arbitration first became widespread under the aegis of the National War Labor Board.\textsuperscript{45} From the time of \textit{Textile Workers Union v. Lincoln Mills}\textsuperscript{46} onward, the Supreme Court has worked assiduously to refine the mystique of grievance arbitration as a "favored process" and "proved technique for industrial peace."\textsuperscript{47} Indeed, the Court has made enforced adherence to arbitration agreements a "dominant motif" and "kingpin of federal labor policy."\textsuperscript{48}

Because arbitration is viewed as a proven technique to achieve industrial peace, the Court relies on the availability of arbitration as the basis for stripping workers of the statutory right to engage in concerted activity for dispute-resolution purposes,\textsuperscript{49} even in cases involving pro-

\textsuperscript{43} Id. at 90-91.


\textsuperscript{45} Feller, \textit{supra} note 8, at 745-48; Lynd, \textit{Investment Decisions, supra} note 1, at 413-16.

\textsuperscript{46} \textit{Textile Workers Union v. Lincoln Mills}, 353 U.S. 448 (1957) (specific enforcement under Labor Management Relations Act § 301 of agreements to arbitrate labor disputes).


\textsuperscript{49} Compare NLRA § 7, 29 U.S.C. § 157 (1976) ("[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection"); \textit{id.} § 13, 29 U.S.C. § 163 ("[n]othing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . .."); Labor Management Relations Act § 502, 29 U.S.C. § 143 (1976) ("[n]othing in this Act shall be construed to require an individual employee to render labor or service without his consent . . ."); and Norris-LaGuardia Act § 4(a), 29 U.S.C. § 104(a) (1976) (forbidding federal courts from enjoining peaceful strikes) \textit{with} \textit{Boys Markets, Inc. v. Retail Clerks Local 770} (strike over arbitrable grievance enjoinable); and \textit{Local 174, Teamsters v. Lucas Flour Co.}, 369 U.S. 95 (1962) (strike over arbitrable grievance is breach of contract).
tests against race discrimination and potentially life-threatening safety hazards. Likewise, in its zeal to enhance and protect the grievance arbitration system, the Court relies upon its view of the needs of that system to deny employees rights on the collective bargaining contract. At the same time that the mystique of grievance arbitration is used to justify the suppression of collective worker self-help, grievance arbitration is an important instrument of managerial control. Many of the primary features of the most advanced management practice in non-unionized firms have their origin in the grievance arbitration aspects of collective bargaining. The defining characteristic of modern management practice is capital’s desire to control workers and the flow of the work process by controlling the social organization of the enterprise. The recent literature indicates that this is achieved through the institutionalization of management’s power by the introduction of the “rule of law” into the workplace. This approach is, of course, precisely the contribution of collective bargaining ideology and practice to American management. The introduction of grievance procedures, seniority systems and internal job posting and bidding in non-union

50. Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (concerted activity by dissenting unit members held unprotected). Although the withdrawal of section 7 protection from otherwise routine concerted activity in Emporium Capwell tested on the concept of majority rule and exclusive representation embodied in section 9(a), Emporium Capwell unquestionably favors formalized dispute-resolution mechanisms over employee self-help in the area of remedying alleged race-discrimination in employment. The Court’s reasoning strongly favors grievance arbitration as an “orderly, established [process] for eliminating discrimination,” 420 U.S. at 70, and condemns the dissenting employees for “bypass[ing] the grievance procedure,” id. at 67, and “short-circuit[ing]” this orderly process, id. at 70.


52. This is the effect of Vaca v. Sipes (empowering the union to decline, within the confines of its duty of fair representation, to process an employee’s grievance) and Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) (requiring employees wishing to assert contractual claims to do so in the first instance through the grievance procedure). Both Vaca, 386 U.S. at 191-93, and Maddox, 379 U.S. at 652-53, are explicitly grounded on the Court’s solicitude for the requirements of a smooth-functioning arbitral system.

53. The Court appears relatively uninterested in the question of whether grievance arbitration actually serves the purposes Justice Douglas ascribed to it in the Trilogy, much less whether the system serves the interests of workers or, indeed, even how grievance arbitration actually works. On these questions there are, of course, widely differing views. Readers will profit from Charles Spencer’s fascinating description of the actual operation of grievance arbitration in a large steel plant. C. Spencer, Blue Collar: An Internal Examination of the Workplace (1977). A harsh critic of the system, Spencer decries the way in which grievance arbitration defuses and disperses rather than galvanizes workers’ collective power. Interestingly, though, despite his criticisms Spencer still claims that “the grievance procedure has become the single most important social mechanism for recording the blue collar workers’ resistance” to poor working conditions. Id. at 134.

54. See note 40 supra.

55. Stone, supra note 1, demonstrates the integral connection between the reigning “human relations” school of industrial management and the traditional liberal theory of collective bargaining law.

56. See generally R. Edwards, supra note 41, especially at Chapter 8.
firms so closely parallels the personnel procedures of unionized firms that we may say that they reflect generic problems of modern industrial management. The collective bargaining system is the most sophisticated and most carefully thought-out managerial response to these problems.

In summary, the ideology of collective bargaining law, as articulated by its sophisticated liberal theorists and judicial sponsors, justifies, first, industrial hierarchy against a background of democratic aspirations, and second, private lawmaking by powerful groups. With this as background we can see how traditional collective bargaining theory provides a justification for state regulation of an economy based on private enterprise.

Providing an explanation and defense of a legitimate role for the public regulation of a supposedly private economy presents a fundamental problem to contemporary liberal political theory. The core of the problem is to find a justification for public regulation which does not in logic quickly lead to the notion that all economic decisions of societal consequence (e.g., all investment decisions by the "top 500" corporations) should be subject to public control. In short, the problem is to reformulate the "public/private" distinction so central to classical liberal political theory in a world whose social reality has rendered this distinction obsolete.

In the traditional theory of collective bargaining law, industrial conflict has been denuded of political or class-based content and recast as the struggle of countervailing pressure groups solely over issues of economic distribution. It follows that all parties—i.e., capital and labor—can be said to share a common interest in uninterrupted production. The Supreme Court explicitly so asserts in the Steelworkers Trilogy. This shared interest in maintaining operations coincides with the public’s "convenience" interest in avoiding the disruptive effects of strikes and with the state’s "national-security" interest in labor

---

57. The emphasis in the text on parallels is not intended to divert attention from the fundamental difference that in the unionized plant workers can and do periodically resort—lawfully or otherwise—to their collective, organized power to advance their interests within the structure of the firm.

58. See note 19 supra.

59. Warrior & Gulf Navigation Co., 363 U.S. at 582 (“the parties’ objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement”) (emphasis added). See also NLRB v. Local 1229, IBEW, 346 U.S. 464, 472 (1953) (“[i]t is . . . elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise”) (footnote omitted). Cf. Lincoln Mills, 353 U.S at 454 (quoting legislative history of Labor Management Relations Act) (“[t]he chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement”).
peace in vital industries.\textsuperscript{60} True, liberal collective bargaining theory allows for the fact that labor and management occasionally have to slug it out in a regrettable but inevitable donnybrook over the precise size of each side's slice of pie (hence the biennial or triennial economic strike is recognized as a legitimate weapon).\textsuperscript{61} But it is deemed folly for all concerned to permit routine, day-to-day disputes (\textit{i.e.}, grievances) to interrupt production and thereby diminish the overall size of the pie. Thus while collective bargaining law acknowledges the inevitability, and even utility, of some forms of economic conflict, a line is drawn with respect to the midterm strike. The wildcat is not only folly. It is out of bounds, a crime, indeed, the ultimate form of social deviancy in advanced industrial society.\textsuperscript{62} The wildcat strike must be suppressed, and it comes in for brutal treatment by law (second in harshness only to the treatment accorded secondary activity and, of course, public employee strikes).

Yet to be consistent with their overall conflict-institutionalizing project the liberal theorists could not advocate repression of the midterm strike without simultaneously providing alternative, seemingly hospitable dispute-resolution processes through which workers could air their grievances. The alternative dispute-resolution system must be fully backed by the power of government, yet simultaneously appear to be the autonomous creation of the private parties to industrial disputes. Collective bargaining law satisfies these concerns by substituting the formalized processes of arbitration for direct action. This trade-off—one of the most profoundly important developments in modern labor law—virtually compels workers to surrender their greatest source of power, the powerconcertedly to interrupt work. The arbitration system removes grievances from their context as experienced on the shop floor to the rarified atmosphere of the hearing room.

\textsuperscript{61} See \textit{NLRB v. Insurance Agents' Int'l Union}, 361 U.S. 477, 488-89 (1960): \[\text{Collective bargaining . . . cannot be equated with an academic collective search for truth . . . . The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.}\]
\textsuperscript{62} See \textit{American Shipbuilding Co. v. NLRB}, 380 U.S. 300, 317 (1965) (NLRA "contemplate[s] resort to economic weapons should more peaceful measures not avail.").
Now, within the legislative analogy, the collective bargaining contract represents a legislative compromise among legitimately conflicting interests. Real legislators, at least in theory, are elected public officials representing the public interest, although everyone knows they in fact respond to private interests and groups powerfully represented in their respective constituencies. In the collective bargaining situation it is understood that management and labor, the opposed groups from whose strategies and relative bargaining strength the "legislative compromise" results, are private interests. In recognition of the fact that formulation of the "legislative compromise" is a "private matter," government is supposed to play a minimal role in regulating the negotiation process as such.63

However, superimposed on the private "statute" or "charter" of the workplace (i.e., the contract) is a content-neutral adjudicative mechanism for "reasoned elaboration" upon the legislative compromise in particular cases.64 Because grievance arbitration is supposedly a technical, content-neutral process, liberal theorists can plausibly claim societal consensus on the use of arbitration to obtain the universally accepted goal of industrial peace. The notion that grievance arbitration and the goal of industrial peace are content-neutral is, of course, a fiction as bizarre as the notion that courts "discover" but do not

---

63. The classic statement of this posture is the oft-repeated quotation from the legislative history of the Wagner Act:

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.


64. The industrial theory of "separation of powers" can be further refined by adding a "constitutional" layer on top of the "legislative" (collective bargaining negotiations) and "judicial" (arbitration) levels. Namely, the statutory duty of fair representation has been said to circumscribe the permissible limits of union action in settling workplace disputes with employers. See Brief of Teamsters For A Democratic Union, et al., As Amici Curiae, Williams v. Pacific Maritime Ass'n, 101 S. Ct. 896 (1981) (cert. denied). Obviously the employer's statutory duty to bargain in good faith also forms part of the "constitution" of the workplace on this model.

In passing, there is an analogy in collective bargaining theory to the "executive" function as well as to legislation and adjudication. This is supplied by the so-called "work now and grieve later" doctrine. It is a fundamental rule of arbitral law that "employees must obey management's orders and carry out their job assignments, even if believed to violate the agreement, then turn to the grievance procedure for relief." F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 671 (3d ed. 1973). An employee's refusal to obey an improper order is a separate, justifiable ground of discipline, absent exceptional circumstances such as an imminent threat to safety. See C. SUMMERS & H. WELLINGTON, CASES AND MATERIALS ON LABOR LAW 705 (1968).

The effect of this doctrine is to vest management with full authority to interpret and apply the "law of the shop" in the first instance, subject to later review (as to arbitrable matters) in the grievance procedure. See Feller, supra note 8, at 737-39, 770-71, 777-78.
“make” law. But this doctrinal formulation has achieved something quite extraordinary. It has justified the existence of a preeminently important public interest in the so-called private question of managerial practice, but has done so in a manner that steadfastly maintains the private character of significant industrial decisionmaking. Put another way, collective bargaining law legitimates the activism of the regulatory state by demonstrating that management practice is a necessary and vital focus of public policy. The intellectual challenge to liberal political theory has been met. The theory acknowledges the close interconnection between “public” and “private,” yet the conceptual barrier between them is maintained. Public regulation of societally significant economic conduct is justified by reliance on a theory that insists, even from the standpoint imputed to the dominated classes, upon the private character of economic activity.

III. THEORIES OF RIGHTS IN THE WORKPLACE

In the preceding section, I attempted to demonstrate that the analogy between collective bargaining and law-making enables its liberal theorists to cope with certain problems of management theory and political theory. However, by bringing the intellectual apparatus associated with the ideas of constitutionalism and the separation of powers to the shop floor, collective bargaining law reproduces in that context age-old problems of general political theory. In particular, liberal political theory does not possess a coherent theory of rights. It is unable convincingly to explain either the source or the meaning of rights.

On the question of origins, one strand of liberal thought adheres to the view that people “naturally” possess inalienable rights as against government, rights that are morally superior to all law including the law that creates government. A contrary tradition claims that rights derive from law, including the fundamental social compact said to au-

---

65. It is very important to be clear that I am not arguing that professional arbitrators lack the qualities of fairness and impartiality. The claim is of quite a different nature, namely, that arbitration as a system contains a pronounced, value-laden “tilt” toward management. The system may well be administered neutrally and judiciously, but it nonetheless in the long run promotes management interests because of the substantive content of arbitral law and the institutional function of arbitration in suppressing collective worker self-activity. Notwithstanding my criticisms of the systemic significance of arbitration, I still regard it as the most important source of such due process as Americans have on the job. See note 53 supra.

66. “Separation of powers” refers here to the distinction between legislation and adjudication, not, of course, to the intertwined problems of the allocation of power in a federal system.

thorize state power. But both the natural rights and the positivist traditions contain such a high degree of internal ambiguity and contradiction as to deny each approach the capacity to definitively resolve—even within its own terms—most significant legal issues.

A second paramount issue in liberal political theory is the question of the relationship of state power to the individual or, alternatively, the question of the moral evaluation of the institutionalization of communal power. From one perspective government is a necessary evil to be kept within close boundaries. It follows that rights exist for the purpose of shielding the individual from the unauthorized exercise of state power. A contrary tradition takes a somewhat more hospitable attitude toward government, seeing in it the potential to enhance social welfare. In this view rights are conceived as entitlements to participate in the advantages flowing from the exercise of state power. Here again, both the individualist and welfare traditions are subject to such severe internal ambiguity and contradiction that each perspective fails to generate determinate prescriptions with respect to most significant legal issues.68

The incoherence of liberal rights theory is reproduced in the labor context. The decisional law of collective bargaining has generated a number of frameworks and hierarchies of workplace rights, each of which is so ambiguous and internally contradictory that the courts may, and do, brutally manipulate these rights frameworks in particular cases. Through this process, so painful to observe, “collective” comes to mean “disciplinary” rather than “communitarian”;69 “public” comes to mean “subject to government regulation,” not “a forum for communicative interaction”; and “fundamental” sometimes means a “precious guarantee of institutional democracy,” but at other times means “antiunion.” The malleable character of collective bargaining law’s rights frameworks, in the hands of those who would abuse it, has rendered the entire constellation of workplace rights, fought for by working people with majestic courage and fortitude, into an institutional system of repression.

I am unable in this context to develop the full taxonomy of the law’s conceptualizations of workplace rights, a task to which I intend to

68. The arguments contained in this and the preceding paragraph are derived from Blackstone’s Commentaries, supra note 5, particularly at 351-62.

69. That is, “collective right” becomes a symbol for the legal power of the institutional representative of the group to discipline or disadvantage dissenting members, rather than an ideal in which the law protects the collective decisionmaking process and actions of workers because group life is valuable in its own right. In a similar vein, James Atleson notes that judicial invocation of the notion of the “common interests” of management and labor is almost always a signal that section 7 rights are about to be narrowed and subordinated to managerial prerogative, rather than expanded so as to enhance employee participation in a “collective enterprise” or so as to recognize duties of the employer toward employees flowing from their “joint venture.” See Atleson, Values and Assumptions, supra note 1, at 104.
devote a future essay. The following examples are intended merely to illustrate the incoherence and potential for manipulation of the labor rights frameworks, an incoherence ultimately rooted in the contradictions of liberal political theory.\textsuperscript{70}

\textbf{A. Public vs. Private}

The public/private distinction is an essential aspect of liberal thought in general and liberal rights theory in particular.\textsuperscript{71} In American constitutionalism it finds preeminent expression in the intractable problems of the “state action” doctrine. There are several manifestations of the public/private dichotomy in the labor context. Reference has already been made to one, viz., whether unions and employers assume such importance in the direction of society as to call into question their traditional treatment as “private” entities.\textsuperscript{72} The key legal issue posed by this aspect of the public/private distinction goes to the appropriate limits of state intervention in the collective bargaining process or, put another way, what the “rights” of the parties are in collective bargaining.

A second manifestation of the public/private problem in the labor context deals with characterization of the activities and purposes of labor unions. This issue tracks the so-called “public function” strand of constitutional state action doctrine. It implicates a wide spectrum of rights issues, many dealing with the relationship of employees to unions. Thus, unions seem to be “semi-public” when communist exclusion is at stake,\textsuperscript{73} but “private associations” when exclusion of black workers is involved.\textsuperscript{74} Unions are quasi-public “taxing authorities”\textsuperscript{75}

\textsuperscript{70} See text at notes 112-18 infra.

\textsuperscript{71} See generally Frug, The City As A Legal Concept, 93 HARV. L. REV. 1057 (1980).

\textsuperscript{72} See note 19 and text accompanying notes 58-65 supra.

\textsuperscript{73} American Communications Ass'n v. Douds, 339 U.S. 382, 401 (1950) (upholding constitutionality of a now-repealed section of the National Labor Relations Act, as amended by the Taft-Hartley Act, depriving unions of the benefits of the NLRA unless their officers filed non-communist affidavits) (“[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of . . . the union. But power is never without responsibility. And when authority derives in part from Government’s thumb on the scales, the exercise of that power by private persons becomes closely akin . . . to its exercise by Government itself.”).

\textsuperscript{74} Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) held that because unions are private associations they may set their own eligibility requirements for membership, even if membership is denied solely on the basis of race. See notes 19 & 21 supra. This view prevailed until the enactment of § 703(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c). See Elephant v. Brotherhood of Locomotive Firemen, 262 F.2d 359 (6th Cir. 1958), cert. denied, 359 U.S. 935 (1959).

\textsuperscript{75} Buckley v. American Fed’n of Television & Radio Artists, 496 F.2d 305, 311 (2d Cir. 1974):

[Assuming \textit{arguendo} that government action is involved here, the dues [involuntarily paid under a union security clause] . . . constitute the employee’s share of the expenses of operating a valid labor regulatory system which serves a substantial public purpose. If
when they collect dues under union security clauses, but apparently they are private and partisan entities when spending the same money. Unions are affected with a public interest, and therefore, government must regulate their internal decisionmaking processes when problems of racketeering and labor "bossism" are in the spotlight. When, however, the primary concern is a new spirit of rank and file militancy, unions are once again private institutions to whose "management" (read: "incumbent leadership") the courts must defer. 

76. See generally IAM v. Street, 367 U.S. 740 (1961). Technically the Street Court avoided constitutional issues due to Justice Brennan's construction of the Railway Labor Act. The constitutionality of spending compulsorily collected union dues for political purposes was reached by the Supreme Court in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), but there the difficult "state action" issues posed by unions operating in the private sector were avoided because the Abood case dealt with public sector collective bargaining. However, Abood and the dissenting opinions in Street point to the constitutional issues that Brennan's construction was designed to avoid. Treating Brennan's opinion as, for practical purposes, written in relationship to constitutional law concerns, I believe it reflects the fundamental contradiction pointed to in the text. Put simply, the issue is whether the first amendment rights of dissenting employees are offended when a labor union collects dues from them under a union security clause authorized by federal statute and then spends those dues on political causes deeply opposed by the dissenters. The answer is, apparently, "yes," but I believe it would be impossible for the Court to supply a clear explanation as to why this is so. The first amendment is implicated in the problem only if "governmental action" is present, i.e., only if we conceive of unions as cloaked with the imprimatur of public power when they enforce compulsory dues collections. However, the first amendment is offended only if we conceive of the union's subsequent expenditure of the dues for political purposes as private and partisan in nature. If the expenditures were "public" and "non-partisan" the dissenting employees would have no more right to claim an infringement of their first amendment freedoms than does the ordinary taxpayer when some government agency spends money on publicity.

By way of example, the United States Department of State has information officers who brief the news media on the foreign policy of the U.S. Government. Plainly these officers promote American foreign policy. A taxpayer might be deeply opposed to what they say, but presumably the work of information officers is deemed a public, non-partisan function and therefore properly underwritten by the public fisc. However, if the Secretary of State launched a campaign for elective office and directed State Department information officers to spend their time promoting his or her candidacy, presumably all would agree improper use was being made of the taxpayer's money. Leaving aside whether an individual taxpayer has standing to enjoin expenditures for such purposes, the gravamen of the offense would be that the State Department staff was no longer serving a "public," "informational" function but rather promoting a "private," "partisan" cause. To return to the labor context, the contradiction of the Court's position in Street is that there can be no first amendment problem unless a labor union is deemed to be "like" a public agency when it is collecting dues; but first amendment values are not offended unless a labor union is deemed to be "like" a private entity when spending the money.


Congress . . . finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations. . . .

78. It has apparently become stylish for courts, without a sense of irony, to refer to the
As the examples indicate, the power of government to regulate unions, including internal union affairs, derives from their quasi-public nature, i.e., from the fact that unions engage in economic activity of societal consequence (they control access to significant job benefits and they participate in making the law of the shop). On the other hand, the desire to regulate unions stems in part from this factor but also in significant measure from unions' value as private associations. In the latter role unions provide workers with an important context of social ties as well as a forum for expression on political and social issues, an institutional potential to aggregate and unify the voices of working people and to translate that unity into partisan leverage in the political arena. As a result of this public/private dichotomy, participation in union affairs is alternatively treated as something purely instrumental, a necessary evil to advance one's economic interests, or as a value in leadership of a union as the union's "management." E.g., Newman v. Local 1011, Communications Workers of America, 570 F.2d 439, 445 (2d Cir. 1978).

With some important exceptions there has been a perceptible trend during the 1970's in the law of LMRDA Title I, 29 U.S.C. §§ 411-415 (1976), away from the fairly vigorous judicial intervention in union affairs characteristic of the 1960's and in the direction of a heightened judicial deference to internal union processes. This has occurred against the backdrop of the emergence in the 1970's of militant rank and file opposition to incumbent union leaderships and to "business unionism" generally. See, e.g., Newman, 570 F.2d at 445-46; Aikens v. Abel, 373 F. Supp. 425, 434 (W.D. Pa. 1974) (court refuses to intervene to upset allegedly undemocratic internal decision-making process in Steelworkers Union, at one point relying on doctrine that unions are private and therefore not amenable to constitutional constraints).


See Directors Guild of America v. Superior Court, 64 Cal. 2d 42, 48 Cal. Rptr. 710, 409 P.2d 934 (1966) (different roles of state and federal regulation of union membership practices): [Union] membership affords to the employee not only the opportunity to participate in the negotiation of the contract governing his employment but also the chance to engage in the institutional life of the union.

Participation in the union's affairs by the workman compares to the participation of the citizen in the affairs of his community. The union affords to its members the opportunity to record themselves upon all matters affecting their relationships with the employer; it serves likewise as a vehicle for the expression of the membership's position on political and community issues.

64 Cal. 2d at 52-53, 48 Cal. Rptr. at 717-18, 409 P.2d at 941-42 (emphasis added).

This view is most pronounced in Justice Douglas's concurring opinion in Street: Some forced associations are inevitable in an industrial society. Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth, and Fifth Amendments be lost and we all succumb to regimentation. If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief, or expression.

The collection of dues for paying the costs of collective bargaining of which each member is a beneficiary is one thing. If, however, dues are used to promote or oppose [political or social causes] then the group compels an individual to support with his money causes beyond what gave rise to the need for group action.

367 U.S. at 775-77 (emphasis added). Compare this opinion with the extremely narrow view Justice Douglas, writing for the Court, took of the concept of union solidarity in NLRB v. Granite
itself, as a locus of social ties and political expression. 83

B. "Individual" vs. "Collective" Conceptions of Rights

Are workplace rights "individual," "vested" rights that may not be diluted by majoritarian processes or concerns? Or may the rights of employees be "balanced" against the interests of the majority or of the union as an institution? 84 These questions also replicate a set of fundamental issues contained in liberal rights theory.

In some contexts the courts address these problems explicitly. For example, it has been held that the right of workers to be immune from invidious discrimination is an entitlement securely vested in the individual. 85 For a time, a leading case indicated that the rights guaranteed by the Fair Labor Standards Act 86 are not vested, individual rights. 87 This view was in turn recently overruled by the Supreme Court. 88 And the federal labor policy embodied in the collective bargaining laws "ex-

---

83. See Directors Guild of America v. Superior Court, 64 Cal. 2d 42, 48 Cal. Rptr. 710, 409 P.2d 934 (1966); see also Mitchell v. IAM, 196 Cal. App. 2d 796, 805, 16 Cal. Rptr. 813, 819 (1961) (union members' political expression on matters of union interest treated as "an immeasurably important source of political thought.").

84. When the courts speak of "collective rights" they evidently mean this notion of measuring the scope of individual protection against majoritarian considerations. As noted, quite different meanings might be attached to the phrase "collective rights"; e.g., protection of the right of workers to act in concert, or protection of the participatory rights of workers in enterprises or in union governance as a value for its own sake.


We are also unable to accept the proposition that petitioner waived his cause of action under Title VII . . . . It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike . . . . These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

Id. (citations omitted).


87. Satterwhite v. United Parcel Service, Inc., 496 F.2d 448 (10th Cir. 1974), cert. denied, 419 U.S. 1079 (1974) (employee's right to sue for overtime compensation is foreclosed by prior submission of claim to arbitration under a collective bargaining agreement). "Wages and hours are at the heart of the collective-bargaining process. They are more akin to collective rights than to individual rights, and are more suitable to the arbitral process than Title VII rights." 496 F.2d at 451. Contra, Leone v. Mobil Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975).

tinduces the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."

In other contexts the vocabulary of "individual" versus "collective" rights may not be employed, but similar concerns and tensions are apparent in the cases. A classic paradox is the inherent circularity of the Court's decision in the watershed case of Vaca v. Sipes. A critical question in contemporary collective bargaining law is whether an individual employee has rights "on" a collective bargaining contract. Put another way, when the union declines or fails to pursue a worker's claim of breach of the collective bargaining contract through the grievance procedure, does the worker have a justiciable claim in contract against the employer? Vaca teaches that the courts may hear what is said to be the employee's "contractual claim" if, and ordinarily only if, the union has breached its duty of fair representation. Now, the union may commit a breach of the duty by a variety of forms of forbidden conduct. Classic cases of impermissible behavior are race-discrimination or bad-faith actions based on antagonisms arising from intra-union political quarrels. However, in addition to "discriminatory" and "bad-faith" behavior, "arbitrary" union conduct toward a unit member is also a breach of the duty of fair representation. The argument has been made that if the union "waives" or compromises an employee's entitlements under the collective contract, it acts "arbitrarily" within the meaning of Vaca. The problem with this argument is that whether it is "arbitrary" for a union to waive or compromise a contractual entitlement turns ultimately upon whether the employee is thought to have a vested right to, or at least a strong reliance interest in, that

---

90. 386 U.S. 171 (1967) (held, in effect, that proof of a breach of union's duty of fair representation will ordinarily be a condition precedent to employee suit to enforce a collective bargaining contract). See the discussion of Vaca in Feller, supra note 8, at 700-07; 773-817.
91. 386 U.S. at 185, 196.
92. Id. at 185.
93. Id. at 190.

When the contract establishes rules, the refusal to follow those rules can only be described as arbitrary. For the union to reject a grievance that correctly protests a violation of the contract is for it to 'arbitrarily ignore a meritorious grievance.' [citing Vaca]

... The individual employee has a right to have clear and unquestioned terms of the collective agreement ... followed and enforced until the agreement is properly amended. For the union to refuse to follow and enforce the rules and standards it has established on behalf of those it represents is arbitrary. ... 

Id. at 267, 279. Professor Summers' article is cited with approval in Smith v. Hussman Refrigerator Co., 619 F.2d at 1237 n.8, 1241.
entitlement in the first place. But of course contractual entitlements "vest," if at all, only if and when the union has breached its duty of fair representation. In other words, the quality of an employee's contractual entitlements turns on the scope of the union's representational duties; but the scope of the union's representational duties may in turn be measured by our initial evaluation of the quality of the employee's contractual entitlements. This confusing circularity of Vaca obviously arises from the Court's desire both to protect the "collective rights" of the exclusive bargaining representative to monitor the grievance process and simultaneously to preserve the "individual rights" of employees, in some circumstances, to enforce contract entitlements against employers on collective bargaining agreements.

C. "Inalienable" vs. "Waivable" Rights

Whether employee rights are waivable raises a third set of issues that replicate fundamental problems of liberal rights theory. Some workplace rights are said to be inalienable or, at least, presumptively inalienable. For example, a union may not waive certain rights deriving from section 7 to engage in in-plant leafletting, and it has been held that the right to strike to protest serious unfair labor practices is ordinarily not waived by a contractual no-strike clause. Similarly, a member's right to bring a charge against a union before the National Labor Relations Board cannot be "waived" by operation of the union's by-laws. Finally, it is now standard learning that public sector employment cannot be conditioned upon a waiver of first amendment freedoms; public employees take the inalienable protection of the first amendment with them into the workplace.

95. Some courts appear to take the view that contractual entitlements provided for in a collective bargaining agreement "vest" in covered employees. E.g., Hussman Refrigerator, 619 F.2d at 1238 & n.10, 1239; Price v. Teamsters, 457 F.2d 605, 609-10 (3d Cir. 1972). Contra, Feller, supra note 8, at 773 ("[t]he collective agreement is not a contract between the employer and any employee and neither may bring suit against the other for its breach").


97. Id. at 185-86, 196.


99. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); Arlan's Dep't Store, 133 N.L.R.B. 802, 48 L.R.R.M. 1731 (1961). Mastro Plastics apparently leaves open the possibility that a waiver of the right to strike to protest unfair labor practices could be found in unusual circumstances.

100. NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 425 (1968) (Douglas, J.): the proviso in § 8(b)(1)(A) [29 U.S.C. § 158(b)(1)(A) (1976)] that unions may design their own rules respecting "the acquisition or retention of membership" is not so broad as to give the union power to penalize a member who invokes the protection of the [National Labor Relations] Act for a matter that is in the public domain and beyond the internal affairs of the union.

101. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) ("unequivocally rejecting" the view that public employees may, consistent with the Constitution, be compelled to relinquish first
On the other side of the ledger, it is well understood that some section 7 rights can be waived by contract, most notably the right to engage in the economic strike,102 but also, for example, the right to sympathetic picket line observance.103 The statutory right of employees to refrain104 from concerted activity is in some circumstances waived when a worker undertakes the duties and privileges of union membership.105 And in the public sector it now appears that a state may constitutionally condition public employment upon a “waiver” of procedural due process guarantees. This results from the Court’s decision in Bishop v. Wood106 that state statutes or local ordinances creating public employment (e.g., a permanent job as a police officer) may specify the exclusive procedures to be followed when terminating such employment.

The question naturally arises why some workplace rights are inalienable and others are not. One typical response to this question tracks the “natural rights” tradition in political theory. That is, we decide which rights are inalienable by determining which are virtually essential to any moral and political justification of the institutional setup. This determination is made by a process of analytical deduction from the very “nature” or “conception” of the type of governance system desired. Thus for example, in the Magnavox case Justice Douglas reasons that the right to leaflet must be non-waivable because suppression of leafletting would suffocate any attempt by workers to unseat and replace the incumbent bargaining agent,107 and a “fundamental groundrule” of our system of industrial democracy must be that periodic change of the representative is permitted.108

There are two problems with this “conceptual-deductive” approach. First, no one has ever convincingly demonstrated that deductive analysis alone is capable of telling us why some rights are less “fundamental” than others. This writer, for example, is aware of no

---

104. NLRA § 7, 29 U.S.C. § 157 (employees “shall . . . have the right to refrain from any or all of [the] activities [protected by section 7]”).
108. Cf: The Declaration of Independence, July 4, 1776 (“all men . . . are endowed by their Creator with certain inalienable Rights [and] whenever any Form of Government becomes destructive of these Ends [protection of natural rights] it is the Right of the People to alter or to abolish it”).
persuasive argument that the right of workers to strike is less precious or less significant than the right to change their bargaining representative.

But even assuming consensus could be achieved on some finely-tuned calibration of the relative "fundamentalness" of rights, there is a second difficulty with the deductive approach. It simply does not follow logically that because, e.g., due process is "less fundamental" than free speech, that therefore due process guarantees should be waivable. That conclusion requires a distinct justification, and purely deductive analysis from the "nature" of a particular conception of industrial democracy is simply incapable of providing one. The "conceptual-deductive" approach to the analysis of workplace rights reproduces the inadequacies and internal contradictions of the classics of natural rights theory and of late 19th and early 20th century "conceptualist formalism" in American legal thought.

A second approach to the question of the "waivability" of workplace rights parallels the "utilitarian" tradition in political theory. The effort is made to derive legal conclusions by appeal to sound social policy and to the maximization of social welfare. There are two problems with this approach as well. First, it rests on the implausible assumption that reference to the general social policies underlying the collective bargaining system can guide decisionmakers to determinate answers to concrete legal problems. To take a typical example, it is simply impossible to derive answers to questions about the proper scope of collective action from the general congressional policy of encouraging industrial peace. We know that formal, legal channels of dispute resolution are ordinarily preferred, but that by the same token the reserve availability of and occasional resort to economic weapons provide valuable incentives to the parties to respect the congressional policies that gave rise to the need for legal machinery. There is little in the basic policy itself that tells decisionmakers whether to permit or to repress the use of economic weapons in a particular case. The Supreme Court's treatment of representation disputes illustrates the intractability of this dilemma. No doubt all the justices participating in *Linden Lumber Division, Summer & Co. v. NLRB*\(^{109}\) shared equally in the desire to create a legal environment favorable to the peaceful resolution of representation disputes. Yet the Court split 5 to 4, with prominent liberal and prominent conservative justices on each side, over whether the best approach was to stake all on the Board's representation case machinery or, by contrast, to allow some breathing room for the recognitional strike.

Leaving this problem aside, however, there simply is no consensus on what the social purposes and goals of the collective bargaining sys-

---

tem are. Thus it is commonplace to cite the social goal of industrial
peace as the basis both for the notion that the right to engage in griev-
ance strikes can (and ordinarily should) be waived by contract and for
the Mastro Plastics\textsuperscript{110} notion that the right to strike to protest serious
unfair labor practices must be inalienable (because the bona fide pro-
test strike serves a valuable “safety-valve” function in maintaining the
overall groundrules of fair play in the system for achieving industrial
peace). But it is unclear, to say the least, that keeping industrial peace
is or should be the sole or even most important social function of the
labor laws.\textsuperscript{111} “Labor peace” might connote the benefits of uninter-
rupted production to Justice Douglas, but to a factory worker “labor
peace” might well mean maintenance of an intolerably exploitative or
life-threatening status quo. And the industrial peace policy accords no
independent significance to the idea of protecting collective worker ac-
tion as value for its own sake, as a contribution to nurturing in workers
the capacity to self-govern their industrial destinies. In short, the “utili-
tarian-social policy” approach to the question of workplace rights re-
produces the inadequacies and contradictions of the utilitarian
tradition in politics and of the “purposive” or “realist” posture charac-
teristic of American legal thought since the New Deal.

In summary, labor rights theories are ambiguous and internally
contradictory and cannot provide coherent, principled answers to the
most significant legal problems. In this respect, labor law theory is but
a paradigm of the theoretical difficulties of liberal legalism\textsuperscript{112} which
possesses no coherent theory of rights.\textsuperscript{113} Indeed, what might be called
“rights-consciousness”—the formulation of all issues of political theory
in terms of an inherently conflictual relationship between the individ-
ual (or group) and state power—is the problem of liberal legalism and
of labor law as ideology. Unable to transcend the dichotomy between
“public” and “private” actors, liberal theory can only conceive of free-
dom as either the escape from community, or the prudent, limited par-
ticipation in community solely to achieve narrow instrumental ends.\textsuperscript{114}

There are two enormous problems with this liberal conception of
freedom formulated in terms of rights. To begin with, because liberal
legalism exhausts its description of social life with two rigid categor-
ies—“public” (\textit{i.e.}, governmental) and “private”—it perpetuates two

\textsuperscript{110} 350 U.S. 270 (1956).

\textsuperscript{111} See generally Klare, Judicial Deradicalization, \textit{supra} note 1, at 281-93.

\textsuperscript{112} I have defined the term at some length in Klare, Judicial Deradicalization, \textit{supra} note 1,
text and accompanying notes at 276-77.

\textsuperscript{113} This claim is brilliantly demonstrated in R. \textit{Unger}, \textit{supra} note 67, and Kennedy, \textit{Black-
stone’s Commentaries}, \textit{supra} note 5, at 354-63.

\textsuperscript{114} The notion of limited, “instrumental” participation in group life is dramatically exempli-
fied by Justice Douglas’ concurring remarks in IAM v. Street, 367 U.S. at 775-77, quoted \textit{supra}
ote 82.
falsehoods. The first, endemic to natural rights theory, is the erroneous belief that it is possible to treat the individual as an abstraction, apart from the entire texture of his or her social life.\(^{115}\) Second, endemic to legal positivism, is the erroneous belief that the state stands apart from civil society and is not implicated in its illicit hierarchy.\(^{116}\) A more adequate social theory must recognize that:

'Society' and 'individual' are both essentialist abstractions, based on the notion that persons and institutions are closed, demarcated beings, with fixed boundaries between them. In reality there are no such separate, autarchic beings—there is instead a continuum of human actions, which collide, converge and coalesce to form the whole personal and social world we live in. Man and society exist only as praxis, outside themselves in the fluctuating interworld their actions compose together . . . . It follows that there is ultimately no neutral area, into which the individual can withdraw from society: he is socially at stake in the whole plenitude of his life, in his work, in his art, in his sexuality. In a capitalist society, all these domains of living tend to be confiscated and denied . . . . [I]ust as power is at stake throughout civil society, so are freedom and fulfilment.\(^{117}\)

In collective bargaining law the analogue of the problem of liberalism's limited social theory is the notion that it is possible to speak meaningfully of "collective rights" and "majoritarian processes" in the union or in the "legislative process" of collective negotiations without addressing the social function and political character of labor unions and collective bargaining in advanced capitalism. Discourse on the system of "industrial self-government" in the absence of a critical analysis of the social function of collective bargaining can only be an ideological endeavor.

The second difficulty of liberal rights-consciousness is that it excludes the possibility of conceiving of human freedom as self-expression and growth in and through community. The labor law analogy here is the law's virtually total refusal to conceive of work as an expression of human meaning or to conceive of the collective bargaining process as an experience in participatory worker self-management. That is, collective bargaining law as traditionally formulated stands as a bar-


> It is above all necessary to avoid . . . establishing 'society' as an abstraction over against the individual. The individual is the social being. His vital expression—even when it does not appear in the direct form of a communal expression, conceived in association with other men—is therefore an expression and confirmation of social life. Man's individual and species-life are not two distinct things.

Id. at 350 (emphasis omitted).

\(^{116}\) Kennedy, Blackstone's Commentaries, supra note 5, at 215.

rier to the potential of employee participation in workplace governance to be experienced by workers as "an experiment in the possibility of their own emancipation." 118

IV. Conclusion

As an exercise in political theory, the contribution of collective bargaining law is to justify active state regulation of private economic conduct in a manner that does not lead swiftly to the conclusion that all significant economic decisionmaking is affected with a public interest. Rather, traditional collective bargaining theory developed a regulatory and management system that rests upon and legitimates the delegation of law-making power to large private entities (corporations and unions). There is a significant message here for radical critique with respect to the controversy over regulation and "deregulation."

Debate on the question of economic regulation traditionally centers on two themes. First, it is assumed that "private ordering" and "regulation" stand in polar opposition as modes of organizing economic behavior. On that assumption controversy rages about whether regulation prejudicially distorts the allocation of resources, whether it protects worthy interests that might be vulnerable under the regime of free market, and so on. Second, it is frequently assumed that regulation favors the weak and that the free market and "deregulation" ratify existing social inequality to the immense benefit of the wealthy and powerful. In the simplest terms of American political rhetoric, regulation is identified with liberal reform, and non-regulation and deregulation are identified with conservatism. 119

The example of collective bargaining law demonstrates that both themes underlying the traditional frame of reference on regulation are untenable. The choice is not between private ordering and regulation: private economic conduct cannot transpire, "private enterprise" cannot function without significant involvement of governmental activity. 120 By the same token the prevailing regulatory system in the labor relations field rests to an enormous extent on "private ordering," i.e., private party autonomy with respect to significant economic decisions. It is seriously misleading to think of a complex institutional system for encouraging private ordering as anything other than a system of

119. Cf. L. Jaffe & N. Nathanson, Administrative Law: Cases & Materials 7 (3d ed. 1968) ("[t]he administrative process has, during the last seventy-five years, been the characteristic instrument of political and economic reform").
120. The regulatory character of the so-called "self-regulating market" has been brilliantly described in K. Polanyi, The Great Transformation (1944).
Moreover, the political tendency of regulation, as such, cannot be determined a priori. The role of the federal government in regulating union organization campaigns and in promoting collective bargaining is generally regarded as one of the great achievements of liberal reform. There is no way to know for sure, but evidence indicates that NLRB regulation of employers was critical to the success of modern industrial unionism. I think it in no way demeans the heroism of...

121. I have made a similar argument regarding twentieth century developments in the common law of contracts. Klare, Contracts Jurisprudence And The First-Year Casebook, 54 N.Y.U. L. REV. 876, 889 (1979) (arguing that traditional treatment of contracts issues in terms of clash between ideals of "private autonomy" and "social control" should be replaced by emphasis on "conflict between older and newer modes of social control reflecting the transition from a market economy to a highly interdependent planned economy"). Cf. I. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS & RELATIONS 346 (2d ed. 1978) ("[o]ne form of social control is the power of contract itself—the power society confers on each party to a contract to invoke legal sanctions and protections. So indoctrinated are we in thinking of this form of control as freedom of contract and as a fundamental firmament of our social structure, that we easily fail to recognize its fundamental character: control of human behavior imposed by human institutions") (emphasis in original) (footnote deleted).

122. This is not an argument that it is impossible to evaluate the partisan nature of any particular program of governmental intervention in or governmental abstention respecting some aspect of social life. Obviously the entire enterprise of critical labor law rests on the assumption that it is possible to make political judgments about the content, structure and mechanisms of public policy. Rather, the claim is that we do not advance significantly closer to making such judgments by knowing, without more, that government has adopted an interventionist or passive mode in any particular arena. This claim rests in turn upon the view that “economy” and “government” are not abstractions that exist apart from each other, the latter to a greater or lesser extent imposing upon the former. Rather, civil society and state are inextricably intermeshed aspects of the totality of capitalist social life. See text at notes 115-18 supra.

Let me illustrate these points by reference to the “deregulatory” program of the present Administration. Its claim that judgments can be made about “regulation” in general (e.g., that it is “wasteful,” inhibits enterprise, etc.) is sheer nonsense. This does not mean that it is impossible to form judgments about the political character of the Reagan Administration’s program. The point is that, leaving rhetoric and hoopla aside, the Administration’s objection is not to “regulation” as such (e.g., there has as yet been no call for legislative repeal of the common law of contracts or abolition of the Treasury Department). Rather, the Reagan program is an attack on specific forms of protective and social-service oriented statutory and administrative law. By the same token, a generalized defense of “regulating the market” as a way of achieving reform and protecting the vulnerable is not a coherent political posture. The question is not whether the organized power of the community should intervene in social and economic transactions but for what ends and by what means.

123. My own view is to agree that the Wagner Act is one of the most progressive, even radical, pieces of legislation ever enacted by the Congress, see Klare, Judicial Deradicalization, supra note 1, at 265, 285-90, but also to place greater emphasis on the role of working people in establishing industrial unionism and modern collective bargaining:

[it] is of transcendent importance . . . to appreciate that the Wagner Act did not fully become “the law” when Congress passed it in 1935, or even when the Supreme Court ruled it constitutional in 1937, although obviously these legal events enhanced the legitimacy of the labor movement. The Act “became law” only when employers were forced to obey its command by the imaginative, courageous, and concerted efforts of countless unheralded workers. Id. at 266 (footnote omitted).

124. See id. at 290-91 n.79, 318 n.183, and sources cited therein.
American workers and the brilliance of their organizational capacities to acknowledge the contribution of the Wagner Act and of the NLRB to the rise of the CIO. The deployment of governmental power to combat authoritarianism in the workplace was a development of epochal significance in the history of the American people.

Nonetheless critical labor jurisprudence must confront the possibility that 45 years of systematic state regulation of the class struggle has played at least some part in shaping the type of labor movement we have today, namely a labor movement that is overly bureaucratized, politically unimaginative and generally on the defensive. The task of critical labor jurisprudence is to determine how and why even the most progressive state regulation, fought for and won by the victimized and oppressed, may be implemented in a manner that deflects and demoralizes popular participation and, through cooptation of popular struggle, ultimately reinforces the institutional infrastructure of capitalism. The technique of "decodification" of legal doctrine described here is but a preliminary effort to develop a methodology adequate to this task.

I have argued that traditional theorizing about collective bargaining law is a vital moment in the maturation of post-World War II liberal thought. This realization opens an exceptional prospect to critical labor jurisprudence. The mission of all critical social thought is to free us from the illusion of the necessity of existing social arrangements. The more total the criticism, the greater the emancipation from the mental and political constraints of false necessity. The critique of labor law as political theory offers the possibility of totalizing and deepening the partial and conjunctural criticisms critical labor jurisprudence has thus far made of labor law doctrine. The critique of labor law as ideology is therefore an indispensable component of the utopian project of experiencing in thought and in social life the radical disintegration of the intellectual and institutional constraints of capitalist society. For these reasons, it is hoped that critical reflection on the contradictions of labor law may provide an intimation of the experience of transcending those constraints, that is to say, an intimation of the experience of freedom.\textsuperscript{125}

\textsuperscript{125} For further discussion see \textit{id.} at 336-39.