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REVISIONISM IN LABOR LAW

MATTHEW W. FINKIN*

Imagination without criticism may burst out into a comic profusion of grandiose and silly notions.

— Peter Medawar¹

In the past few years several works identified with the "critical legal studies" movement have appeared making novel claims for the content and direction of the American law of collective bargaining. Paramount among these are Karl Klare's The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941,² which treats the reception of the labor Act by the United States Supreme Court until Pearl Harbor; and Katherine Stone's The Post-War Paradigm in American Labor Law,³ which discusses the Act up to the present.

My initial (if hasty) reading of these pieces led me to conclude that, despite their length and density, there was a lot less there than met the eye. But at least four of the nation's better law schools have invited the authors to informal colloquia;⁴ indeed, symposia have also been published.⁵ Accordingly, I thought that remarks prepared for this body, composed of historians and labor economists, as well as lawyers, suitably might address two questions: Are these serious works to which attention must be paid? And, if they are not, why are they being taken seriously at places that ought to know better?

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¹. P. MEDAWAR, Science and Literature, in PLUTO'S REPUBLIC 46 (1982).
². 62 MINN. L. REV. 265 (1978). I met Professor Klare when I was leaving and he arriving as visiting professors at a midwestern law school. I found him to be a thoroughly engaging colleague, and it would be a source of regret were my profound disagreement with his work to chill an heretofore cordial relationship.
⁴. They are the law schools of Yale, the University of Pennsylvania, New York University, and the University of Texas.
I. A Critical Study of Two "Critical Legal Studies"

The primary focus of what follows is upon the manner in which these writers develop their arguments. They do not suggest anything out of the ordinary with respect to how one decides what historical facts are, or how one analyzes a case; thus, the claims they make are fully amenable to a conventional legal evaluation. Accordingly, I will examine the sources they rely upon, ask whether these sources support the claims made for them, and inquire of sources they chose to ignore.

Because of the variety of claims made, and the wealth of footnoted material supplied in support of them, an exercise of this kind is not for the fatigue-prone; and so I beg your endurance. I have tried to limit this assessment to some major themes and to reduce less significant aspects to footnotes. Nevertheless, a considerable amount of detail remains. And in this lies a paradox, for the devotion of serious and so necessarily detailed critical attention to how these writers make their claims makes the claims seem serious, and the criticism, by the very weight of detail, seem to be little better than persistent carping. I hope you will beware of this pitfall in the total impression conveyed. As a partial corrective, I will supply a brief summary of the major points of criticism at the close of the textual discussion.6

A. The Labor Act From the Beginning to World War II

Karl Klare argues that the labor Act "was susceptible of an overtly anticapitalist interpretation"7 which the United States Supreme Court could have reached by "employing accepted, competent, and traditional modes of judicial analysis and remaining well within the boundaries of the legislative history of the Act."8 But, he argues, the Court declined to do so. Instead, the Court "deradicalized" the labor Act and, in the process, articulated a "legal consciousness" that contributes to the contemporary co-optation of the working class.

Klare examines five areas under the Act, each of which, he claims, illustrates the process of deradicalization: (1) the emphasis upon "contractualism"; (2) the development of the law under the duty to bargain, establishing a system of private rather than public ordering; (3) the development of the doctrine that the Act vindicated public, not private rights; (4) the restricted scope of protection accorded concerted employee activity, especially the condemnation of the sit-down strike; and

6. See infra text accompanying notes 277-80 (captioned "Imagination, Criticism, and Scholarship").
8. Id. at 292.
(5) the development of a "modern legal consciousness." The third theme does not strike me as doing much to advance Klare's claim. The second would, but it has been ably dispatched in a student comment.9 Thus, I will attend to the themes of contractualism and concerted employee activity, and connect these to Klare's argument on "legal consciousness."

Klare posits a world where the workplace is governed by "participatory democracy," where decisions about work processes are made by spontaneous worker self-activity; in short, a utopian, anti-hierarchical world of work in which neither bosses nor union officials have much, if any, power of control. The Wagner Act, Klare argues, could have been read to usher in this world. But this reading, which he claims would be consistent with the Act's intendment, was thwarted by decisions of the Court that fostered instead a stultified world ruled by collective agreements and union bureaucrats.

1. The Deradicahizing Process.-(a) Protected Activity, the Sit-Down, and the "Emancipated" Workplace.—Klare is on firm ground in pointing out that—as with any new piece of controversial social legislation—a wide range of choice is given to the ultimate interpreter of the Act. In addition, Klare recognizes that the labor Act embodied several goals, not all of which are necessarily consistent. The Act sought, for example, to foster collective bargaining and, toward that end, emphasized the protection to be accorded labor's use of economic power. But the Act also sought to achieve industrial peace and stability. Because the Supreme Court is ultimately responsible for resolving the tension between these conflicting desiderata, the Court's decisions have long been fair game for criticism. Thus, Klare seems well within this traditional framework in attacking a series of Supreme Court decisions that he believes to have unduly narrowed the ambit of protected employee activity: NLRB v. Sands Manufacturing Co.,10 in which the Court treated a strike to secure modification during the term of an existing collective agreement as an act of "repudiation," unprotected by the labor Act; NLRB v. Mackay Radio & Telegraph Co.,11 in which the Court (in dictum) allowed struck employers to resist strikes by permanently replacing economic strikers; and NLRB v. Fansteel Metallurgical Corp.,12 in which the Court denied the National Labor Relations Board (the labor Board or

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the Board) the exercise of remedial power to reinstate sit-down strikers even though the sit-down was triggered by the employer’s own pervasive unfair labor practices.

Klare goes well beyond the conventional framework, however, for he makes large claims about the ideology these decisions reveal and for the practical impact the “legal consciousness” they embody has had. Using the Fansteel case, Klare makes specific claims that adumbrate these larger themes.

The sit-down strike was important not only because it was so effective tactically, but also because it minimized the risks of picket line violence. The traditional strike separates the employees from the workplace and from each other. Typically striking workers come together only serially, on the picket line. In the sit-down, however, workers posed themselves as collectively capable of organizing the workplace. The logistics of the sit-down required the constant participation of all in decisionmaking and fostered a spirit of community, cooperation, and initiative. The sit-downs nurtured a new psychological and emotional experience: “‘The fact that the sit-down gives the worker in mass-production industries a vital sense of importance cannot be overemphasized.’”

222 The sit-downs were a utopian breach in the endless regularity and pessimism of everyday life, a “dereifying” explosion of repressed human spirit.

Let us pause a moment before reaching the larger claims made for Fansteel. It is mildly puzzling that Klare relies entirely upon a pamphlet of almost voluptuous obscurity, written by the editor of Radical America, when even the pamphlet’s author heavily relies upon what he characterizes as “the basic scholarly study of the great General Motors strike of 1936-1937”—Sidney Fine’s Sit-Down. The reason Klare chooses to

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222. Brecher, The Sitdown Strikes of the 1930’s: From Baseball to Bureaucracy, 4 Root & Branch Pamphlet 23 (n.d.) (quoting L. Adamic, My America 408 (1938)).

223. “[The] potential of ordinary workers organizing their own action posed an implicit threat to every form of hierarchy, authority, and domination. For if the workers could direct a social enterprise as complex as, say, the Flint sitdown, why could they not reopen production under their own direction?” Id.13

Let us pause a moment before reaching the larger claims made for Fansteel. It is mildly puzzling that Klare relies entirely upon a pamphlet of almost voluptuous obscurity, written by the editor of Radical America, when even the pamphlet’s author heavily relies upon what he characterizes as “the basic scholarly study of the great General Motors strike of 1936-1937”14—Sidney Fine’s Sit-Down.15 The reason Klare chooses to

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13. Klare, supra note 2, at 324-25 (emphasis added).

ignore Fine's book may become a little clearer momentarily. It suffices to say that Fine confirms much of what Klare says: The sit-downers did develop a sense of community and "consciousness of kind," the experience was humanizing for the alienated, and for many, it was a thoroughly enjoyable experience.

But Fine stresses (and Klare mentions only obliquely\(^6\)) that the Flint sit-down was not engaged in for these purposes. It was a tactic to a larger goal of achieving union recognition and, most importantly, a collective agreement.\(^1\) Toward that end, as virtually every account of the episode makes clear, the basic tactical and strategic decisions governing the sit-down from its inception to the eventual contractual settlement with General Motors were made not by a "participatory democracy" of the rank-and-file, but by union leaders and organizers on the outside.\(^18\) Klare neglects to make note of that fact.

Klare does mention that the sit-down tactic was successful; but he tends to gloss over a full explanation. The reason was not only the minimization of picket line violence, the general unlikelihood that the employer would attack his own factory to oust the strikers, or the serious difficulty of sustaining picketline activity in cold weather (the Flint sit-down commenced in bitter cold on December 30, 1936), but also the fact that,

Because of the closely interrelated processes of automobile production, a small group of automobile workers could tie up a large factory by closing down a few key departments, and they could paralyze even one of the major producers by stopping production in a few strategic plants that fabricated the parts upon which its other plants depended for their uninterrupted


\(^{16}\) Klare does stress that "the sit-down strikes were an indispensible weapon with which workers stemmed the tide of employer resistance to unions and to the law . . . ." Klare supra note 2, at 324. But at no point does Klare acknowledge that a major goal of unionization was the achievement of a collective bargaining contract.

\(^{17}\) Indeed, Fine points out that this was the general goal of most sit-down strikes. See S. Fine, supra note 15, at 332. The carefully engineered and successful MESA sit-down at Kelvinator in February, 1937 is an example. See H. Dahlheimer, A HISTORY OF THE MECHANICS EDUCATIONAL SOCIETY OF AMERICA IN DETROIT FROM ITS INCEPTION IN 1933 THROUGH 1937, at 39-43 (1951). The union's demands were for a minimum wage, abolition of piece work, and a forty hour week with time and a half for overtime. Id. at 39.

\(^{18}\) See, e.g., I. Bernstein, TURBULENT YEARS 499-571 (1970); S. Lens, THE LABOR WARS FROM THE MOLLY MAGUIRES TO THE SITDOWNS 291-321 (1973); W. Mortimer, ORGANIZE! MY LIFE AS A UNION MAN 123-41 (1971). Klare points out that some of the sit-downs were spontaneous and were carried out against the advice of CIO leaders. Klare, supra note 2, at 290 n.79. But he omits mention of the larger role of union led sit-downs, and totally ignores the key role played by the union leadership in the Flint struggle, the sit-down of the time.
operation. All this could be accomplished by a minority of workers in any given plant or in any given company, which meant that the sit-down was marvelously effective as an organizing device for a union like the UAW that had succeeded in enrolling only a relatively small percentage of the automobile workers. 19

In fact, there was considerable contemporary uncertainty surrounding the legality of the sit-down, which Klare also neglects to mention. The American Civil Liberties Union, a strong supporter of industrial unionization, considered the sit-down illegal, 20 in part because it constituted a denial by a strategically situated union minority of the non-union majority's right to work.

Nevertheless, on the basis of this skewed (and more than a little Romanticized) view of the Flint sit-down, Klare supplies a peroration on Fansteel. For analytical purposes, Klare's conclusion must be taken one sentence at a time.

By ignoring these social realities and condemning the sit-down strike, the Court interpreted the Act as standing against the possibility of emancipatory workplace experiments. 21

The idea of an "emancipated" workplace is at once powerfully evocative and marvelously vague. It seems to draw its sustenance from Klare's assertion that the sit-downers "posed themselves as collectively capable of organizing the workplace," which in turn is supported by Brecher's claim that the sit-down "posed a threat to every form of hierarchy, authority, and domination" because it held the potential of workers running production under their own direction. It is only in that sense that the phrase would seem to have any meaning, unless loafing on the job or sabotaging the machinery is understood as an "emancipatory workplace experiment." Indeed, the idea of the workers controlling production would go far to supply the "anticapitalist" reading that Klare claims the Act was amenable to.

The only problem with Klare's assertion is that the leading student of the episode concludes that the sit-down did not so threaten:

20. See id. at 176. See generally Baldwin, Organized Labor and Political Democracy, in R. Baldwin & C. Randall, Civil Liberties and Industrial Conflict 3, 36-38 (1938) (view of ACLU leader Baldwin on justifications for sit-downs). One historian has argued that the ACLU's position was adopted at a time when the organization's leader, Roger Baldwin, was moving toward a more critical view of American Communists. C. Daniel, The ACLU and the Wagner Act 131-32 (1980). The ACLU had earlier opposed the Wagner Act largely because the organization's leadership was sympathetic to the Communist position. See id. at 127.
It was possible, of course, to see the sit-down strikes as a revolutionary challenge to the rights of private property in the United States, and a few radicals inside and outside the plants undoubtedly did so; but the mass of the sit-down strikers were utterly without revolutionary intent, and, unlike the Italian automobile workers who occupied the great Fiat plant in Turin in September, 1920, they evinced no desire to operate the factories that they were temporarily occupying or to achieve labor control of industry. They were sitting in to secure meaningful collective bargaining with their employer and better working conditions, not to transform property relationships.  

Where is the evidence to the contrary? The only evidence Klare supplies is the reference to Brecher, and he could just as well have quoted it all:

_This potential of ordinary workers organizing their own action posed an implicit threat to every form of hierarchy, authority, and domination._ For if workers could direct a social enterprise as complex as, say, the Flint sitdown, why could they not reopen production under their own direction? Certain experts like engineers and chemists would at certain times be needed, but the foremen and the rest of management would be completely unnecessary. The workers would simply have to provide for their common needs and send out delegates to coordinate with their suppliers, with workers in the same industry, and with those who used their products. The sitdown movement was widely perceived as a threat to management power; as G.M. President Sloan wrote, the "real issue" of the G.M. sitdown was "Will a labor organization run the plants of General Motors . . . or will the management continue to do so?"  

22. S. Fine, _supra_ note 15, at 174. One sympathetic study of the role of Communists in the UAW makes the same point of the Flint sit-down:

The communists avoided revolutionary or socialist sloganeering. They believed that even though the sit-down represented "a more advance form" of encroachment on property rights than most strikes, it still aimed at traditional union goals. Weinstone [Michigan Communist Party secretary] observed shortly after the conflict that "the workers were not motivated by revolutionary aims in occupying the plants but were limiting themselves to a form of pressure to achieve their immediate ends." Under these circumstances, raising revolutionary slogans would only have divided the strikers, confused public opinion, and played into the hands of those who were imputing revolutionary objectives to the strikers. Instead, the Communists stressed the workers' "reasonable and modest demands"—a contract, better wages, hours and working conditions.


The only evidence Brecher supplies is Fine's book, whence Sloan's statement is borrowed.\textsuperscript{24}

Let us, then, look to that source. Sloan's statement, an open letter of January 5, 1937, to General Motors' employees, was in rebuttal to a UAW letter of the preceding day setting forth the union's demands.\textsuperscript{25} These included, in addition to exclusive UAW representation, prohibitions on any speed-ups, seniority determined by length of service alone, and abolition of incentive methods of pay. All these matters are perfectly routine subjects of bargaining under the "deradicalized" labor Act. No doubt management thought of these demands as serious threats to its power, even as a serious threat to capitalism, for these demands challenged management's totally unconstrained right to manage. But the right of management to manage, as constrained by demands sought to be embodied in an agreement with the union, was not challenged. Thus the Flint sit-down scarcely supports the claim of a threat to any form of hierarchy; nor can there be found any threat to the capitalist system in the sense that Klare—not Alfred P. Sloan—would have the reader believe.

Furthermore the Board's brief to the Court made no mention of the "social realities" that the Court is supposed to have ignored. On the contrary, the Board's brief to the Court conceded that misconduct, such as serious violence, might disqualify a striker for reinstatement;\textsuperscript{26} indeed, the Board's attorney, in arguing \textit{Fansteel} before the court of appeals, characterized the sit-down as "foolish and illegal."\textsuperscript{27} Thus, it was never argued that the sit-down strike should be protected under the Act, but rather that the Board could, in the exercise of its remedial power, disregard such employee misconduct when it flowed in response to the employer's pervasive unfair labor practices—else the employer could reap a benefit from its own misconduct. Consequently, at no point did the Board or the Court evidence any awareness of the alleged "emancipatory" features of the sit-down.

A second source of the Court's understanding of what was at stake might have been found in the news and editorial coverage of the time; indeed, Brecher relies heavily on the news accounts in the \textit{New York Times}. But the reportage (and editorializing) merely confirms Fine's conclusion. The sit-down was decried as "revolutionary" by business and political leaders because it challenged, albeit temporarily, the owner's right to possess his property and it denied the right to work to the

\textsuperscript{24} \textit{Id.} at 23 n.119 (citing S. \textit{FINE}, \textit{supra} note 15, at 182).
\textsuperscript{25} \textit{See} S. \textit{FINE}, \textit{supra} note 15, at 182.
\textsuperscript{26} \textit{See} Brief for the National Labor Relations Board at 55 n.24, NLRB \textit{v.} Fansteel Metallurgical Corp., 306 U.S. 240 (1939).
\textsuperscript{27} \textit{Sit-Down Illegal, Says NLRB Lawyer}, \textit{N.Y. Times}, May 17, 1938, at 12, col. 5.
majority of non-union workers. The C.I.O. and some commentators made plain, however, that the sit-down was merely a tactic to secure union recognition and a collective agreement. Thus even Brecher concludes that the assault on managerial power posed by the sitdown was "severely limited."

Undaunted, Klare goes on:

*Fansteel* condemned a tactic designed to transcend the disjunction between the union and its members; it bolstered the forces of union bureaucracy in their efforts to quell the spontaneity of the rank and file.

Whatever the ancillary consequences of the Fansteel sit-down for the in-plant communal life of the strikers (the Fansteel sitdown lasted nine days, the Flint sit-down forty-four), like the Flint sit-down, it was a tactic designed to achieve union recognition and a collective bargaining agreement. Klare’s conclusion, however, seems to be directed to the alleged ancillary effects. He suggests that the Court condemned the sit-down because it was designed “to transcend the disjunction between the union and its members”—that is, because of its added social, political, or psychological character. But he supplies no evidence to support this claim.

Moreover, it is difficult to see how *Fansteel* "bolstered the forces of union bureaucracy in their efforts to quell the spontaneity of the rank and file." The agents of the Steel Workers Organizing Committee, which had chartered the Fansteel union, vigorously encouraged and supported the sit-downers and were given severe penalties for contempt of court for having done so. To be sure, once union recognition and a collective agreement were secured, the unions that had employed the sit-down as an organizational tactic would have no need of it; indeed, they strove to secure control over the rank-and-file’s resort to disruptive tac-

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30. See Brecher, Sidewalk Strikes, supra note 14, at 25.

31. Klare, supra note 2, at 325.

32. See Fansteel Metallurgical Corp. v. Lodge 66, Amalgamated Ass’n of Iron Workers, 295 Ill. App. 323, 324-28, 14 N.E.2d 991, 992-93 (1938). Indeed the heaviest penalties were given to the two union officials, not to the employee leadership. Warner and Swanson, employee leaders, were given $300 fines and 180 days in jail. Meyer Adelman, the SWOC organizer, was fined $1,000 and 240 days in jail. Oakley Mills, Adelman's assistant, was fined $500 and 180 days in jail. Id. at 328, 14 N.E.2d at 993.
tics. By the same token, management would wish to be rid of any threat to production. But as the Board’s brief to the Fansteel Court pointed out, the C.I.O. unions in mass production industries such as rubber, electrical, glass, tile, and automobiles had already agreed to collective agreements “outlawing the sit-down strike as a weapon of labor.”

Thus the eradication of the sit-down by collective agreement occurred well before Fansteel was decided; it is not easy to see how the Fansteel decision could have bolstered the unions in that effort.

As such, it [Fansteel] marked the end of the radical potential of the 1930’s by demarcating the outer limits of disruption of the established industrial order that the law would tolerate.34

Although Fansteel can be read as establishing the limit of legal disruption, resort to the sit-down had peaked in 1937. Citing statistics in its brief to the Court, the Board pointed out that “[a]t the present time, the sit-down has virtually disappeared.”35 Though Fansteel may have marked a symbolic end to the (ostensible) radicalism of the 1930s, it seems that the “radical potential” of the decade was exhausted more than a year before Fansteel was decided.

The utopian aspirations for a radical restructuring of the workplace, engendered by enactment of the Wagner Act and the intoxicating experience of the rise of the CIO, were symbolically thwarted by Fansteel, which erected labor law reform as a roadblock in their path.36

It is not at all clear what Klare means.37 He seems merely to be saying that Fansteel dashed the hopes some people had for how the labor Act would be read. No one could argue with that; but it does not seem to add much to Klare’s thesis. As we shall see, however, Klare makes a rather more expansive claim for the role “utopian aspirations” play in the construction of the labor Act.38 It suffices to say at this point that Fansteel either thwarted the radical restructuring of the workplace or it

34. Klare, supra note 2, at 325.
36. Klare, supra note 2, at 325.
37. In fact, I had a pretty hard time with this sentence. Klare does not explain how Fansteel “erected labor law reform” or had anything to do with labor law reform. Moreover, the “roadblock” to the radical restructuring of the workplace is supposedly “erected” by a decision that “symbolically thwarted” that effort. The chief current meaning of “to thwart” is not “to oppose,” it is “to oppose successfully.” It doesn’t make much sense to speak in terms of “to oppose successfully symbolically.”
38. See infra text accompanying notes 82-88.
did not; and, from what we know, it did not, for the simple reason that such a radical restructuring was not what Fansteel (or the Flint sit-down) was all about.

(b) Contractualism. — Klare never explains what an “anti-contractual” interpretation of the labor Act would be, beyond a vague notion of collective bargaining as an on-going “participatory” process that is somehow distinct from collective bargaining as we know it today. Nevertheless, he discusses three decisions, NLRB v. Jones & Laughlin Steel, NLRB v. Mackay Radio & Telegraph Co., and NLRB v. Sands Manufacturing Co. On the basis of these cases, he argues that “despite the strongly anticontractualist overtones of the Act, the Supreme Court ensured from the start that contractualism would be the jurisprudential framework of the law of labor relations.” Let us see if the cases support his claim.

In Jones & Laughlin Steel the Supreme Court held that Congress’ power to regulate interstate commerce encompassed the labor Act’s regulation of labor relations. In so holding, the Court also opined:

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer “from refusing to make a collective contract and hiring individuals on whatever terms” the employer “may by unilateral action determine.” The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.

Klare employs this quote to support his assertion that “the Court emphatically rejected any suggestion that the Act abolished private order-

40. 304 U.S. 333 (1938).
41. 306 U.S. 332 (1939).
42. Klare, supra note 2, at 294-95 (emphasis added).
43. 301 U.S. at 45-46.
ing as the framework of relationships in the workplace." After quoting the Court, Klare concludes that, "[t]he Court rejected any inference that the law would inquire into the substantive justice of labor management relations or the fairness of the wage bargain."

The *Jones & Laughlin Steel* decision actually concerned the dismissal of a group of employees for union activity. As the government was at pains to point out in defending the Act, the "entire theory of collective bargaining" was not before the Court. Thus, the degree to which the Act inquired into the substantive justice of the wage bargain or the fairness of labor-management relations was not presented.

The company did argue that the statute violated the fifth amendment's guarantee of substantive due process. The government defended the Act by adverting to parallel provisions of the Railway Labor Act, which the Court had sustained; thus it argued that freedom of contract was constricted only by the reasonable anti-discrimination provisions of the Act. The company could have claimed that the Act totally "abolished private ordering" and so was unconstitutional. Had it done so, and had the Court rejected that reading by giving the statute the narrower construction proposed by the government, Klare's argument conceivably might make some sense. But the company did not so claim. It was solely the requirement of non-discrimination based on union mem-

44. Klare, *supra* note 2, at 299 (emphasis added).
45. *Id.* at 300 (emphasis added).
47. Note the following colloquy among Solicitor General Reed, Justice McReynolds, and Chief Justice Hughes:

Justice McREYNOLDS. I am trying to get at the effect of the order, if you will be good enough to tell me.

Mr. REED. The effect of the order is to restore him to the position that he was in before.

Justice McREYNOLDS. What does that mean?

Mr. REED. That means that he goes back there on the crane, if you please, in that sense, and is therefore at that instant in the same position he was before.

The CHIEF JUSTICE. Employed at will?

Mr. REED. Employed at will.

The CHIEF JUSTICE. And can be discharged the next day?

Mr. REED. Provided he is not discharged because of his union or labor activities.

The CHIEF JUSTICE. Exactly; but employed at will?

Mr. REED. Employed at will. I think that answers the whole question.

The employer is also required, of course, to cease and desist from interfering with the organization of labor and to post notices to that effect.

*Id.* at 453.
bership that the company argued was unconstitutionally arbitrary.\(^{48}\)

The Court agreed with the government:

> What we have said points to the fallacy in the [company’s] argument. Employees have their correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work [citations to Railway Labor Act decisions]. Restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious.\(^{49}\)

Thus, the Court “rejected” no alternative, anti-contractual interpretation, for there was no issue or argument before the Court implicating such an interpretation. There was simply nothing of that nature before it for the Court to “reject” emphatically or otherwise.

As I have noted, the Court relied rather heavily on the law under the Railway Labor Act; but Klare relegates that reliance to a brief informational footnote.\(^{50}\) The reason for this virtual neglect of a body of law that played so obvious a role in disposing of the issues actually presented in *Jones & Laughlin Steel* will be dealt with later.

Like the issues in *Jones & Laughlin Steel*, the issue in *Mackay Radio & Telegraph Co.*\(^{51}\) does not seem to have much to do with contractualism. In *Mackay Radio*, the employer had excluded militant unionists from

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48. The restoration of 10 men was a vastly more important thing than the wages involved. If it were announced, if it were known, as it would be, to 22,000 employees, that 10 men who had been discharged over a period of 6 months, who belonged to the union, had to be taken back and put back to work and had their positions, and could not be discharged except upon a hearing before the Labor Board, all freedom of contract, all right to manage your own business, is gone.

Now, an employer has to have discretion. He cannot always give a reason for a discharge. There are times when sabotage occurs, times when there is theft, and he cannot fasten the responsibility. There are men who are just a disorganizing influence and have to be transferred. There are men who have no promise of ability, who cannot either maintain or operate a machine, or who are a constant menace to their fellow employees. Is the discretion of the management to be reviewed every time the man discharged happens to be a union man? Here are 22,000 employees, and 10 of them over 6 months discharged that happen to be members of the union, and we are hauled into court and have to trial to show why we discharged those 10 men. Is that an interference with the right of freedom to contract? Is that an interference with the right to run our business as we think best?


49. 301 U.S. at 43-44.


51. 304 U.S. 333 (1938).
among the former strikers it would reinstate. The Court held that such selective reinstatement violated the labor Act. But the Court also opined:

[I]t does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.\(^{52}\)

According to Klare, "[t]he issue before the Court was whether, as a matter of labor policy, the employer should have the weapon of permanent replacement at its disposal. The Court, however, never candidly addressed this question . . . ,"\(^{53}\) but merely assumed the result in the above language. "Thus," he asserts, "the conceptualist tradition was upheld and continued as the Court masked the unavoidably ideological content of judicial action."\(^{54}\)

The issue of an employer's ability permanently to replace economic strikers was not presented to the Court. As Klare recognizes in a footnote, the Board decided to challenge only the issue of discrimination in reinstatement.\(^{55}\) Nevertheless, Klare connects the ill-considered dictum in \textit{Mackay Radio} to the idea of "contractualism": The decision "taught . . . that the economic combat of the parties had replaced a 'meeting of the minds' as the moral basis of labor contractualism."\(^{56}\)

How did the Court do that? It did so, presumably, by weakening the economic weapon of the strike,\(^{57}\) for Klare observes that "[a]ny hint that the Act might bar management from utilizing its vastly superior bargaining power in labor negotiations was silenced."\(^{58}\) Accordingly, one must ask what a radical, "anti-capitalist" reading of the Act would have argued for, had the issue of striker replacement \textit{simpliciter} actually been presented. It surely would not have argued for a balancing test, weighing the employer's ability to resist a strike by means less drastic

\(^{52}\) \textit{Id.} at 345-46 (footnote omitted).
\(^{53}\) Klare, supra note 2, at 301.
\(^{54}\) \textit{Id.} at 302 (footnote omitted).
\(^{55}\) See Klare, supra note 2, at 301 n.117. Klare argues that the issue of the employer's ability permanently to replace economic strikes \textit{simpliciter} was "clearly presented in the case," which assertion is evidenced in the court of appeals. But Klare also recognizes that the Board did not raise that question before the Court. \textit{Id.} This fact flatly contradicts his assertion as to what "the issue before the Court" was.
\(^{56}\) \textit{Id.} at 303.
\(^{57}\) See \textit{id.} at 319. Klare views \textit{Mackay Radio} as an undue restriction on concerted protected activity. \textit{Id.} at 301 n.117.
\(^{58}\) \textit{Id.} at 301 n.115. "In this respect, labor law was not detached from the law of contracts, but assimilated to itself the presistent antinomies of contractualism." \textit{Id.}
than permanent replacement of strikers. That classically liberal approach would recognize the employer's business interests as legitimate and, in some cases, as superceding employee rights. Such an approach would scarcely be radical or notably anti-capitalist; and, in fact, the law has edged a bit in that direction. A truly radical, anti-capitalist reading would argue that the right to strike, expressly guaranteed by section 13 of the Act, is the right to an effective strike under all circumstances. Consequently, no effective employer counter-measure in opposition to the express right could be statutorily permissible.

The difficulty with this reading, in terms of Klare's argument, is that any agreement resulting from such a bargaining situation would plainly be the product of economic coercion by the union to which the employer would be statutorily denied the ability to resist. Had the Mackay Radio Court so opined, it is difficult to see how the moral basis of the resulting collective agreement would rest upon a "meeting of the minds" in contradistinction to "economic combat."

Although the issues actually presented in Jones & Laughlin Steel and Mackay Radio had nothing to do with "contractualism," NLRB v. Sands Manufacturing Co. did, and so a fuller account should be provided. According to Klare's statement of the case, the union and the company were at loggerheads about an issue during the term of a collective agreement; it was, indeed, an issue whether the union was seeking to change the terms to which the parties previously had agreed. In view of a threatened strike, the company discharged the entire workforce and reopened with new employees. The Supreme Court, according to Klare, interpreted the contract "sua sponte" and accepted the company's view that the union was seeking to modify the agreement.

The Court held that employees may not use economic power to impose their demands in such a situation, despite the fact that the contract did not contain a 'no strike' clause and, in fact, reserved full liberty of action to the employees in case of impasse in attempts to resolve 'misunderstandings' between the company and the work force.

59. Klare asserts that "[t]he Mackay rule remains the prevailing law." Id. at 302. He appends a footnote: "But see NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) (continuing recall rights of economic strikers); Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970)." I suggest that these cases actually deprive the "Mackay rule" of some of its vitality.

60. "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." National Labor Relations (Wagner) Act § 13, 29 U.S.C. § 163 (1976).

61. Klare, supra note 2, at 303-04.
Accordingly, Klare concludes that *Sands Manufacturing Co.* relied upon a "contractualist reading of the statute to legitimize the inequalities of bargaining power arising from the unequal social distribution of property ownership."\(^6\)

This "contractualist" conclusion is a puzzlement. It seems simply to decry the fact that workers do not own the means of production. But however much Klare argues that the labor Act was susceptible of an anti-capitalist interpretation, I do not read him to suggest that the Act should be read to bestow title with the workers. Thus the conclusion is better read as critical of the Court for using the contract to limit the bargaining power of groups who, because they do not own property and because they lack financial resources, are compelled to labor for their livelihoods. The connection, however, between the "unequal social distribution of property" and collective bargaining power is drawn, as best the reader can tell, from thin air. Like the "emancipatory workplace experiments" "symbolically thwarted" by *Fansteel*, it is an idea that parachutes into the text from the lofter realm of "critical legal studies" rhetoric; and, rhetorical uses aside, it does not make all that much sense in the context of the actual case. Financial resources surely affect the ability of workers to hold out in a long strike; but these employees were immediately replaced.

It is the conventional wisdom that the amount of relative bargaining power is affected by the state of the economy, the elasticity of demand for the employer's product or service, and the discrete labor market. When there is a high demand for the product and the workers are not easily replaced, they have a much enhanced bargaining position; and *per contra*, when business is slack and employees easily replaced, their power is similarly reduced.\(^6\) The *Sands Manufacturing Co.* case itself evidences this.

In *Sands Manufacturing Co.*, the NLRB found that in the spring of 1934, the company recognized and negotiated a sixty-day agreement with the Mechanics Educational Society of America (MESA). That fall, in an effort to secure a lucrative government contract, the company "obtained a promise from the employees that there would be no labor

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62. *Id.* at 304.

63. Much of the history of labor relations in the post-war period can be explained by vigorous and often concerted efforts by management to recapture managerial control lost to unions (and workers) during the war as a result of cost-plus government contracts and an extraordinarily tight labor market. *See generally* H. HARRIS, *THE RIGHT TO MANAGE: INDUSTRIAL RELATIONS POLICIES OF AMERICAN BUSINESS IN THE 1940s* (1982) (discussing management strategy for the recovery of the initiative in industrial relations); N. LICHTENSTEIN, *LABOR'S WAR AT HOME: THE CIO IN WORLD WAR II* (1982) (documenting the degree of control lost by management during WW II).
In May of 1935, after unsuccessful negotiations primarily on wages, MESA struck. About a week later a contract was signed and the employees went back to work. But the company refused to reinstate seven men on grounds of inefficiency, and the union struck again, this time to secure reinstatement. The result, in addition to the reinstatement of the seven, was an agreement drafted by the union, modified by the company with respect to transfer and seniority rights, and accepted as so modified by the union. The agreement was to run from June 15, 1935 to March 1, 1936.

The contract provided in Article 20 that, "In case of a misunderstanding between management and the employees, the [MESA] committee shall allow the management forty-eight hours to settle the dispute and, if then unsuccessful, the committee shall act as they see fit." By the middle of July, the work slackened and the company began to lay-off workers. A dispute arose precisely as to the question of seniority and transfer. The company insisted that the dispute was covered by the modification it had made in the draft agreement, which the union had accepted. It refused to budge. So did the union. When given the choice of acceding to the employer's position or closing down the plant, the union chose the latter. The plant was closed and, according to the Board, the company, now hostile to the union (or, according to the company, fed up with repeated strikes and the threat of strikes) discharged the MESA employees and reopened with new employees represented by the International Association of Machinists.

Klare is quite correct that an anti-contractualist reading of the statute would have produced a different result. And in this case, unlike Jones & Laughlin Steel or Mackay Radio, such an argument was made. The Board, although "of the view that an honest difference of opinion existed" as to the meaning of the June 15, 1935, agreement, opined that the result would have been no different even if the union's stand "[were] considered a violation of the agreement." This was made plain in the Board's brief to the Supreme Court. Under the heading that the contract is "irrelevant" to the employer's duty to bargain, the Board asserted squarely that "[c]ollective bargaining may properly deal with a change in an existing contract."
The major difficulty with this position, as the company argued in reply, was that it ignored the fact that the labor Act's protection of bargaining was precisely to secure collective agreements. The flouting of agreements made was, the company argued, inconsistent with achievement of labor peace and industrial stability, policies that Klare concedes were among the desiderata of the Act. This was put fairly powerfully in the company's brief:

This statement [in the Board's brief quoted above] cannot be the law, else a strike by a group of employees during the term of a contract for the sole purpose of accomplishing a change in the contract between them and their employer, as, for example, an increase in wage rates specified in the contract, would be lawful on the part of the employees, and filling their places unlawful on the part of the employer. Similarly, a lockout of employees by an employer during the term of a contract . . . for the sole purpose of effecting a cut in the wage rates specified in the existing contract would be lawful. In other words, if the respondent employer did not have the right to stand on its contract and refuse to negotiate further on the MESA refusal to perform, then respondent's contract was worthless. Indeed, the value of every collective bargaining contract would be greatly lessened if the rule stated by the Board and by the Government were held to apply in such situations. 70

One comes away from the briefs in the case with the impression that the Board was simply out-lawyered, for it marshalled no argument or authority to rebut the company's argument, which was firmly rooted in the legislative history of the Act. 71

But there was an alternative argument that might have produced a different result, and I read Klare to make it. As Klare accurately points out, there was no expressed "no strike" provision in the June 15 agreement. On the contrary, as he stresses, Article 20 could be read as reserving to the union the right to strike during the term of the contract; in fact, the company alluded to Article 20, as a "constant threat to strike." 72 Thus a powerful argument upon these facts is that the union was acting wholly in accord with an agreement that was, in practical

71. The Company pointed to S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935) in arguing that the Act was designed to "encourage the making of contracts" and that the Board's position "destroys the very thing which the Act was designed to promote." See Respondent's Brief at 57-58, NLRB v. Sands Mfg. Co., 306 U.S. 322 (1939).
effect, no more than a rolling forty-eight hour truce in a system of continuous collective bargaining.

But the Court can be little faulted for failing to view the case this way, for the argument was not made. More important, although the argument to a contractual reservation of the right to strike might have been a fairly powerful one, it can scarcely be characterized as “anticontactual”; indeed it is intensely contractual, for it hinges entirely on the meaning to be given Article 20 of the collective agreement.

I return to Klare’s theses that “despite the strongly anti-contractualist overtones of the Act, the Supreme Court ensured from the start that contractualism would be the jurisprudential framework of the law of labor relations”; 73 and that, “[t]he Act’s plain language was susceptible to an overtly anticapitalist interpretation.” 74 He has not supported them in his treatment of the cases. Does he demonstrate them some other way?

The support for the former assertion is supplied in two footnotes. 75 The first footnote refers to sections 8(3) and 8(5) of the Act. 76 These provisions prohibit employer discrimination due to union activity and forbid employers to refuse to bargain in good faith with the majority representative selected for the purpose of collective bargaining. They stand for the obvious principle that employers cannot circumvent the rights of employees to organize and engage in collective bargaining by executing individual contracts in derogation of the statutory scheme. These provisions speak not at all to whether the “jurisprudential framework” of the law of labor relations flowing from the labor Act would be contractual or anti-contractual; and characterizing the Act as a whole as having “strongly anti-contractualist overtones” on the basis of these two sections is, viewed most generously, a non sequitur. The second footnote Klare supplies directs us to the text accompanying notes 103-53; that is, not to any reference to the Act or its legislative history, but to the discussion of the three cases I have just reviewed. This makes a tautology of history.

Does the legislative history of the labor Act contain “strongly anti-contractualist overtones”? In explaining the statutory scheme, the Senate Committee report made plain that “[t]he object of collective bargaining is the making of agreements that will stabilize business

73. Klare, supra note 2, at 294-95 (emphasis added).
74. Id. at 285 (emphasis added).
75. Id. at 294-95 nn.91-92.
conditions and fix fair standards of working conditions.”77 Section 8(5) created a duty to negotiate “in a bona fide effort to arrive at a collective bargaining agreement.”78 So, too, the House Committee report spoke to section 8(5) as carrying out “the essential purpose of the bill to encourage . . . the making of agreements,”79 and, in explaining the system of majority rule, the report opined:

[C]ollective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous both to the worker and the employer. There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides.80

You will find no reference to any of this in the Klare article.

In sum, Klare criticizes the Supreme Court for refusing to adopt an anti-contractual interpretation of the Act, an interpretation that he asserts the Court could have reached “employing accepted, competent, and traditional modes of judicial analysis and remaining well within the bounds of the legislative history of the Act.”81 But Klare refuses to adhere to accepted, competent, and traditional modes of judicial analysis and refuses to look at the legislative history at all.

Klare supports the second assertion, that the Act was amenable to an “overtly anticapitalist interpretation,” as follows:

Obviously such a radical reading of the Act is not compelled by the legislative history. It does, however, find substantial support in that history and in the text of the Act, see notes 50-61 supra and accompanying text; and moderate and conventional interpretations of the Act, however more plausible they may seem now, cannot conclusively be said to be commanded by the legislative history either.82

We are, accordingly, directed to the material contained in twelve footnotes. These consist of citations to the statute, the text of which is, according to Klare, susceptible of either a “radical” or “conventional” interpretation; decisions of the Supreme Court, the very agency of deradicalization; references to secondary sources on the New Deal; and law

78. Id. at 12, reprinted in LEGISLATIVE HISTORY, supra note 77, at 2312.
80. Id.
81. Klare, supra note 2, at 292.
82. Id. at 285 n.62 (emphasis added).
Klare does explain how an alternative, anticapitalist reading of the Act could be reached, and it should be quoted at length:

There is evidence to support the claim that the collective bargaining model that eventually prevailed in the United States may not accurately reflect the aspiration of at least a significant number of those who were foot-soldiers in the industrial battles of the New Deal era. Rather, these working people may have contemplated a far more radical restructuring of relationships within the workplace in which industrial democracy, as an ongoing, participatory process both in the factory and the union, was at least as important as improved living standards. From this perspective, working people fought with determination to make the Act a reality—many giving their lives—because it imported more to them than the right to engage in endless economic combat for whatever benefits could be wrung from their corporate adversaries; it meant a commitment of government assistance toward the achievement of an objectively decent living standard and some control over the industrial decisions that affected their lives. At the very least, it can be asserted that the Act meant many different things to different people and groups on the labor side and that, for a substantial number, although they may have had only a vague idea of what the statute actually said, it nevertheless symbolized a significant opening in the direction of radical change.  

It remains to be seen whether the 1930s were quite as radical as Klare would have us believe. In addition, some of the sources upon which he relies are inconsistent with his thesis. He notes the role of left wing radicals such as Communists, but he neglects to deal with the

83. Id. at 290.  
84. See Dubofsky, Not So "Turbulent Years": Another Look at the American 1930's, 24 AMER- IKA STUDIEN 5, passim (1979); Skocpol, Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal, 10 POL. & SOC'Y 155 (1980):  

Working-class pressure leading to reforms can entail very different scenarios. It can mean that strong labor unions and a labor or social-democratic or Communist political party impose a more or less anticapitalist reform program on (and through) the government. Or it can mean that spontaneous working class "disruption," especially strikes, forces specific concessions out of a reluctant government. Neither of these scenarios really fits what happened in the United States during the 1930s. Obviously the industrial working class was organizationally too weak for the first scenario to happen. And we have already seen enough historical evidence on what happened with labor reforms in the New Deal to see that the "disruption" scenario is also inaccurate.  

Id. at 186-87 (footnote omitted) (emphasis added).  
85. See Klare, supra note 2, at 291 n.79.
fact that the Communist Party opposed the labor Act.\textsuperscript{86} He also notes the conduct of workers in sit-down strikes: “[T]heir efforts to create collective forms of social life during the building occupations . . . intimates a yearning for . . . a democratic reorganization of the workplace on the basis of a workers’ control mode.”\textsuperscript{87} But the plain fact is that, however much the collective social life (is there any other?) bolstered strikers’ morale, American sitdowners never attempted to operate the plant. Thus I fail to see the intimation of or any yearning for workers’ control in anything Klare has brought to our attention.\textsuperscript{88}

It is not unreasonable to assume, however, that a portion of the working class was radical in the sense that Klare would have. From that assumption, he draws the following conclusion:

[T]he indeterminacy of the text and legislative history of the Act, the political circumstances surrounding its passage, the complexity and fluidity of working-class attitudes toward collective bargaining and labor law reform during the period, and the hostility and disobedience of the business community make it clear that there was no coherent or agreed-upon fund of ideas or principles available as a conclusive guide in interpreting the Act. The statute was a texture of openness and divergency, not a crystallization of consensus or a signpost indicating a solitary direction for future development. This situation presented first the Board and the lower courts, but ultimately the United States Supreme Court, with the task of plotting the contours of the nation's new labor law.\textsuperscript{89}

In fine, the legislative history, consistently claimed but never discussed, which was supposed to support a radical interpretation of the

\textsuperscript{86} Even in unions which the Communists influenced or dominated, their radicalism was not a reflection of rank-and-file views. See H. Levenstein, Communism, Anticommunism and the CIO 45-46, 71 (1981); see also Karsh & Garman, The Impact of the Political Left, in Labor and the New Deal 77 (M. Derber & E. Young eds. 1957):

The Communists were the most effective of the leftwingers in controlling the new unions, but their revolutionary political philosophy was frequently deliberately concealed. . . . In contrast with their earlier left-wing attempts, Communist leaders in the unions worked hard at prosecuting normal and “legitimate” trade union service functions. The leaders in this case had many followers largely because they were satisfying the economic and social needs of job conscious American workers.

\textsuperscript{87} Klare, supra note 2, at 291 n.79.

\textsuperscript{88} Klare recognizes that “collective bargaining was almost universally and uncritically viewed by working-class activists, both within and outside of the organized left-wing groups, as the cornerstone of all programs for social justice.” Nevertheless he asserts that “the new labor history provides convincing support for the proposition that the possibilities of, and support for, working-class radicalism going beyond the quest for reforms within the boundaries of capitalism existed during the 1930s to a far greater degree than is customarily supposed.” Id.

\textsuperscript{89} Id. at 291.
Act is now termed too "indeterminate" to supply a conclusive guide to
analysis. Instead of employing "accepted, competent and traditional
modes of judicial analysis" to achieve a radical reading, Klare now
asserts that there was "no fund of ideas" or principles available as a "con-
clusive" guide to interpreting the Act. As a result, the Court should
have turned to the unarticulated yearnings of a radical element within
the working class, which it was the task of the Supreme Court somehow
to divine—even though that radical minority "may have had only a
vague idea of what the statute actually said" — because to them the Act
"symbolized a significant opening in the direction of radical change."

Any novel, controversial social legislation, like the labor Act, inevi-
tably presents issues in the disposition of which the precise language of
the act may supply only the beginning of an analysis. The interpretive
choices presented must be weighed against the core values of the Act;
some readings are closer to these values, and others more remote. But
this is not what Klare is saying. He maintains that because the text and
legislative history are too indeterminate, the task at hand is fundamen-
tally different. Instead of seeking to identify the goals and values of
the Act, the Court should instead have sought to identify the "right" band
of radicals, though no guidance is given on how the Court was to pro-
ceed. (Presumably the Court was not supposed to have looked to the
small but influential group of Communists, for, contrary to Klare, they
believed in collective agreements. Perhaps the Court was supposed to
have looked at an even smaller group of relatively uninfluential Wob-
blies because they did not believe in collective agreements.90) In any
event, having identified the proper radical band, the Court was to have
attributed to the statute the desires of that group, apparently for no

90. See P. BRISSENDEN, THE I.W.W. 326, 332 (1920); J. GAMBS, THE DECLINE OF THE
I.W.W. 129 (1932). Brissenden reports the conflict between the I.W.W. and the Mine Work-
ers on just this issue:

To the I.W.W., agreements—particularly all time agreements—are in themselves evil. Consequently the friction between the world's smallest and most revolutionary industrial union and its largest and most conservative industrial union was experienced primarily in connection with these agreements. "Wherever the bona fide labor unions have succeeded in effecting a satisfactory agreement with the employers," declares the Miner's Magazine, "... there will be found the I.W.W. organizer, attempting to create dissension." The Wobblies justified their attacks upon the Mine Workers [said President John Mitchell at the U.M.W. convention in 1906] by saying that we make trade agreements which so tie the hands of our members as to render us unable to strike at any time during the year when conditions would seem propi-
tious. They lost sight of the fact that if we ... were ... at liberty to strike at our
own sweet will, the operators would have precisely the same right and could lock us
out whenever trade was dull.

P. BRISSENDEN, supra, at 326 (footnotes omitted).
better reason than that the group desired it—and that Klare approves of its aspirations. This is to translate Disney into law:

When you wish upon a star, makes no difference who you are,
Anything your heart desires will come to you.
If your heart is in your dream, no request is too extreme,
When you wish upon a star as dreamers do.91

I realize that from a neo-Marxist perspective, Disney would ordinarily be seen as an embodiment of the capitalist credo—like the Horatio Alger stories, “When You Wish Upon a Star” would be seen as instilling a faith in individualism that thwarts the awakening of class consciousness.92 By applying Klarian analysis, however, can we not but conclude that “When You Wish Upon a Star,” a product of the radical thirties, was, as the emphasized text evidences, actually a crypto-revolutionary anthem that has been denuded of its radical potential by a trivializing bourgeois culture?

It suffices to say that although there may not be an agreed upon fund of ideas or principles as a “conclusive” guide to interpreting the Act, there is a legislative history, and it will not do to dispense with it out of hand.93 Both the Senate and the House reports stress the continuity of the labor Act with prior law—the Norris-Laguardia Act and the sequence of railway labor legislation culminating in the 1934 amendments to the Railway Labor Act of 1926. The principle of majority rule, so hotly contested when originally enacted, was imported from the railway labor legislation; and the phrasing of sections 7 and 8(1) of the Wagner Act was carried over essentially verbatim from the Norris-Laguardia Act via section 7(a) of the National Industrial Recovery Act, which had a developed case law under the (old) National Labor Rela-


92. See A. DORFMAN & A. MATTLEART, HOW TO READ DONALD DUCK: IMPERIALIST IDEOLOGY IN THE DISNEY COMIC 79 (D. Kunzle trans. 1975) (treating Scrooge McDuck as a personification of “the basic myth of social mobility in the capitalist system” and as propagating the myth of “the bourgeoisie-as-a-class[—]that the capitalist system” was established by individuals and not by the class for which “Scrooge [McDuck] is a screen”).

93. To the extent Klare examines the background of the Act, he focuses primarily upon the record of venomous business opposition. He quotes, for example, the Associated Industries of Oklahoma’s attack that the bill would “‘out-SOVIET the Russian Soviets’.” Klare, supra note 2, at 286. But he does note that “[b]usiness rhetoric was sometimes quite exaggerated.” Id. at 289 n.74 (citing Alfred P. Sloan’s description of the Flint sit-down as a “dress rehearsal for Sovietizing the entire country”). This will not do, for Klare uses business opposition as an important source for how the Act should be read. In effect, he would have the Court read the Act to accord with the exaggerated fears of its most reactionary opponents, just as Brecher saw a threat to capitalism through Alfred P. Sloan’s eyes. See supra text accompanying note 23.
Thus the labor Act can be considered "epoch making" (or "radical") in the sense that, for the first time, the law firmly allied government with the right to form unions and engage in collective bargaining in the private sector at large. But as then Professor Frankfurter pointed out, as the legislative history confirms, and as the Jones & Laughlin Steel Court made clear, the substance of the law borrowed heavily from previous enactments, which supply a relevant guide to the judicial interpretation of the Act.

I suspect that Klare refuses to accept the obvious connection to prior law because these laws had little or no radical political connection. The railway labor laws were jointly negotiated by representatives of management and the railway brotherhoods—notoriously among the most conservative of unions. The Norris-Laguardia Act, the language of which forms the heart of sections 7 and 8(1), was drafted by Felix Frankfurter and other non-radical reformers, was adopted by the 72nd Congress, and grudgingly was signed into law by Herbert Hoover.

Klare dismisses the obvious connection of the labor Act to prior law with the pronouncement that "this was interesting as intellectual history, but politically disingenuous, given the extraordinary opposition that greeted the Wagner Act." Klare's argument conceivably might make some sense if he illuminated what he meant by "politically disingenuous." He seems to suggest that although much of its language was borrowed from prior law, a different meaning should be given to the Act because of the political context in which it was enacted. The argument would hinge on demonstrating that the legislature, while apparently adopting a reform Act, was actually embracing the demands of that radical element whose unarticulated yearnings Klare would make dispositive of the content of the law.

At this critical juncture, Klare's argument confronts an historical obstacle. It remains to be seen how influential labor as a whole—let alone a radical minority—was in 1934. But, from what we know, the labor Act was vigorously supported by the conservative labor element, the AFL, and was opposed by the Communist Party which, presumably,
did speak for at least a significant portion of the radical minority. In sum, Klare declines to confront the fact that the labor Act’s animating spirit was Robert F. Wagner—not Rosa Luxemburg.

2. Participation, Co-optation, and “Legal Consciousness.” —The larger purpose to which all of this is put is the theme of co-optation. The labor Act sought to foster the realization of industrial democracy, but, Klare argues, industrial democracy can be viewed as either “participatory” or “representational.” Although Klare only alludes to what he means by the former, he does explain the latter with some precision: A “representational democracy” is “an industrial democracy limited to the notion that the bargaining unit is a political constituency to which should be extended the traditional democratic right to vote for or against representation, but that democratic participation is largely exhausted by that choice.” The law, Klare asserts, developed along the latter line “with only a passive role allowed the rank-and-file employees in day-to-day industrial affairs.” As a result, the law developed counter to the proposition that “workers’ organizations ought to affirm and advance[,] the proposition that those whose collective efforts make social production possible should have a decisive say in the decisions that affect the process . . . .”

Klare never supplies a model of what the “participatory” system looks like or how it would work. To the extent we can glean a positive

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98. Daniel Bell has reported the Communist Party’s reaction to the New Deal: The chief resolution of the party’s 1934 convention declared: “The ‘New Deal’ of Roosevelt is the aggressive effort of the bankers and trusts to find a way out of the crisis at the expense of the millions of toilers. Under cover of the most shameless demagogy, Roosevelt and the capitalists carry through drastic attacks upon the living standards of the masses, increased terrorism against the Negro masses, increased political oppression and systematic denial of existing civil rights. . . . The ‘New Deal’ is a program of fascization and the most intense preparations for imperialist war . . . . [T]he Roosevelt regime is not, as the liberals and the Socialist Party leaders claim, a progressive regime, but is a government serving the interest of finance capital and moving toward the fascist suppression of the workers’ movement.” As late as February 1935, the Communist Party manifesto was headed: AGAINST THE “NEW DEAL” OF HUNGER, FASCISM AND WAR!
D. Bell, MARXIAN SOCIALISM IN THE UNITED STATES 141 (1967) (footnotes omitted).

99. See generally J. Huthmacher, Robert F. Wagner and the Rise of Urban Liberalism 154-98 (1968) (discussing Wagner’s pivotal role in passage of the Act bearing his name). Klare never mentions this source and, in fact, deals not at all with Wagner’s ideas or efforts.

100. See Klare, supra note 2, at 285.
101. Id. at 285 n.61 (interpreting Weyand, Majority Rule in Collective Bargaining, 45 COLUM. L. REV. 556, 599 (1945)).
102. Id. at 289.
103. Id. at 285 n.61.
104. Id. at 321.
proposal, as Daniel Bell said in criticism generally of the New Left’s idea of participatory democracy, “it is an inchoate, primitive Rousseau-
ism.”105 How, for example, are each of the tens of thousands of General Motors employees to have a “decisive say” save by a system of representa-
tion? And how is a system of “participatory democracy” to resolve inevitable conflicts between the myriad of interest groups that compose the work force?

More important, Klare’s claim that the statute was amenable to an alternative to “representational” democracy must deal with the lan-
guage of section 9,106 which adopts the principle of majority rule by exclusive representation. As Senator Wagner argued in presenting the bill:

Collective bargaining is not an artificial procedure devoted to an unknown end. Its object is the making of agreements which will stabilize employment conditions and promote fair working standards. It is well nigh universally recognized that it is prac-
tically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit. For this reason, collective bargaining means majority rule. This rule is conducive not only to agreements, but also to friendly relations. Workers find it easier to approach their em-
ployers in a spirit of good will if they are not torn by internal dissent. And employers, wherever majority rule has been given a fair chance, have discovered it more profitable to deal with a single group than to be harrassed by a constant series of negotiations with rival factions.107

It is hard to see how a system of participation in contradistinction to representation could function without breaking down into a “constant series of negotiations with rival factions.” In any event, Klare never deals with this aspect of the Act’s language or history.

Is it accurate to say that the workers’ participation under the labor Act (as “deradicalized”) is “exhausted” by the selection of a bargaining representative? Does the law “allow” workers “only a passive role” in day-to-day industrial affairs? The image of the American worker that Klare conjures up with these sentences is a figure of transcendent passiv-
ity, so without intelligence or even passion as to be indistinguishable from Millet’s Man With A Hoe.108

105. D. BELL, supra note 98, at xi.
107. 79 CONG. REC. 7571 (1935); LEGISLATIVE HISTORY, supra note 77, at 2336.
108. Regrettably, this lecture cannot be illustrated. I had thought that Edwin Markham’s
We confront, again, Klare’s language. To “allow only a passive role” cannot mean that an active role is legally unallowed in the sense of being forbidden or unpermitted for such is plainly not the law. Thus what Klare seems to be saying is that the labor Act only makes provision for such a passive role. But once an exclusive representative has been designated under the Act, the Act speaks not at all to how that representative structures itself. The Act would protect the employees’ right to select an I.W.W. local, even one that eschews collective agreements in favor of a system of continuous collective bargaining, just as it would protect the employees’ right to designate a single person as their representative.

Thus I find Klare’s use of language misleading at best. Nothing in the labor Act “disallows” a union from functioning as a committee of the whole, or from securing a collective agreement that would function as a forty-eight hour rolling truce in a continuous system of collective bargaining. On the matter of structure, unions do not function as committees of the whole, but this is not because of the labor Act. On the matter of self-help, a current survey of four hundred collective agreements indicates that over a third of them do reserve the right to strike—fourteen percent after exhaustion of the grievance procedure, thirteen percent for violation of an arbitrator’s award, and six percent for violation of the contract itself. In the automobile industry, for example, the union’s “sacred clause” has been the reservation of the right to strike during the contract term over the speed of production. Nothing in

famous poem might suffice. E. Markham, The Man with the Hoe, in The Poems of Edwin Markham 30 (1950). (“A thing that grieves not and that never hopes,/ Stolid and stunned, a brother to the ox?”). But Markham supplies a more useful sketch:

As I looked at Millet’s The Man with the Hoe, I realized that I was looking on no mere man of the field; but was looking on a plundered peasant, typifying the millions leftover as the debris from the thousand wars of the masters and from their long industrial oppressions, extending over the ages. This Hoe-man might be a stooped consumptive toiler in a New York City sweat-shop; a man with a pick, spending nearly all his days underground in a West Virginia coal mine; a man with a labor-broken body carrying a hod in a London street; a boatman with strained arms and aching back rowing for hours against the heavy current of the Volga.

Id. (Markham’s comment on the painting that inspired his poem).


110. See R. Herding, Job Control and Union Structure 29 (1972). In fact, the union’s ability to manipulate the “strikeable issues” clause to expand control or achieve concessions is limited primarily by the policy and bargaining power of its adversary. General Motors, from the first, took a firm and consistent view, but Ford did not. See R. MacDonald, Collective Bargaining in the Automobile Industry 335-38 (1963). MacDonald observes:

'Since 1949 not a single negotiation of an authorized strike notice has been restricted to the so-called strikeable issue. In almost every instance the strikeable issue has been insignificant in the negotiations which we [Ford] have been forced to under-
these facts evidences an "exhausted" rank-and-file or suggests that work- 
ers are affected by a legal consciousness that "allows" them "only a pas- 
vie role"; that is, when direct action is provided for, whether it will be 
resorted to (and the success of that resort) depends in good measure 
upon pressure from and the cohesion of the rank-and-file and the inter-

By the same token, a number of unions make provision for ratifica-
tion of collective agreements by vote of the membership, and in a not 
consequential number of instances, ratification is denied.\textsuperscript{111} To simi-
lar effect, appeals by members dissatisfied with the disposition of their 
grievances may be put to a vote of the members of the local; indeed, one 
study has pointed out that the leadership often seeks the local's vote in 
particularly "hot" cases.\textsuperscript{112} The submission of these matters to a vote 
cannot be considered as allocating "only a passive role" to the rank-and-

Klare's assertion may have yet another meaning: First, that certain 
spontaneous, concerted activities by discrete work groups in derogation 
of the exclusive representative are not protected by the labor Act; and, 
second, that the law's declination to protect these activities results in a 
passive working class. The former is certainly true. As Senator Wagner's 
observations made clear, that is an inherent part of the principle of 
exclusive representation.\textsuperscript{113}

The latter requires further examination. The "orthodox" view of 
collective bargaining "assumes a simple relationship between the work-
ers and the union . . . ."\textsuperscript{114}

\begin{quote}
[T]he union claims a proprietary right to the use of forceful 
tactics and a proprietary interest in the discontent that such 
tactics manifest. The union seeks to organize the workers' dis-
content and to direct it through the union's own channels of 
activity.\textsuperscript{115}
\end{quote}

take with the union to avoid an actual walk-out or to end the walk-out which has 
taken place.' The company cited a number of instances where the union had failed 
to utilize the procedure properly, had openly fabricated disputes involving produc-
tion standards and health and safety conditions as a tactical move in nullifying the 
no-strike section of the contract, and had then compelled management to negotiate 
on nonstrikeable issues.

\textit{Id.} at 338.

\textsuperscript{111} See Summers, Ratification of Agreements, in Frontiers of Collective Bargaining 
75, 78 (J. Dunlop & N. Chamberlain eds. 1967).

\textsuperscript{112} L. Sayles & G. Strauss, The Local Union 104-05 (1967).

\textsuperscript{113} See supra text accompanying note 107.

\textsuperscript{114} J. Kuhn, Bargaining in Grievance Settlement: The Power of Industrial 

\textsuperscript{115} Id. at 127 (footnote omitted).
Accordingly, Klare's argument, from this perspective, would seem to be that the legal legitimation of the union's monopolization of discontent contributes to the co-optation and the passivity of the working class.

As Kuhn's classic study of rubber workers explains, however, the "orthodox view of collective bargaining" is contradicted not by logic, but by experience.

Apparently workers do not recognize the claim by unions to an exclusive interest in their shop discontent. Workers do not understand themselves to be simply members paying dues to the union and receiving in return wages and working benefits and protection of their individual rights under the agreement. The relationship of workers to the union is more complex than that. They no more approach the union as individuals than citizens of our nation approach the government as individuals. For some purposes they may do so, but for many more they make known their interest and demands through specialized agencies and pressure groups.\footnote{116. \textit{Id.} at 128 (emphasis added).}

Kuhn illuminates the day-to-day pressures and tactics by which work groups, through the presentation of grievances and pressures upon their union representatives, engage in "fractional bargaining"\footnote{117. \textit{Id.} at 79.} to secure benefits, advantages, and adjustments, perhaps not even provided for in the collective agreement and, sometimes, actually in derogation of it. As Kuhn documents:

Though at times reluctant to admit it, or so used to it that they are unaware of the implications of their actions, management and union officials in all of the plants studied bargain over grievances and more often than not settle grievances or their underlying problems on the basis of their relative bargaining position in the shop. They may refer or appeal to their rights under the agreement, but they are not apt to respect the letter of the agreement, or even its spirit, if the shop bargaining position does not support it. Grievance bargaining and its disruptive tactics are not an occasional, anomalous event in the shop; they are normal practices within the grievance system, making up a significant, if not the largest, portion of all grievance work.\footnote{118. \textit{Id.} at 57.}

Nothing here bespeaks passivity and exhaustion. On the contrary, Ivar Berg and his associates point out that "[t]he rights of managers to manage people rather than property derives from a voluntary contract the
terms of which are reached by parties who keep a weather eye on the prospects, so to speak, for a favorable balance of trade.\textsuperscript{119}

I appreciate that this evidence from the "real world" is irrelevant because Klare's argument is built upon the assumption of a fundamental disjuncture between the union and those who comprise it: If "democratic participation" means participation in or influence on the collective representative, it is not a "participatory democracy" that gives the workers a direct and decisive say. But, contrary to Klare's logic, if workers, acting through the union or acting upon the union, as work groups whose interests must be accommodated, actually have a decisive say in all manner of things important to them, then their participation is scarcely "exhausted" by the counting of a ballot in a representation election, nor does the law "allow" them only a passive role in day-to-day industrial life.

Although most of the measures taken by work groups and their union representatives are perfectly lawful (flooding the grievance system to manufacture trading material, pressing grievances to embarrass, or threaten to embarrass, managers from whom concessions are sought, or putting political pressure on union officers for more vigorous pursuit of work group interests) some tactics, such as the slowdown or recurrent refusals to work overtime, are not protected activities. Thus one might conclude that, at least to the extent these disruptive tactics are not protected by law, Klare's argument is partially supported.

The argument, however, runs into another difficulty, for a major element of Klare's critique is the claim that the law and the "legal consciousness" articulated by the Court has contributed to the co-optation of the working class.\textsuperscript{120} This claim cannot be squared with the facts. Some "fractional bargaining" is in derogation of the principle of exclusive representation, and some grievance bargaining rests upon tactics unprotected by law. Nevertheless, given a favorable economy, labor market, and strategic situation in the work process, workers seem to be singularly unaffected by the "legal consciousness" that Klare argues has had a stultifying effect.\textsuperscript{121} It suffices to say, as Kuhn's and others' studies illuminate,\textsuperscript{122} the world of unionized work is scarcely the passive world that Klare posits. It is a tumultuous place of more-or-less con-

\textsuperscript{119} I. Berg, M. Freedman & M. Freeman, Managers and Work Reform 210 (1978).

\textsuperscript{120} See Klare, supra note 2, at 338-39.

\textsuperscript{121} See, e.g., Atleson, Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience, 34 Ohio St. L.J. 750 (1973).

stant haggling, of threats and reciprocally coercive measures, of bargains and concessions by work groups and their leaders.

Finally, even if Klare were to acknowledge these industrial realities, I doubt that he would be much persuaded by them, for the ends of these tactics—a higher shift differential, better compensation for down-time, a wage increase for working undermanned machines—do not threaten the foundations of the capitalist order. That these matters are the meat-and-potatoes of "day-to-day industrial affairs," and that workers often do have an effective (even decisive) say in them is, for Klare's purposes, irrelevant, for it seems that workers engage in concerted activity and are on occasion willing even to risk industrial discipline for ends that Klare believes are unworthy—that are contrary to what workers and their organizations "ought to affirm." The source and implications of that "ought" will be discussed later. 123

B. The Post-War Paradigm

Katherine Stone points to a group of lawyers and labor economists who were active in the post-war period: Archibald Cox, Harry Shulman, John Dunlop, and David Feller, among others. These men, she claims, share a common ideology. She terms this ideology "industrial pluralism," the "tenets" of which are

(1) the workplace under collective bargaining can be analogized to a political democracy;
(2) private arbitration is a necessary element in the workplace mini-democracy;
(3) in order to foster arbitration and to ensure the functioning of the mini-democracy, the processes of the state must not intervene;
(4) individual rights in collective bargaining must yield to the collective rights of the union; and
(5) under the Act, labor's only rights are to bargain collectively and to arbitrate disputes with its employer. 124

The writings of these ideologues, she claims, "had an enormous impact on the shape of legal doctrine"125 even to the point of being "adopted" by the United States Supreme Court. 126 But the ideology

123. See infra text accompanying notes 289-91.
124. Stone, supra note 3, at 1516.
125. Id.
126. Id. at 1511 ("This model [which the Court "adopted"] . . . I shall call 'industrial pluralism' . . . .").
according to Stone, is fatally flawed. It is doctrinally "incoherent" as evidenced by (1) the problem for private ordering created by the duty of fair representation, (2) the narrowed realm of joint sovereignty resulting from the mandatory-permissive bargaining subject distinction, and (3) the pluralists' inability to reconcile their "belief in retained management prerogatives with the premise of joint sovereignty." With extraordinary distaste for the emphasis pluralist ideology places on private ordering, especially the role of grievance arbitration, Ms. Stone concludes that the ideology and the law it has generated serve ultimately "as a vehicle for the manipulation of employee discontent and for the legitimatization of existing inequalities of power in the workplace." Klare, as we have seen, arrives at the same general conclusion; but he gets there by a rather direct route: The Wagner Act was radical, and the Supreme Court distorted it for co-optative, reformist ends.

In Stone's piece, it is not altogether clear who or what the object of her ire is. It does not appear to be the statute, for Stone seems to criticize the Supreme Court for its reading of the Act. Thus her object, like Klare's, could be the Court, yet the Court's decisions are discussed only as they "adopt" an ideology generated by others. Accordingly, as I read her article (and if I err, I am abjectly apologetic), Stone takes the whole of the labor Act's development following the war as reflecting neither the statute (or arguable statutory constructions) nor the predisposition of individual Justices, but an ideology fashioned after the war by a bunch of lawyers and economists—primarily identified with Harvard University—whose willing instrument was the United States Supreme Court.

I shall deal first with this coterie theory of legal history. Once the pluralist postulate is safely tucked away, we can deal with Stone's attack on private ordering, especially arbitration.

1. The Pluralist Postulate.—Only one feature of Stone's pluralist "tenets" is historically rooted in the post-war period; that is, the widespread adoption of grievance arbitration was encouraged by experience under the War Labor Board. Accordingly, an ideology may be at-

127. Id. at 1516.
128. Id. at 1541-42.
129. Id. at 1547-48.
130. Id. at 1545.
131. Id. at 1517.
132. Cox and Dunlop teach at Harvard University; both Shulman and Feller graduated from the Harvard Law School.
tributed, as one historian has, to those whose attitude toward labor relations was molded by that experience:

The first public members [of the WLB] were men skilled in mediation and arbitration. They were liberal pluralists, committed to the development of a labor relations system in which the triple objectives of efficiency, order, and representative democracy could be reconciled. They believed in the Wagner Act's legislative philosophy, and in strong, responsible unions as agents for its implementation. They preferred to see industrial disputes settled in decentralized, voluntarist negotiations between the parties rather than on terms imposed by the state from the center, or unilaterally determined by employers.\(^{134}\)

However, the beliefs of these "liberal pluralists" were based, as the emphasized language makes plain, not in post-war theorizing but in the philosophy of the labor Act. This distinction is not without significance, for Occam's razor applies to law as well as logic: If the post-war development of the law represents the working out of the basic philosophy of the labor Act, the pluralist postulate becomes superfluous.

Stone's first tenet, that the workplace under collective bargaining can be analogized to a political democracy, is not a product of post-war theorizing, as she seems candidly to recognize.\(^{135}\) As we have seen already, the achievement of industrial democracy was a desideratum of

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135. Indeed, she traces the origin of the idea to a 1922 article by William Leiserson, "the first" she claims, "to apply the metaphor of industrial self-government to American labor relations." Stone, supra note 3, at 1514. He was not. The "industrial democracy" movement commenced out of the social gospel before the turn of the century and flowered after World War I, especially in the 1920s. See M. DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1865-1965, at 109-96 (1970); Summers, Industrial Democracy: America's Unfulfilled Promise, 28 CLEV. ST. L. REV. 29, 29-34 (1979). \(\hfill\) The industrial democracy plans,\(^{136}\) writes the historian Daniel Rodgers, "all looked toward reconstruction of the factories on essentially political and constitutional lines." D. RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920, at 61 (1978).
the labor Act. Thus the Senate Committee's report on the precursor of the Wagner Act stated: "The language [of the Act] restrains employers from attempting . . . to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy." Insofar as that feature of "pluralist ideology" is concerned, it is firmly rooted not in post-war academic writing, but in the labor Act itself.

The same is true of her fourth tenet that "individual rights in collective bargaining must yield to the collective rights of the union." In support of this assertion, Stone points to the Supreme Court's decision in *J.1. Case Co. v. NLRB,* which held that individually executed employment contracts cannot serve as a bar to collective bargaining with a union. This decision, she argues, established "one of the essential features of industrial pluralism", namely, that the rights conferred by the Act are collective, not individual. "This comported with the notion, found in general pluralist theories of democracy, that the basic unit of social life is the group."

I fear I am insufficiently schooled in general pluralist theories of democracy to comment on the soundness of this assertion; however, Stone neglects to mention that the legal roots of *J.1. Case* lie not in post-war academic theorizing but in the Court's pre-war decision in *National Licorice Co. v. NLRB.* Stone's assertion concerning the collectivization of the wage bargain is sound insofar as it points to the suppression of the individual's ability to bargain for himself in derogation of the statutory system of exclusive representation by majority rule. To the extent, however, the Court was guided by sources external to the statute in *J.1. Case,* it did not look to general pluralist theories of democracy, but to the "practice and philosophy of collective bargaining" as it had developed out of the experience of the American labor movement.

The fifth tenet of "pluralistic ideology" is similarly rooted in the labor Act. This tenet asserts, in conjunction with the others, that the labor Act establishes a system of private ordering that precludes govern-
mental determination of wages, hours, and working conditions. Klare attributed this development to pre-war judicial deradicalization; it could, then, scarcely be the result of post-war pluralist writing. Indeed, Stone neglects to mention that greater governmental intrusion into the bargaining process was proposed as part of the post-war amendments. Proposals for a more constricted scope of bargaining, procedural limitations on the right to strike, and compulsory arbitration of labor disputes were rejected by Congress in favor of the antecedent system of private ordering by collective bargaining.¹⁴⁴

The soundness of the pluralist postulate can be tested another way. If the development of the law under the labor Act has been skewed by the writings of post-war pluralists, one would expect Stone to demonstrate the connection; that is, one would expect her to take a series of pivotal cases, to canvass the choices before the Court, and to show how the Court was influenced by pluralist writings in lieu of other at least equally plausible statutory readings. But with the exception of arbitration, she declines to connect the case treatment to the pluralist postulate. Much of the theoretical “incoherence” she finds is the result of her untested assumption that palpably every post-war decision of the Supreme Court was a product of pluralist ideology. This is evidenced in the three areas she examines—fair representation, the scope of bargaining, and “reserved rights.”

Stone claims that the duty of fair representation, as an externally imposed limit upon the union’s control of the grievant’s access to arbitration, was “an exception”¹⁴⁵ to the principle of private ordering. Because it generates “a major problem for industrial pluralism,” it indicates the “demise” of the pluralist structure.¹⁴⁶ It strains the pluralist tenet that the Act creates collective, not individual rights, and represents an “implosion of the pluralist vision.”¹⁴⁷

I shall return to Stone’s treatment of the law of fair representation more fully later; but she has it at least partly right—the duty is an externally imposed limit upon the system of private ordering. It would, however, threaten the “coherence” of the pluralist structure—it would pose a challenge to the consistency of pluralist ideology—only if the duty could be shown to have been the product of that ideology. In order to make that point, Stone would have had to delve into the text and history of Steele v. Louisville & Nashville Railroad,¹⁴⁸ which created the duty,

¹⁴⁴. See, e.g., S. 858, 80th Cong., 1st Sess. § 5(c), 93 CONG. REC. 1912-13 (1947).
¹⁴⁵. Stone, supra note 3, at 1538.
¹⁴⁶. Id. at 1541.
¹⁴⁷. See id. at 1542.
¹⁴⁸. 323 U.S. 192 (1944).
and relate the Court's decision to the writings of the pluralist school. But she doesn't undertake that effort; indeed, she never mentions the Steele case, even though it was decided that same term as J.I. Case.

The Steele Court, drawing an analogy to constitutional law, held that a collective representative (in that case, under the Railway Labor Act) has "at least as exacting a duty to protect equally the interests of the members of the craft [it represents] as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." It relied upon no secondary authority to arrive at that proposition; nor was any cited in the briefs of the parties. The reason, I suspect, is that "industrial pluralism" is concerned with groups, not individuals. It is entirely unsurprising that writers sharing that basic interest would not be writing about individuals. Indeed, the idea of individual rights did not take root in academic writing until after Steele was decided, stimulated largely by the writings of Clyde Summers.

One could argue, though Stone does not, that Steele is consistent with Stone's thesis, for it expressly builds upon the analogy of the workplace to a political democracy. As we have seen, however, the analogy was not taken from the writings of post-war ideologues, but was found in the statute. Thus the pluralist postulate is superfluous. It seems to me that the judicially imposed limit on the system of majority rule in collective bargaining represented in the duty of fair representation is no more (or less) "incoherent" than judicially imposed constitutional limits on the exercise of majority rule in the political realm. I doubt that the structure of liberal democracy has "collapsed" (or "imploded") because of the seeming tension between majority rule and judicial review.

More important, Stone argues that once the duty of fair representation is imposed, the pivotal element for pluralist theory lies in the rigor of the standard: The more intrusive the standard defining what fair representation is, the greater the external intervention and so the greater the threat to the pluralist premise of private ordering. Again, this would advance her theory if it could be shown that "the pluralists" pro-

149. Id. at 202.
To "reveal" that it [judicial review] is antidemocratic may sound as though a shameful discovery had been made deserving of apology and atonement. In fact it is no revelation at all. . . . It was defended as a positive good: the integrity of the Constitution would not depend upon mutating impressions in Congress or elsewhere. . . . The difficulty with the objection is, therefore, that while its endless repetition has given it the appearance of profound insight, it may rather be set aside as altogether trivial.
Id. at 224-25 (footnotes omitted).
151. See Stone, supra note 3, at 1542.
posed a broadly intrusive standard (seemingly oblivious to the inconsistency) which the Court adopted in *Vaca v. Sipes*.152 Stone uses *Vaca*, which defined the standard of fair representation in grievance processing, to illustrate the "incoherence" of pluralism; but she neglects to mention that the union, represented by David Feller (an archpluralist in Stone's demonology), strove unsuccessfully to avoid having the Court include "arbitrariness" as an element for breach of the duty.153

In sum, *Steele* and *Vaca* do conflict with the principle of private ordering; they are, as Stone suggests, at odds with her putative pluralist ideology. But Stone does not show that these cases are based on the pluralist ideology. On the contrary, Stone's claim that the whole of post-war labor law represents a working out of that ideology to its ultimate "collapse" is flatly contradicted.

Nowhere is this contradiction more evident than in Stone's use of the "narrow[ed] realm of joint sovereignty"154 that resulted from the mandatory-permissive bargaining subject distinction drawn by the Court in *NLRB v. Wooster Division of Borg-Warner Corp.*155 Again, the claim of "incoherence" rests upon a syllogism: The law of collective bargaining announced by the Supreme Court adopts the pluralist ideology; *Borg-Warner* constricts the scope of bargaining in a way that is inconsistent with that ideology; therefore, the pluralist ideology is fatally flawed. Again, the initial assumption goes unsupported; no evidence is supplied connecting *Borg-Warner* to any of the pluralists she identifies.

Unlike *Steele*, however, the case is connected to pluralist writing. The company had insisted that a collective agreement contain two provisions—one limiting recognition to the local union, the other conditioning the union's ability to strike upon a vote of its membership. The labor Board held such insistence to breach the duty to bargain; the court of appeals enforced the Board's order only as to the "recognition" clause. In arguing to the Supreme Court, the company relied upon the writings of George Taylor—whom Stone lists as a major pluralist—to the effect that collective bargaining should occur on any issue either

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152. 386 U.S. 171 (1967).

In briefing and arguing the case we emphasized heavily the language in *Humphrey* that the union should be free of any further review so long as it "took its position honestly, in good faith, and without hostile discrimination." We emphasized the Court's statement in *Huffman* that the union must be given a wide range subject to "complete good faith and honesty of purpose in the exercise of its discretion." We stayed away from the word "arbitrary" like the plague. But the Court did not.

*Id.* (footnotes omitted).

party chooses to raise free of any governmental restraint. The Court disagreed. In other words, the company did make a “pluralist” argument, and it did so by relying upon “pluralist” authority. Thus Borg-Warner represents a flat rejection of the pluralist paradigm, not an adoption of it.

The only point at which Stone does seriously engage with the writings of the pluralist “school” (putting arbitration aside) is on what she terms the problem of “retained rights,” to which various authors have proposed equally various solutions. The problem concerns the status of matters not expressly governed by a current collective agreement—whether an employer must bargain about them before effecting a change and whether any change so effected is subject to grievance arbitration. Stone quickly glosses the law to focus upon the solutions proposed by five writers—Harry Shulman, Archibald Cox and John Dunlop, David Feller, and Arthur Goldberg. The differences among them are taken to evidence the “incoherence” of pluralist ideology.

I shall spare you a discussion of the literature; nor do I care even to

157. See 356 U.S. at 349.
158. Since Stone reserves a high seat in the pluralist pantheon for Archibald Cox, one would have expected her to have researched Cox’s writings for evidence of support for the mandatory-permissive distinction. Had she done so, she would have learned that Cox was critical of the Borg-Warner decision. 
159. See Stone, supra note 3, at 1552-57.
164. What conclusions can be drawn from this uniform descent into incoherency by the leading industrial pluralists when they confront the problem of retained management rights? Clearly each of them sees the problem, but cannot resolve it. Their
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To assess whether Stone has got it right. It is her technique that I wish to address. Why is the circle of pluralists so small? The other participants in this symposium issue are, to put it mildly, notable figures in labor law. Clyde Summers is a firm believer in collective bargaining and grievance arbitration, and his writings have been rather influential, but Stone never mentions him. I suspect he was disqualified because of his views on individual rights, that is, because he did not fit Stone's a priori postulate about what "the pluralists" espouse. Jack Getman is also a firm believer in collective bargaining and grievance arbitration, and his work has been cited with approval by the Supreme Court; but then, he is critical of the Collyer doctrine (requiring NLRB deferral to arbitration) which Stone takes for an ideological litmus test.

Her inclusions are similarly puzzling. Both Archibald Cox and Harry Shulman are included, presumably because both strongly believe in grievance arbitration. Toward that end, Cox would have the courts enforce an agreement to arbitrate; but, as Stone seems to recognize, Shulman would not. In the event of a refusal to arbitrate, Shul-

_ideology not only provides them no guidance; it renders them incapable of describing the real world._

_Id._ at 1557.

165. Interestingly, Summers and his equally non-pluralist co-author, Harry Wellington, have produced a labor law casebook that is probably the most candidly pluralist of the lot. C. SUMMERS & H. WELLINGTON, CASES AND MATERIALS ON LABOR LAW 1 (1968) ("Despite . . . forms of governmental control of the substantive terms of employment, the dominant pattern is one of private ordering and our labor is largely directed toward shaping the institutions and processes of private ordering.")

166. In Collyer Insulated Wire, 192 N.L.R.B. 837, 839-41 (1971) the NLRB held that it would dismiss charges involving refusals to bargain filed prior to an arbitration award if the dispute is contractual in nature, the agreement calls for final and binding arbitration, and a reasonable construction of the agreement would preclude a finding that the disputed conduct violated the NLRA. The Board has eliminated the latter requirement. See Great Coastal Express, Inc., 196 N.L.R.B. 871 (1972). For Professor Getman's opinion of Collyer see Getman, Collyer Insulated Wire: A Case of Misplaced Modesty, 49 IND. L.J. 57, passim (1973) (arguing that disadvantages of the deferral doctrine outweigh advantages).


168. Stone says:

Harry Shulman adamantly criticized judicial intervention to enforce collective bargaining agreements. He urged that the administration and interpretation of trade agreements be left to the "judicial" mechanism the parties had established—the grievance and arbitration procedure. _Resort to the courts was only appropriate when self-government in the workplace disintegrated completely_. Sporadic judicial intervention in labor disputes would corrode the parties' continuing relationship and adversely affect the evolving systems of self-government.

_Id._ (footnotes omitted) (emphasis added). What Shulman actually said was:

When it [the system] works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their
man would have the dispute resolved on the field of economic combat. 169 If a disagreement of such magnitude does not disqualify one or the other from sharing a common ideology, then how could this group fairly be considered as of a single ideological stripe? And if a difference of such dimension is not disqualifying, then why exclude Summers and Getman?

From this perspective, one appreciates how artful Stone's discussion of "retained rights" is, for Stone takes the fact of disagreement among the writers to evidence the "collapse" of the pluralist "structure" without entertaining the possibility that such a "structure," in the sense she would have it, never existed. It seems to me a transparent device: Select a group of independent-minded scholars, who agree at a great many points, but disagree at others; attribute to them a common ideology (which, to the best of my knowledge, they have never attributed to themselves); show where they differ among themselves; and, conclude that their ideology is fatally flawed by "incoherence." Q.E.D.

One could just as well select two "critical legal studies" writers, like Klare and Stone. They are both participants in the Conference on Critical Legal Studies (which proclaims itself to be a movement), and they share the belief that the labor Act, as interpreted by the Supreme Court, is co-optative of American workers. But note the enormous difference between them. Klare is intensely critical of a "contractualist" interpretation of the Act; he claims that the very emphasis upon contractualism has contributed to the deradicalization of the working class. Stone says that the Act has not been read with enough contractual emphasis in that the courts (and the labor Board) have ceded jurisdiction to arbitrators to interpret collective agreements. By Stone's own lights, the "critical legal studies" labor ideology must be fatally flawed by "incoherence."

2. The Persistence of Private Ordering.—Stone traverses some well worked ground: Textile Workers v. Lincoln Mills 170 and the Steelworkers

intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award? I suggest that the law stay out—but, mind you, not the lawyers.

Shulman, supra note 160, at 1024. Shulman did not say that resort to the courts was "appropriate" when the system breaks down. He merely observed that it is when the system breaks down that the aid of the courts is sought, and he would not have them intervene even then. 169. See supra note 168.


Trilogy, which fashion a federal law of collective bargaining agreements that assigns a preferred role of grievance arbitration; and Vaca v. Sipes, which deals with the problem of an individual suit for breach of a collective bargaining agreement (and the union's breach of the duty of fair representation). The theme that pervades the discussion of both arbitration and fair representation is Stone's distaste for private ordering.

(a) Arbitration.—Lincoln Mills resolved the dispute surrounding whether section 301 of the Taft-Hartley Act was procedural or substantive; the Court decided that it was a command to the judiciary to fashion a federal common law of collective bargaining agreements limited only by the "range of judicial inventiveness." In the Steelworkers Trilogy, the Court commanded that a broad reading be given to grievance arbitration provisions.

Stone is critical of these cases because they foster a co-optive institution. I will deal with that claim later. However, she does attack the Court's emphasis on arbitration as a forum for grievance resolution on purely legal grounds to evidence the distorting effect of pro-arbitration ideologues on the law:

Nothing in the Wagner Act or in the Taft-Hartley Amendments dictated that workers or unions be deprived of their rights as citizens to judicial adjudication of their disputes with employers.

In part, the institutional choice of arbitration over the courts was motivated by systemic concerns—a fear that the federal courts would be inundated with small claims by employees for minor company breaches of collective agreements. That concern itself, however, is not sufficient to deprive unions or workers of their rights to use the federal courts. Nor does it explain why the administrative agency established by the Act—the NLRB—was not adequate to the task of adjudicating these disputes. The courts justified the institutional choice by tying it to the industrial pluralist view that arbitration is an instrument of the parties' self-government.

174. See 353 U.S. at 450-52.
175. See id. at 457.
177. See infra text accompanying notes 215-76.
178. Stone, supra note 3, at 1530 (footnotes omitted) (emphasis added).
I find this mildly puzzling. The Court was confronted with arbitration provisions contained in collective agreements and chose to give them a very broad sweep. But the result "deprives" a union of nothing, for if it thought judicial enforcement preferable to arbitration, or—to return to Klare's view—if it thought traditional self-help (the strike) preferable to resort to any outside party, all the union need do is so provide in the collective agreement; in the former, by stating that claims of breach will be judicially determined, and in the latter, by reserving the right to strike over grievances.\textsuperscript{179} To be sure, such provisions may be difficult to secure: in the former, because unions prefer arbitration to judicial disposition; in the latter, because of the obvious reluctance of employers to agree. But it works a debasement of meaning to equate a policy strongly favoring arbitration to a judicial deprivation.

Stone's distaste for the idea of private ordering—her preference for the imposition of some public body—leads her to accuse the Court of "sidestepping" the NLRB's role.\textsuperscript{180} She argues that the Board has all the seeming advantages of arbitration: expertise in labor matters, informality of procedure, and remedial flexibility.\textsuperscript{181} Most important, "[t]he Act would support an interpretation giving the NLRB jurisdiction over breaches of contract":\textsuperscript{182}

Under section 8(a)(1) the Board is required to prevent any interference with employees' rights to organize and bargain collectively. Because frequent employer breaches of collective agreements discredit a union and undermine its strength, such breaches are arguably unfair labor practices. Furthermore, under section 10(a) of the Act, the Board is empowered to prevent unfair labor practices notwithstanding any other means of adjustment established by agreement. The Court, however, chose not to adopt this viewpoint. Instead it reinforced the primacy of the arbitral forum by diminishing the power of the Board even over its explicit [sic] statutory jurisdiction.\textsuperscript{183}

As Stone's suggested reading amply evidences, however, the Board's jurisdiction to adjudicate claims of breach of contract simpliciter is scarcely "explicit" in the text of the Act. Indeed, while citing the Court's neglect of section 10(a), Stone neglects to mention section 203(d) of the Taft-Hartley Act,\textsuperscript{184} upon which the Court did rely:

\textsuperscript{179}. As, in fact, some do. See supra text accompanying note 109.
\textsuperscript{180}. Stone, supra note 3, at 1531.
\textsuperscript{181}. Id.
\textsuperscript{182}. Id. at 1531-32 (emphasis added).
\textsuperscript{183}. Id. (footnotes omitted) (emphasis added).
Section 203(d) . . . states, "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . . ." That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.\(^{185}\)

More to the point, Stone also neglects to mention a relevant portion of the legislative history of section 301, which was relied upon in *Lincoln Mills*.\(^{186}\) The Conference Report on the bill explained:

The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.\(^{187}\)

In other words, Stone criticizes the Court for failing to reach a result that Congress had explicitly rejected, and she does so without even deeming that rejection worthy of note.

She is also indifferent to the practical consequences of her argument. Even the Senate Committee, in proposing that breach of a collective agreement be made an unfair labor practice, contemplated that the Board would exercise its power selectively. "Any other course could engulf the Board with a vast number of petty cases that could best be settled by other means."\(^{188}\) Will the federal district courts or the labor

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188. S. REP. NO. 105, 80th Cong., 1st Sess. 23 (1947).

The committee wishes to make it clear that by this provision and the parallel provision making contract violations by employers unfair labor practices, it is not intended that the National Labor Relations Board shall undertake to adjudicate all disputes alleging breach of labor agreements. Any such course would be inimical to the development by the parties themselves of adequate grievance-handling and voluntary arbitration machinery. It is the purpose of this bill to encourage free-collective bargaining; it would not be conducive to that objective if the Board became the forum for trying day-to-day grievances or if in the guise of unfair labor practice cases it entertained damage actions arising out of breach of contract. Hence the committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself,
Board provide fairer and more expeditious forums for employee grievances than arbitration? The question of fairness goes to Stone's co-optation argument, and so I will turn to it later. But as to expedition, the following ought at least give pause. According to a sample of Federal Mediation and Conciliation Service (FMCS) cases from 1970 to 1977, the mean elapsed time between the date of the filing of a grievance and the date of the arbitrator's award was approximately eight months, and varied by little more than one month over that eight year period. In 1979, the average time elapsed from the filing of an unfair labor practice complaint to the date of the labor Board's decision was approximately fourteen months. And in that year, the average time elapsed in federal diversity cases from date of complaint to close of trial was twenty months. The last figure is based upon the approximately 3,500 diversity cases dealt with by all the federal district courts. The labor Board's figure is based upon the approximately 1,200 unfair labor practice cases that went to hearing. I should note that in 1977, the most recent year for which I was able to secure data, the FMCS received over twenty-three thousand panel requests; and FMCS is not the most important source of arbitral selection. It is inconceivable that inundating the federal courts or the labor board with literally tens of thousands of cases a year will result in faster justice than that which employees receive in arbitration. It may result in "better" justice in terms of procedural rigor, and, perhaps, advocacy, but at an inevitable and significant cost in delay, a factor Stone dismisses out of hand.

(b) The Duty of Fair Representation.—Stone is sharply critical of the Court's decision in Vaca v. Sipes. First she states the holding in the case:

The Court ruled that the employee could not sue the employer directly under Section 301 [for breach of a collective bargain-

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189. See infra text accompanying notes 215-76.
191. The author compiled this data from the Annual Reports of the NLRB and from internal NLRB reports.
193. Id.
194. See FMCS ANN. REP., supra note 190, at 42.
ing agreement] because there were grievance and arbitration procedures established in the collective bargaining agreement. But because the union had thwarted his access to those procedures, the employee could sue the union under section 8(b)(1) of the Act for breach of the duty of fair representation. The standard set to establish a union's breach of duty was failure to process the grievance "in good faith and in a nonarbitrary manner." Should the employee prevail against the union, then and only then could the employee be heard on the merits of the underlying breach of contract claim against the employer.  

Then, Stone attacks the Court for having taken jurisdiction over the duty of fair representation claim at all. "Theoretically, this should have been a matter exclusively for the [labor] Board, because the duty arises under the Act. Under the NLRA, breach of duty is an unfair labor practice, and the preemption doctrine should have relegated the issue to the Board." The Court, she notes, supplied three reasons for not doing so: (1) the disposition of the contract claim may be intertwined with the fair representation issue, especially on the question of remedy; (2) the fair representation issue involves the determination of questions, such as the union's handling of the grievance machinery, which are not normally within the Board's unfair labor practice jurisdiction; and (3) the Board's General Counsel has unreviewable discretion over the issuance or non-issuance of an unfair labor practice complaint. Only the first does Stone find worthy of full consideration; the other two are dispatched in a footnote.

Inevitably the "reason" the Court chose as it did, Stone claims, was ideological:

The only limiting factor in the individual's ability to secure outside adjudication of his contract claim would be the standard set for proving a breach of the union's duty. If the standard were set low, then a breach would be relatively easy to establish and the contract claim would have to be heard, thus undermining the entire principle of the exclusivity and the finality of arbitration. In order to keep this exception within bounds and to prevent the demise of the doctrines of the Steelworkers Trilogy, the Court decided to retain jurisdiction over these hybrid breach of duty-breach of contract actions.  

195. Stone, supra note 3, at 1536 (footnotes omitted).
196. Id. at 1536-37 (footnotes omitted).
197. See id. at 1537.
198. See id. at 1537 n.152.
199. Id. at 1538.
Permit me to offer four corrections to this account of Vaca. First, Stone says that the holding in Vaca is that the employee cannot sue the employer "directly under section 301"; he must sue the union "under section 8(b)(1)." Only if the employee prevails in that action can the employee "be heard" on the contract issue against the employer—no mention being made here of how there is jurisdiction over the employer. In fact, what the Court held is that the employee may sue the employer under section 301, provided that he prove the union breached the duty of fair representation; the employee need not sue the union to make his case against the employer (and no judicial mention is made of section 8(b)(1) as jurisdictional). The employee's suit against the employer remains always a section 301 suit.

Second, Stone says that the Court agreed that a union's breach of the duty of fair representation is an unfair labor practice under section 8(b)(1) of the Act. In fact, the Court did not pass upon the question. Third, Stone neglects to mention that the Court fully explained its reluctance to accede to the Board's view. The duty of fair representation was fashioned by the Supreme Court in the 1944 decision in Steele. It was not until 1962, in Miranda Fuel, that the NLRB held that breach of the duty was also an unfair labor practice. With this record of administrative foot-dragging on the protection of individual rights, the Court was reluctant to yield to the Board's exclusive unfair labor practice jurisdiction:

Were we to hold, as petitioners and the Government urge, that the courts are foreclosed by the NLRB's Miranda Fuel decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable

200. Id. at 1536.
201. Id.
202. See 386 U.S. at 186-87. At other points, Stone does advert to the action against the employer as a § 301 action. See Stone, supra note 3, at 1537-8.
203. See Stone, supra note 3, at 1536.
204. Vaca, 386 U.S. at 186. As the Court more recently observed:

   The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices. . . . We have twice declined to decide the correctness of the Board's position, and we need not address that question today.


205. See Vaca, 386 U.S. at 185-88.
206. See id. at 177.
207. See id. at 177-78.
discretion to refuse to institute an unfair labor practice complaint. The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union’s breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB’s tardy assumption of jurisdiction in these cases that Congress, when it enacted NLRA § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee’s statutory representative.\footnote{208}

Finally, Stone dismisses the Court’s reliance upon the “unreviewable discretion” of the Board’s General Counsel by footnote.\footnote{209} This reason, she asserts, “merely states that the General Counsel might abuse its discretion, a danger inherent in any delegation of authority to an administrative agency. Furthermore, such abuse of discretion is reviewable under the rule of \textit{Leedom v. Kyne} . . . .”\footnote{210} Unreviewable, however, means unreviewable; it does not mean “reviewable for abuse of discretion,” it means “not reviewable at all.” And \textit{Leedom v. Kyne},\footnote{211} which allowed review of a non-final order of the Board conceded to be patently \textit{ultra vires} the Act, does not stand for review for abuse of discretion.\footnote{212}

The conclusion Stone proffers based on this treatment of \textit{Vaca} (or, I should say, a case that is alleged to be \textit{Vaca}) is that the Court declined to defer to the Board’s jurisdiction over both the contract and fair representation questions to keep the standard of fair representation “within bounds” so to do minimal damage to the system of private ordering.\footnote{213} This reason ignores the fact that the content of the duty, whether applied in the first instance by the NLRB or the federal district courts, is a question of statutory construction reviewable by either route in the courts of appeals, and, eventually determined by the Supreme Court.

The point of Stone’s critique of \textit{Vaca} is the claim she makes for the ultimate “incoherence” of pluralism and for the “collapse” of the “pluralist structure.”

The breach of the duty of fair representation poses problems for industrial pluralism precisely because of the choice of \textit{private forums} for the adjudication of contract disputes. If such disputes were adjudicated by the NLRB, any party—union or

\footnote{208. \textit{Id.} at 182-83 (footnote and citation omitted).}
\footnote{209. \textit{Stone}, supra note 3, at 1537 n.152.}
\footnote{210. \textit{Id.}}
\footnote{211. 358 U.S. 184 (1958).}
\footnote{212. \textit{See id.} at 188 ("This suit is not one to 'review,' . . . a decision of the board made within its jurisdiction.").}
\footnote{213. \textit{See Stone}, supra note 3, at 1538.}
individual—could initiate an action; there could be no breach of a union’s duty in handling and settling grievances.\textsuperscript{214}

This is not quite right. The duty of fair representation poses a "problem" not because of the choice of private forums for contract adjudication, but because it functions as an externally imposed limit on the union's administration of the grievance-arbitration procedure. Accordingly, were Congress to amend the labor Act to give every employee the statutory right to pursue any grievance arising under a collective agreement to an arbitrator, there would be no duty of fair representation problem. Unions would be relieved of their role in selecting the cases to be heard. But arbitration would remain a private, not a public forum for the adjudication of the grievance, and the \textit{Steelworkers Trilogy} would be totally unaffected.

3. \textit{Arbitration and Co-optation}.—The thrust of Stone's piece is that pluralist ideology, as embodied in the law and practice of grievance arbitration, contributes to the co-optation of the working class. Stone's argument proceeds in four stages: (1) "the pluralists' arbitrator in practice does not even try to be a neutral interpreter of the collective agreement";\textsuperscript{215} (2) the real function of arbitration is to implement the industrial sociology of the human relations school, consequently arbitration creates only an "illusion of fairness";\textsuperscript{216} (3) the "hidden agenda" is to destroy the cohesion of the work group;\textsuperscript{217} (4) therefore, the antinomy between the destruction of group cohesion and a pluralist theory premised upon group cohesion ultimately negates the theory.\textsuperscript{218} The conclusion does follow inexorably from the premises; the question, however, is whether the premises have any correspondence with reality.

\textit{(a) The Premise of Neutral Adjudication}.—Stone argues that arbitrators are not the neutral judiciary of an industrial democracy but are active intervenors who function merely to pacify class tensions.\textsuperscript{219} They sense the underground grumblings of employees and tailor their decisions to siphon off employee discontent.\textsuperscript{220} They apply arbitral doctrines in their awards that are biased toward management; they act "consistently on the side of management."\textsuperscript{221} Indeed, they conceive of

\textsuperscript{214} \textit{Id.} at 1542 (footnote omitted) (emphasis added).
\textsuperscript{215} \textit{Id.} at 1565.
\textsuperscript{216} \textit{See id.} at 1570.
\textsuperscript{217} \textit{See id.} at 1576.
\textsuperscript{218} \textit{See id.} at 1577.
\textsuperscript{219} \textit{See id.} at 1565.
\textsuperscript{220} \textit{See id.} at 1572.
\textsuperscript{221} \textit{Id.} at 1565 & n.300.
themselves as activist intervenors, unconstrained by the collective agreement.\textsuperscript{222}

Putting the accuracy of her premises aside, I have a major difficulty with Stone's logic. If arbitrators decide cases in order to quell employee discontent, they do so, presumably, by positively responding to the grievances that gave rise to that discontent. (Indeed, Stone's criticism of the system as a pacifier of class tension is that by individuating grievances, the cohesion of the group is destroyed.\textsuperscript{223}) But Stone does not explain how arbitrators are able to pacify grievants while being biased toward management. The only explanation consistent with her theory is that workers are beguiled by the mere "illusion of fairness" unconnected to the actual results of arbitration. I will pursue the implications of this element of Stone's theory at the close of this lecture.\textsuperscript{224}

Stone's argument to the interventionist nature of arbitration proceeds by connecting the general practice of grievance arbitration to the ideas and practices of the late Harry Shulman, the standing umpire under the Ford-UAW contract. By Stone's account, Shulman took "an extreme position\textsuperscript{225} on the function of the arbitrator as an activist. Nevertheless, Stone uses Shulman as a paradigm for all that she believes is wrong with arbitration. But before reaching that, a page of history would be useful.

Charles Killingsworth and Saul Wallen have outlined the history of permanent or standing arbitration systems.\textsuperscript{226} They point out that two rather different conceptions of the umpire's role competed for acceptance. The first was the "impartial chairman" system, whose roots go back to a system established in 1911 in the Hart, Schaffner & Marx factory in Chicago.\textsuperscript{227}

The basic characteristics of this system were the following: (1) the collective bargaining agreement was quite brief and was stated in general terms; (2) the scope of arbitration was very broad, in that any problem arising between labor and management could be submitted to the impartial chairman; and (3) the settlements were achieved primarily by a process of mediation.\textsuperscript{228}

\begin{flushleft}
\textsuperscript{222} See id. at 1572.
\textsuperscript{223} See id. at 1576.
\textsuperscript{224} See infra text accompanying notes 289-91.
\textsuperscript{225} See Stone, supra note 3, at 1561.
\textsuperscript{227} See id. at 57.
\textsuperscript{228} Id.
\end{flushleft}
The second, the "umpire" system, grew out of the award of the Anthracite Strike Commission in 1903. The basic characteristics of the system were very different:

(1) the collective bargaining agreement is detailed and, to the extent possible, specific; (2) the scope of arbitration is restricted to the interpretation and application of existing agreements between the parties, and disputes not covered by such agreements are not to be arbitrated; and (3) the umpire disposes of those problems that fall within his jurisdiction by a process of adjudication, which means that he promulgates a decision based on the formal record of a hearing.

In 1940, General Motors and the UAW established an umpireship based upon the latter model. But the second umpire, George Taylor, was an enthusiast for the impartial chairman approach, which apparently occasioned some conflict. The Ford-UAW umpireship was established in 1943 with Harry Shulman as the umpire. His style was very personal, even free-wheeling, more like a chairman than an umpire. But it did not last. With the blessings of the parties the mediative approach was abandoned by his successor for one more adjudicative. At the time they wrote, Killingsworth and Wallen pointed out that "detailed collective agreements, limited powers for the arbitrator, and decision making by adjudication" had become one of the "eternal verities"

229. See id. at 60.
230. Id. at 61.
231. See id. at 62-63.
232. Everyone who is familiar with the writings of George Taylor can readily infer that his enthusiasm for the umpire system was not unbounded. But in his early months in the GM-UAW system he conformed to what he understood was the parties' conception of the proper role of the umpire in their system. Soon the parties were expressing surprise and even dismay at some of the umpire decisions. Taylor received a delegation of corporation executives and listened to their complaints. His reply was that an umpire system inevitably produced some decisions which one side or the other found unacceptable, and that this was why decisions were mediated rather than adjudicated in impartial chairman systems. Thereafter, with the consent of both parties, Taylor mediated the key decisions in the GM-UAW system.

Id. at 63-64 (footnote omitted).
233. See id. at 67-68.
234. Despite Shulman's remarkable abilities and the great respect which both parties had for him personally, there was a growing undercurrent of resistance to his approach to the umpire function during the closing years of his tenure. Key representatives of the company and the union appear to have concluded that they had "outgrown" the Shulman approach. . . . [T]here was a growing desire on both sides for the umpire to interpret the language of their contract and stop at that, instead of counseling and advising them on all aspects of their relationship.

Id. at 68.
of labor arbitration.\textsuperscript{235}

Now to return to Stone's thesis. It is a truism that arbitrators must be guided by sources outside the collective agreement. The classic example is the provision requiring "just cause" for discharge—a term customarily not much expanded upon. As the Court explained in the \textit{Trilogy}:

The parties expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, \textit{insofar as the collective bargaining agreement permits}, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.\textsuperscript{236}

Stone goes beyond this, for, relying upon Shulman's highly personal, indeed idiosyncratic style, she generalizes that all or most arbitrators today function as he did.\textsuperscript{237} I do not think it useful to assess Stone's critique of Shulman, though I think it profoundly in error; indeed, it stands for the rather astonishing proposition that Harry Shulman managed to co-opt the UAW. I submit that the generalization from Shulman to "the pluralists" at large will not hold up. In fact, as Killingsworth and Wallen point out, Shulman's approach was not even followed in the Ford-UAW system itself.\textsuperscript{238}

Stone asserts that "[a] permanent umpire would still be superior to an ad hoc arbitrator . . . because ongoing contact would allow the umpire a better opportunity to hear underground grumblings. The pluralists therefore prefer that form of arbitration."\textsuperscript{239} Are pluralists ideologically committed to permanent umpireships in preference to ad hoc arbitration? There are two ways of testing this claim. We could read the references Stone supplies to a body of "pluralist" writing evidencing that widespread preference. But she supplies only one, namely, George Taylor.\textsuperscript{240} Or we could look to the prevalence of umpireships under collective agreements; for if the pluralists so believed, and if pluralist ideology has had the practical effect she claims, we would expect the majority of collective agreements to reflect that ideology. Again, Stone does not supply the data. But they are available. According to a current survey of four hundred collective agreements, of those that specify the means of arbitral selection, sixty-eight percent provide for ad hoc

\textsuperscript{235} See \textit{id.} at 72.

\textsuperscript{236} \textit{Warrior \& Gulf}, 363 U.S. at 582 (emphasis added).

\textsuperscript{237} See Stone, \textit{supra} note 3, at 1565.

\textsuperscript{238} Killingsworth \& Wallen, \textit{supra} note 226, at 67-68.

\textsuperscript{239} See Stone, \textit{supra} note 3, at 1564.

\textsuperscript{240} See \textit{id.} at 1562 n.281.
arbitration, and five percent provide for standing umpireships. Stone asserts that arbitrators do not try to be neutral adjudicators, that is, to render "reasoned, disinterested interpretations" of the contract:

The pluralists suggest that arbitrators should tailor outcomes to alleviate tensions when underlying conditions are about to explode.295

295. Shulman, supra note 19, at 1023. See also H. Wellington, Labor and the Legal Process 94 (1968) (arbitrators frequently decide cases on prudential grounds rather than on basis of written agreement). This is not to suggest that all arbitrators adopt this view in practice. Many arbitrators do in fact render reasoned, disinterested interpretations of the contract. It is to suggest, rather, an inconsistency between the theory and the practice of arbitration on the part of its very architects.242

Nothing in the references she supplies supports the assertion, as her footnote seems to recognize. Wellington did not suggest that arbitrators do not attempt to render reasoned, disinterested interpretations of the contract; and the Shulman discussion referred to is about a job classification case where there was a conflict among employees and the collective agreement was silent on the issue.244

Do the pluralists "in general" favor a free-wheeling arbitrator who dispenses industrial psychiatry in contradistinction to "reasoned, disint...
tered interpretations of the contract"? To be sure, in the Trilogy the Court did speak of the "therapeutic value" of arbitrating even frivolous grievances, when explaining why such cases should go to arbitration at all. But Stone neglects to mention the Court's additional admonition that

\[ \text{An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.} \]

Is there any other evidence of what "the pluralists" believe? We might look briefly at two of Stone's arch-pluralists whom, on this pivotal point, she curiously ignores. Archibald Cox has written:

If we are to develop a rationale of grievance arbitration, more work should be directed towards identifying the standards which shape arbitral opinions; if the process is rational, as I assert, a partial systematization should be achievable even though scope must be left for art and intuition. I can pause only to note some of the familiar sources: legal doctrines, a sense of fairness, the national labor policy, past practice at the plant, and perhaps good industrial practice generally. Of these perhaps past practice is the most significant; witness the cases in which it is argued that a firmly established practice takes precedence even over the plain meaning of the words.

No suggestion here, or elsewhere in this oft-cited piece, that arbitrators

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246. *Enterprise*, 363 U.S. at 597. The Court's stricture closely parallels William Leiserson's view of the arbitral role that Stone outlines at the outset to illustrate the first and second "tenets" of "industrial pluralism." Stone, *supra* note 3, at 1514-15. But Stone ignores the Court's virtual "adoption" of this aspect of the putative pluralist ideology, i.e., that the arbitrator, as the judiciary of an industrial democracy, is to dispense the collective agreement and not his own brand of industrial justice or psychiatry.

should be dispensing industrial psychiatry. So, too, has David Feller opined:

What you [arbitrators] do in grievance arbitrations is to interpret and apply the agreement and draw an award from the essence of that agreement, just as Mr. Justice Douglas said you do. You decide what their agreement seems to say the parties should do. That is an inference you have to draw. Sometimes, of course, the answer is explicit; usually it is implicit. But the arbitrators' function is to explicate what is implicit in a collective bargaining agreement. That is his one and only job.

Nothing here about administering industrial psychiatry in contradistinction to "reasoned, disinterested interpretations of the contract."

In fact, in Stone's footnote, quoted (and emphasized) earlier, she comes close to disclaiming that arbitrators really act the way she describes; but she concludes of this "rather [that there is] an inconsistency between the theory and the practice." This will not do. If "in practice" arbitrators do not act the way she describes, if in fact arbitrators do at least try to be neutral interpreters of collective agreements, they could scarcely fulfill the ideological mission that Stone assigns them as interventionist co-opters of the working class.

So, in the end, Stone's argument turns back upon itself. She criticizes "industrial pluralism" because, contrary to the theory, which views the arbitrator as the judiciary of an industrial democracy, arbitrators do not really try to act as neutral adjudicators. But she criticizes arbitrators when in practice they try to act as neutral adjudicators, because she takes that practice to be "inconsistent" with the theory of industrial pluralism.

(b) Arbitration and Human Relations. — We can assume, for analytical purposes, that the "human relations" school of industrial sociology is manipulative and co-optive in just the way Stone would have. As Daniel Bell has observed:

The fundamental point [of the human relations approach] as it affects the worker in his own work environment, is that the ends of production are taken as "given" and the worker is to be "adjusted" to his job so that the human equation matches the industrial equation. As one management consultant, Burleigh Gardner, succinctly phrased it: "The more satisfied [the

248. Cox did note that an arbitrator is inevitably influenced by his philosophy but "[e]ven here the parties can make the choice, for they select their arbitrator." Id. at 1507.
250. See supra text accompanying note 242.
worker] is, the greater will be his self-esteem, the more content he will be, and therefore, the more efficient in what he is doing." A fitting description not of human, but of cow, sociology.²⁵¹

What is there, however, to connect the majority of persons who believe in representative democracy and strong unions with this school of thought? Stone tells us first that "[t]he human relations school . . . developed at the same time as did the theory of industrial pluralism," pointing to the famous experiments in the 1930s at Western Electric's Hawthorne Works.²⁵² Then she tells us that "[a] striking similarity exists between the job-counseling program set up in the Hawthorne Works and the typical union grievance procedure."²⁵³ We are next told that Archibald Cox "adopted" the "human relations approach in grievances" which in turn was relied upon in the Steelworker Trilogy's observation on the "therapeutic value" of arbitrating even "frivolous" claims.²⁵⁴

A paragraph away, we learn:

The intricate connection between industrial pluralism and the human relations school also explains why arbitrators abandon the neutrality of the judicial role to become plant psychiatrists. Arbitrators cite subterranean shop tensions and the potentially explosive nature of minor disputes as justification for their interventionist methodology. These are insights drawn from the human relations school. By attending to such invisible and submerged tensions, arbitrators put human relations theory into practice—they diffuse the build-up of collective tensions by addressing problems in an individuated manner. The goal of this psychiatric model of arbitration is the same as the job counseling program at the Hawthorne Works: It is to break up the cohesiveness of the informal work group and to counteract its power over production.²⁵⁵

And finally we are told that "industrial pluralism . . . embodies and implements . . . the human relations school . . . "²⁵⁶

From "developing at the same time" to "a striking similarity" to "an intricate connection" to "embodying and implementing"—in eight pages. "The transition in logic," wrote S.J. Perelman of a different (but no less fictive) piece of prose, "was so abrupt that it was only by opening my mouth and screaming briefly, a procedure I had observed in the

²⁵¹ D. BELL, WORK AND ITS DISCONTENTS 24-25 (1956).
²⁵³ Id. at 1568.
²⁵⁴ See id. at 1571.
²⁵⁵ Id. at 1572.
²⁵⁶ Id. at 1573.
movies, that I was able to keep my eardrums from bursting."\textsuperscript{257}

I shall take up the assertion about work groups in a moment, but the remainder of Stone's argument to the connection between "industrial pluralism" and the human relations school rests entirely upon similarities between them: Both are at pains to attend to the concerns and grievances of employers, and, Stone argues, both the human relations school and industrial pluralists believe in the therapeutic effect of arbitrating even the most frivolous of grievances. Accordingly, she quotes one "prophetic" pluralist commentator as follows:

[a]ny personnel executive will tell you that the most important factor in maintaining a satisfactory morale among employees is to prevent the individual employee from feeling that an injustice has been done him. . . . From the management's viewpoint the problem of grievances is or should be Number One on its industrial relations program.\textsuperscript{258}

But a sentence is omitted from her quote, and it is not without significance. In it, the author opined, "[n]ow that employees have collective bargaining contracts, they are conscious, and jealous as well, of their rights thereunder."\textsuperscript{259} Indeed, his very next sentence pursues the theme that Stone excised. "Labor leaders will tell you that they must constantly watch minor supervisory employees and often the major executives in order to prevent violations of the contract. These violations would in time destroy the efficacy of the contract. The rights so dearly won may be easily dissipated."\textsuperscript{260}

As the omitted language evidences, in addition to similarities, there are fundamental differences between those who believe in strong unions and grievance arbitration, and those of the human relations school. The differences have been summarized by Ivar Berg and his associates. Human relations is "far more preoccupied with psychological and social-psychological forces and with their management than with . . . the rights of persons."\textsuperscript{261} Human relationists believe in an essential harmony of interests of workers and managers, while industrial relations practitioners accept the legitimacy of basic conflict.\textsuperscript{262} It is the conventional wisdom—and an historical fact—that unions are seen by management

\textsuperscript{257} S.J. PERELMAN, Take Two Parts Sand, One Part Girl, and Stir, in \textsc{The Most of S.J. Perelman} 185, 186 (1958).

\textsuperscript{258} Stone, supra note 3, at 1570, quoting Pipin, Enforcement of Rights Under Collective Bargaining Agreements, 6 U. Chi. L. Rev. 651, 651 (1939).

\textsuperscript{259} Pipin, supra note 258, at 651 (emphasis added).

\textsuperscript{260} Id.

\textsuperscript{261} I. BERG, M. FREEDMAN & M. FREEMAN, supra note 119, at 12-13.

\textsuperscript{262} See id. at 13.
as competitors for the loyalty of their employees; hence the hard fought battle between labor and management over whether the employee must grieve first to his foreman before he presses his grievance with the union. As Berg concludes:

In the mainstream and the tributaries that may be identified within the human-relations tradition, little attention has been given to managers' and workers' concerns with their rights as such. To the extent that conflicts over rights have been recognized, they have been perceived, rather condescendingly, as reflections of managers' psychological needs.

Investigators in the industrial-relations and human-resources fields have been far more inclined to view the conflicts in organizations as reflections of conflicts over distributive justice and legal rights than as displaced psychological urges. Investigators in this tradition do not, of course, deny that workers and managers have personalities, but they emphasize that workers are free members of a democratic society as well as the contractual members of an organization owned by others, and that there are at least as many limits on the willingness of employees in America to check their rights, privileges, and immunities at the workplace door as on their willingness to repress their feelings.

Contrary to Stone, to be "similar" is not to be "the same." Both human relationists and trade unionists are concerned for the well being of workers. But the former are concerned for plainly co-optive purposes—in Bell's phrase, thinking of workers as little more than cattle to be lulled into producing more by contentment. The latter are concerned as a representative of employees seeking to secure management's recognition of employee rights. This distinction is fundamental, and ignoring it works a distortion that verges upon the grotesque.

To return to the law, the Court did speak about the "therapeutic" effect of arbitrating even frivolous grievances. But the question here is why a union would expend its treasury and the time of its officers in pursuing frivolous cases to arbitration. If industrial pluralism "implements" the ideas of the human relations school, if unions must create the illusion of fairness in order to co-opt, and if, toward that end, even frivolous grievances must go to arbitration for "therapeutic" and co-opting

effects, unions should take virtually every grievance to arbitration—to the "labor relations psychiatrist." But they do not.

The fact that arbitration is expensive, time-consuming, and in some ways precedent setting militates against its being used, in the fashion of grievances, as part of regular bargaining. The cases that come before arbitrators are likely to be "real" ones, with merit and substantive significance to the parties.\textsuperscript{266}

Does arbitration do justice or does it create only the illusion of fairness? One means of assessment is to look at the results of the system, which Stone does not do. In one study, Ivar Berg and his associates observed that arbitrators "sustained the workers' grievances in the all-important area of discharge, discipline, and plant rules in roughly half of all the cases."\textsuperscript{267} They studied a sample of 259 arbitration cases won by workers "to identify the complaints of organized members of the work force that are sufficiently important to the grievants to cause them to involve themselves and their unions with the expensive and time-consuming paraphernalia of arbitration."\textsuperscript{268} They concluded:

The workers have been sustained when managers use pretexts for charges against workers, lack evidence and act frivolously or inconsistently, fail to investigate "facts" in support of charges against a worker, overlook extenuating circumstances or employee's past records, themselves violate rules applied to employees, or otherwise act in bad faith.\textsuperscript{269}

To Stone, however, this is not fairness, only the "illusion" of fairness. If some public body produced the same results evidenced in this—if workers won half the time (and remember, even frivolous cases must be heard), and they won on the above grounds—would Stone assert nevertheless that the public body produced only the illusion of fairness? But if she concluded that such a pattern of decisions by a public agency evidenced fairness and not an illusion, would she not have to explain how illusion differs from reality?

\textit{(c) Destroying the Work Group.—}As we have seen, Stone claims that the industrial pluralism "adopts" and "implements" the human relations school to destroy the cohesiveness of work groups. Thus, Stone

\textsuperscript{266} \textit{Id.} at 145 (footnote omitted).
\textsuperscript{267} \textit{Id.} at 149.
\textsuperscript{268} \textit{Id.} at 150.
\textsuperscript{269} \textit{Id.} at 149-50.
equates a union grievance procedure with the manipulative strategy of
the human relations school:

The human relations writers are straightforward in their intent
to undermine group cohesion and loyalty by means of personnel
counselling programs. As the Hawthorne Works experiments proved,
individual airing of grievances undermines the strength of work groups. This applies equally in union shops,
so that the pluralist premise of group consent means, in practice,
a fragmentation process aimed at destroying the group.270

This assertion parallels Klare's claim that the law allows the rank-
and-file only a passive role in day-to-day industrial affairs. That claim
was forcefully rebutted by a body of labor relations case studies.271 As
that literature amply evidences, the administration of the grievance-arbitration procedure reacts to and depends upon the cohesiveness of work
groups. Indeed, this fact explains why seemingly frivolous cases are pur-
sued to arbitration better than any theory of industrial psychiatry. Un-
ions often manufacture grievances as part of the collective bargaining
process. Further, they may be pressured by politically powerful work
groups to pursue grievances that the union's officers might personally
evaluate as unwarranted. As one commentator observed:

Of course, the union leadership may be so insecure that it
cannot risk refusing to support unwarranted or trifling griev-
ances. It may face criticism from a rival faction for refusing to
press a grievance, however unmerited. The arbitrator may
never know of this, however, or that the officials may be in too
weak a position to risk the screening of unwarranted or trivial
complaints. The officials may be faced with criticism of manage-
ment collusion for not pressing all grievances, but there will
be no such evidence in the record; in fact the very opposite
may be indicated by militant argument.272

The fact of group cohesiveness in the union setting is well docu-
mented. Note, for example, Sayles' and Strauss' study of a local mine:

Most union members realize that their complaints must
compete with those from other work groups. Rather than sit
idly by while their grievances are being considered, interested

270. Stone, supra note 3, at 1526. It is not at all clear that human relations research argues
straightforwardly for the destruction of group cohesiveness. See S. Seashore, Group Cohes-

271. See supra text accompanying notes 108-20.

272. Myers, Concepts of Industrial Discipline 9 Nat'l Acad. Arb. 59, 70 (1956). The point
seems perfectly obvious. I have chosen to make it through this author's comments because
Stone cites the piece, though not for this proposition. Stone, supra note 3, at 1564 n.296.
work groups make use of a battery of weapons to expedite the process. Sometimes these are directed against the company, sometimes against rival work groups. In most cases, they are exerted directly on the union officers to induce them to pressure management.

The range of weapons varies from the "primitive" self-help techniques . . . through short-term pressures aimed at getting the officers to handle immediate problems, to longer-run efforts directed at increasing the political power of the group within the union.  

* * * *

Although the officers are often intimidated by the coercive techniques applied by strongly united groups, they come to rely on the solidarity of those groups when bargaining with management. Such support is important in convincing management that changes are imperative.  

Or James Kuhn's classic study of rubber workers:

[G]rievances do not arise only from the complaints and injuries of individual workers. Decisions made within the work group determine in large part what grievances are, the timing of them, and the forcefulness with which they are pursued. If only individual workers filed grievances and if only they were affected by the settlements made, foremen and higher management could judge the merits of a worker's complaint without being unduly bothered by the effect of a single worker's reaction in the shop. The reaction of a whole group of workers to the settlement, however, may be a matter of pressing concern to management. In treating such grievances, expediency as well as merit becomes a consideration in grievance settlement. Furthermore, grievances affecting the group have a higher political potential within the union than grievances of individuals. A group grievance receives higher priority from the politically responsive, elected union representatives . . . .

(d) The Antinomy.—Stone asserts that because the practice of industrial pluralism destroys the cohesion of the work group, it negates a pluralist ideology premised upon group cohesion. But if we are to credit the empirical evidence that Stone neglects, group cohesion is alive and well as an inextricable element in the system of unionized industrial re-

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273. L. SAYLES & G. STRAUSS, supra note 112, at 34.
274. Id. at 38.
275. J. KUHN, supra note 114, at 73-74 (emphasis in original).
lations. And so the alleged antinomy evaporates; a theory killed by a fact. 276

C. Imagination, Criticism, and Scholarship

As I cautioned at the outset of this lecture, an examination of this kind necessarily accumulates a lot of detail; and therein lies a pitfall, for the very weight of detail makes Klare and Stone seem weighty. Let us look briefly at these works free from attention to the way that they seek to develop any particular theme.

The surprising thing about these “critical legal studies” is that they are so uncritical. The role of criticism in the search for knowledge was usefully explored in Peter Medawar’s Romanes Lecture for 1968, *Science and Literature*. Advances in scientific thought, he explained, “begin with a speculative adventure, an imaginative preconception of what might be true . . . . The conjecture is then exposed to criticism to find out whether or not the imagined world is anything like the real one.” 277

When the word is used in a scientific context, *truth* means, of course, correspondence with reality. Something is true which is ‘actually’ true, is indeed the case. This is empirical truth, truth in the sense in which it is true to say that I am at this moment delivering the Romanes Lecture and not standing on my head on an ice floe in the North Atlantic; and you know that correspondence with reality in just this sense is the test that all scientific theories must be put to, no matter how lofty or how trivial they may be.

We must at once dismiss the idea that empirical or factual truth as scientists use it (or lawyers or historians) is an elementary or primitive notion of which everyone must have an intuitive or inborn understanding. On the contrary, it is very advanced, very grown-up, something we learn to appreciate, not something that comes to us naturally. 278

276. Schopenhauer has been cited as having said that, “Kant’s idea of a tragedy was that of a theory killed by a fact.” *Markey v. Tenneco Oil Co.*, 707 F.2d 172, 174 n.2 (5th Cir. 1983).


278. *Id.* at 52-53 (emphasis in original). One recent study traces the methodological and epistemological linkage of science with history and law to intellectual developments in 16th and 17th century England. *B. SHAPIRO, PROBABILITY AND CERTAINTY IN SEVENTEENTH-CENTURY ENGLAND* (1983).

As we have seen, Klare and Stone attribute the development of the law to an underly-
Measured by that standard, these works are not very grown-up at all.

Klare's piece rests entirely on an unsupported (and unsupportable) assumption about the supposed radicalism of the Wagner Act. As a result, history is ignored. He makes powerful claims, for example, for the legislative history of the Act; but never engages with it. He makes powerful claims for the Flint sit-down, but studiously ignores the leading study of the episode that flatly contradicts his claim. He turns to the argument before the court of appeals in *Mackay Radio* to conclude that an issue at one point "present in" the case necessarily must have been presented to the Supreme Court, when it was not; but he ignores the arguments in *Jones & Laughlin Steel*, *Fansteel*, and *Sands Manufacturing Co.* that contain information relevant to, if not congenial to, his assertions about those cases. And empirical evidence is never confronted. "For every partisan opinion," Max Weber observed, "there are facts that are extremely inconvenient." Klare's technique for dealing with inconvenient facts is to ignore them.

But if Klare is indifferent to the real world, Stone is downright hostile to it. She accuses the Court of "sidestepping" the labor Board's "explicit" jurisdiction to hear all breach of contract cases, without mentioning that Congress rejected that approach and without mentioning that the Court took note of that rejection. The Court is said to have held that an individual could sue the union "under section 8(b)(1)" for breach of the duty of fair representation, when the Court reserved the question of whether breach of the duty is an unfair labor practice and breathed no hint of the novel proposition that the unfair labor practice provision might be jurisdictional. The Court's reliance upon the General Counsel's "unreviewable" discretion to issue unfair labor practice complaints comes out in Stone's account as discretion subject to judicial review.

The result in both Klare and Stone is a debasement of language. The Court in *Jones & Laughlin Steel* is said to have "emphatically rejected" an anti-contractual construction never presented or argued. The Act is said to have "strongly anti-contractual overtones" that are never identified and are flatly contradicted in the (never discussed) legislative history. The law is said to "allow" workers only a "passive voice," when

encapsulate a comprehensive sociopolitical theory, complete with ideas of cognitive falsity and correctness." *Id.* If something of the latter is what Klare and Stone had in mind, then it is conceivable that their writings would not be amenable to the test of "correspondence with reality" in the sense that Medawar employs the term. But if Klare and Stone mean to be judged by some other test of cognitive falsity or correctness, they have breathed no hint of it.

case studies confirm that the effectiveness of the system of grievance bargaining depends upon and is responsive to perfectly lawful pressure from work groups. The Court is said to "deprive" unions of their right to use the federal courts, when unions are perfectly free to provide for judicial enforcement of collective agreements.

But Stone’s depiction of the world transcends the debasement of language; it bears an inverse relationship to reality. The system of industrial jurisprudence, she asserts, produces only the "illusion" of fairness, when, by empirical accounts (which she refuses to acknowledge), it seems to do a good deal more. The putative pluralist ideology is said to "implement" the sociology of the human relations school, when it is quite at odds with the dehumanizing assumptions of that school. The "hidden agenda" of pluralist ideology is said to destroy the cohesiveness of the work group, when the system of collective bargaining does just the opposite. Not surprisingly, she ends in Newspeak: "collective bargaining undermines collective action." And so I return to the question I put at the outset of this lecture: Are these two "critical legal studies" works of serious scholarship to which attention should be paid? I shall not dwell on what I mean by "serious scholarship." At a minimum, I think it must be critical in the sense that Medawar uses the term: It must be thorough in the search for evidence; it must treat the evidence honestly; it must care about the facts. In the absence of criticism of that kind we are left with nothing but imagination. And imagination without criticism may burst out, as here, in "a comic profusion of grandiose and silly notions."

II. TAKING NONSENSE SERIOUSLY

Why then are these pieces talked about at places that ought to know better? I should note that, to the best of my knowledge, these pieces are not much regarded by labor lawyers, even academic labor lawyers; they know the Act, the caselaw, the legislative history, and the

280. Note, for example, the conclusion drawn in a thorough study of an otherwise laudable experiment in employee participation in a high-fidelity equipment company.

Without the job security and advancement guarantees afforded by a union, even the most active, hostile workers will eventually give up; while more timid workers, protecting their futures with the company, will subside much earlier . . .

It was not that these employees lacked the capability to argue such questions, or that they were persuaded to accept management's point of view; it was simply that they lacked the formal mandate and the organizational power of a union—power necessary to provide a degree of security and a more equitable basis on which to resolve these conflicting issues.

J. WITTE, DEMOCRACY, AUTHORITY, AND ALIENATION IN WORK 90-91 (1980).

281. Stone, supra note 3, at 1577.
realities of industrial relations. The discussion occurs primarily among other legal academics.

A partial explanation is that these pieces appear not in *Socialist Review or Radical America*, but in leading legal periodicals; and they have the appearance of mainstream legal discussions in terms of form, references, and the like. All this lends a certain credibility to the contents. "[N]onsense," John Updike reminds us, "being an inversion of sense, is condemned to share a certain structure with it . . . ."282 But this only begs the question, for it does not explain why the editors chose to publish them.

My colleagues in other disciplines are normally astounded to learn that the law reviews are edited by students, usually without the benefit of any professional evaluation. These students are often terribly bright and may even have advanced degrees in other disciplines. But by definition, they are not yet especially knowledgeable in the law. So one is tempted to exonerate them. After all, they can scarcely be faulted for failing to be aware of books or articles that the authors did not supply. But they can be faulted for failing to find the non sequiturs and mis-statements the authors do supply. That failure means that the non-expert reader assumes for the most part that the cases hold and say what the authors assert and that the historical record is as they claim.

With this as perspective, I think we can understand why the legal-academic intelligentsia would find these works engaging. First they are large in conception and sweep, and they are intensely ideational. In Klare's piece, it is the idea of "deradicalization"—the very phrase a product of intellection—that captivates. In Stone's, we are given a "pluralist paradigm"—an intellectual model attributed to a group of fellow intellectuals.

Second, they attack the status quo from the left: The product of liberalism and reform is said to be a snare and a delusion. This is almost bound to secure academic attention. As Salvador Dali advised, "Painter, if you want to ensure for yourself a prominent place in Society you must, in the first flush of your youth, give it a violent kick in the right leg."283 It is easy to see how academics, scholars in their own corners of the law but intellectuals outside it, would be intrigued. In Daniel Bell's words:

An intellectual is one who, almost by definition, seeks to understand and express the *Zeitgeist*. Unlike the scholar, who starts from a given set of objective problems and seeks to fill

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the gaps, he begins with his personal concerns, and in the grooving for self-consciousness creates intuitive knowledge about the world.284

Finally and closely related, they make large claims not only for the practical effect of law but for the practical effect of those who think and write about law. In Stone’s piece, the United State Supreme Court is a passive instrument, a supine body “adopting” as law an ideology generated by a group of lawyers and economists identified with Harvard University. And Klare is equally candid. “Law in our society,” he writes, “is made by experts socialized in elite institutions and distant from the lived reality of every day life in capitalist society.”285

While seeming to denigrate this intellectual elitism, he actually celebrates it. These pieces not only play with big ideas, they emphasize the importance of those who play with big ideas. As one of the leaders of the “critical legal studies” movement observed to his colleagues, “[I]t is out of, and in large measure because of, this [upper middle] class background of hard work and seriousness that we have developed virtually the only show in town in academic law today.”286 The assertion of seriousness—at least as to these pieces—cannot be accepted,287 but the amour propre in the observation is unmistakeable.288

But in the process of celebrating intelleception (and intellectuals), they do other, less felicitous things. Contrary to the large claims made for the practical impact of law in these pieces, the practice of collective bargaining and the administration of the grievance procedure is only partially the product of law and lawyers (and even then, I suspect, not very much). Indeed, one of the major errors in both of the works under

284. D. Bell, supra note 98, at 152 (addressing the question, “[h]ow could the Communist Party, a garish political group with no real roots in American life, exercise such a wide influence in the intellectual and professional strata of American life?”).


286. Letter from Professor John Henry Schlegel to Professor Mark Tushnet (Feb. 22, 1983) (on file with the Maryland Law Review). I am indebted to Prof. Schlegel for permission to use this quotation, especially as he knew that I disagreed with it and intended to say so.

287. I suppose there are some who would question the “only show in town” assertion as well. See, e.g., Posner, Some Uses and Abuses of Economics in Law, 46 U. Chi. L. Rev. 281, 294 (1979).

[A]t least one can say that the theory [that the common law should be efficient] deserves to be taken seriously, especially in its more moderate form of a claim that efficiency has been the predominant, not sole, factor in shaping the common-law system.

Id.

288. As William Gerhardie cautions, “Whatever you wish to believe, that you will hear yourself speak: in the brain chamber of each one of us is quartered our private ministry of propaganda to keep up the ego’s morale.” W. Gerhardie, God’s Fifth Column 193 (1981).
review here is the wholesale identification of the law of collective bargaining with the realities of industrial relations. In the case studies adverted to earlier, for example, "the law" is virtually non-existent in the conduct of day-to-day life in the plant.

More important, the system of industrial jurisprudence on the shop-floor rests almost exclusively on employees and their elected representatives. The grievanceman, for example, "must represent workers who often know little about their specific rights under the agreement, but who believe that any representative who wants to hold his job should safeguard their interests and fight for their welfare under all circumstances." In sum, the men and women who have established the system of collective representation and who continue to make it work are not experts socialized in elite institutions and distant from the lived reality of everyday life in capitalist society. Whatever its flaws in structure and execution, the system does seem to provide a significant measure of protection from arbitrary treatment for organized workers.

But to Klare, the system is all wrong. It runs counter to what "workers' organizations ought to affirm," namely a system of anti-capitalist "participatory democracy." What workers really need is not a collective agreement ("contractualism") with a grievance procedure; what they need—whether they want it or not—is to engage in sit-down strikes over any dispute about the process of production. The necessary if tacit assumption is that Klare knows far better than those who live the reality of day-to-day life in capitalist society what is good for them. Similarly, by Stone's account, American workers have been deluded by the mere "illusion of fairness"—so deluded, in fact, that they cannot see that arbitrators "do not even try to be neutral adjudicators." Like Klare, the tacit assumption is that Stone knows better than these so easily deluded souls what is good for them. Consequently, their attack on the system of collective bargaining and grievance-arbitration not only denigrates an achievement of American workers, it denigrates as well

289. Note, for example, Abe Raskind's account of the thoroughly botched 1978 negotiations in the New York newspaper industry. Raskind, A Reporter at Large: The Negotiation (pts. 1 & 2), THE NEW YORKER, Jan. 22, 1979 at 41, THE NEW YORKER, Jan. 29, 1979 at 56. He documents the blunders, the miscalculations, and the complicating role of individual personalities in the negotiation. But what is absent from any obvious role in the bargaining, the 88 day strike, or the settlement, is any reference to the law. "In the end," he writes, "it was neither the intriguers nor the worshippers of the bottom line. . . . who put the jigsaw together. It was the rank and file on both sides, trying to devise something that both sides could live with." Id., (pt. 2), at 84.

290. J. KUHN, supra note 114, 122-23.

291. For example, see Paul Friedlander's study of the formation of a U.A.W. local in the 1930s:

[T]he problem with the use of the term bureaucracy is that it conjures up an image
the perception and intelligence of the men and women who comprise the system. This is not (necessarily) a plea against an intelligentsia; but it is a plea for one less apt to arrogance.

Further, because these pieces celebrate the role of ideology in law, they necessarily denigrate the role of lawyering in the development of law. This too is a distortion of reality. In Stone's world, law is made by academic writing; no process seems to intervene between appearance in

of something else, of a formation distinct from and perhaps even opposed to the workers in the shop. Yet in the case of Local 229 the bureaucracy was almost precisely the sum total of the most forceful, intelligent, committed, and farseeing union men in the shop. It was thus not a structure external to the drive for organization, but was rather the formalization and institutionalization of that very drive itself. It was predicated on the assumption that although a minority of the workers had brought the union into being, a substantial majority could be integrated into its social structure. Toward this end, the ability of the union to guarantee job security through seniority and grievance procedures was perhaps the critical factor. And the successful erosion of the authority of the management, described earlier, implied the establishment of the authority of the union.

P. FRIEDLANDER, THE EMERGENCE OF A UAW LOCAL 1936-1939, at 96 (1975) (emphasis in original). As Friedlander also points out, "the leadership hoped to gain a majority as a means of getting a contract . . . ." Id. at 37. For the contract demands, see id. at 48.

292. Klare and Stone come pretty close to illustrating Irving Howe's description of an intelligent unionist's case against radical intellectuals:

Intellectuals have always nourished abstract ideas and sentiments about the people who lead or belong to unions: they have never been willing to see unions as they actually are. A few decades ago, those ideas and sentiments were enthusiastic, out of sympathy for the dramatic struggles of the unions, and sometimes misguided, out of a wish to gratify socialist expectations. Only seldom have intellectuals bothered to look closely at the lives of workers or the workings of unions; only seldom have they understood what is distinctive about the role of unions in American society. . . .

Looking for a proletariat where none is to be found, the radical intellectuals suffer disillusionment. From disillusionment they turn savagely against the workers, condemning them for a failure to be what they, the workers, never dreamed of becoming. . . .

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If unionists had listened to the Stalinist intellectuals, they would have committed suicide, first through "dual unionism" and the theory of "social fascism," and then in another dozen ways. If they had listened to the left-socialist intellectuals, they would have been persuaded that the Wagner Act was a step toward "fascism," thereby refraining from the organization of the millions of workers that in fact occurred during the 1930s. If they had listened to the Trotskyist intellectuals, they would have remained indifferent to the outcome of World War II on the ground that it was "imperialist" on both sides.

Not a pretty list—though one that could easily be extended. The advice of the radical intellectuals to unions has often been disastrous, quite as their tone has been arrogant. I draw a one-sided picture, deliberately, to stress why the suspicion with which even sophisticated unionists look upon left-wing intellectuals is not without some basis in reality.

the pages of the *Harvard Law Review* and appearance in the United States Reports. Similarly, the focus of Klare’s piece is upon judicial ideology, and so, lawyering tends to get very short shrift.\(^{293}\) I would not be so foolish as to suggest that good lawyering inevitably prevails over stupidity or predisposition. But I do suggest that the lawyer in litigating, briefing, and arguing a case plays something more than the virtually non-existent role these writers accord.

Ultimately, these pieces denigrate scholarship. If words can be made to mean what one wants, if the historical record and other evidence can be ignored so long as one’s purpose is “pure,” and if the process of decisional law is solely a matter of ideology to which the lawyer’s diligence and skill are simply irrelevant, then—as these pieces evidence—all the impedimenta of scholarship (but not, apparently, the appearance of scholarship) can readily be jettisoned as well.

Louis Schwartz has suggested that “critical legal studies” generally might be looked upon as akin to surrealist painting.\(^{294}\) At least insofar as the works under study here are concerned, I agree: At best, they provoke our sensibilities (and, I trust, our critical faculties); at worst, they are seemingly harmless exercises in imagination. After all, academics have the same right to talk nonsense as anyone else, perhaps more.\(^{295}\)

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\(^{293}\) Take, for example, Klare’s treatment of *Jones & Laughlin Steel*. You will recall that he made much of the following dicta:

> It [the Act] does not prevent the employer “from refusing to make a collective contract and hiring individuals on whatever terms” the employer “may by unilateral action determine.” . . .\(^{111}\)

\(^{111}\) 301 U.S. at 45-56 (citations omitted). Chief Justice Hughes’ apparent belief in the survival of the employer’s right to enter individual contracts of employment notwithstanding the duty to bargain collectively was clearly incongruent with the statutory plan, as the Court soon made clear. . . . It indicates, however, how far the Court strained to preserve individualist contractualism . . . .

Klare, *supra* note 2, at 299 (citations omitted)(emphasis added).

Klare neglects to point out that the quote—to which he attaches considerable ideological significance—was borrowed from the Court’s decision the previous month in *Virginia Ry. v. System Fed’n No. 40, Ry. Employees*, 300 U.S. 515, 548-49 n.6 (1937) (Railway Labor Act case). In that case, the quoted language was taken verbatim from the Government’s brief, as the Court said. *See id.* Is it accurate to say that a Court strains—strains—to reach an ideological end by adopting the language advanced by one of the parties? It suffices to say that the lawyers actually involved in the process attached a good deal of significance to what was said in the briefs. *See generally* P. IRONS, *THE NEW DEAL LAWYERS* 282 (1982) (explaining the provenance of the Chief Justice’s dictum).


\(^{295}\) *See generally* Kirkland, *Academic Freedom and the Community*, in FREEDOM AND THE UNIVERSITY 113, 117-19 (1950) (discussing the necessity of allowing scholars to explore unpopular or even erroneous ideas).
But if we take nonsense seriously, we become accomplices to the charade; and we can scarcely complain if we are taken in turn as grandiose, comic, and a little silly.