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A Reprise of a Classic: Gorman & Finkin's Basic Text on Labor Law: Unionization and Collective Bargaining

Stephen F. Befort
University of Minnesota Law School, befor001@umn.edu

Book Review

A REPRISE OF A CLASSIC: GORMAN & FINKIN'S *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING*

Stephen F. Befort†

It is unusual to dedicate a book review to a legal treatise. It is even more unusual to dedicate a book review to a treatise that is the second edition of a law school hornbook.[1] But Robert A. Gorman and Matthew W. Finkin's 2004 edition of *Basic Text on Labor Law: Unionization and Collective Bargaining*, published by Thompson-West, is no ordinary updated law treatise.[2] This new edition is the reincarnation of one of the most valuable hornbooks ever written.

When I taught the basic labor law course for the first time in the early 1980s, I slept with Professor Gorman's first edition under my pillow.[3] I read every line of that first edition, which was published in 1976, and I decorated the text with strategic underlining and copious margin notes as I prepared for my classes. Although now tattered and a bit dusty, that first edition still occupies a place of honor on my bookshelf.

What made Professor Gorman's first edition so valuable? Although denominated as a student hornbook, it was the ultimate law teacher's resource. Like any good hornbook, the 1976 version of the *Basic Text on Labor Law* set out the doctrinal rules developed under the National Labor

† Gray, Plant, Mooty, Mooty, and Bennett Professor of Law, University of Minnesota Law School.

1. *See* BLACK'S LAW DICTIONARY 754 (8th ed. 2004) (defining a "hornbook" as a "a book explaining the basics of a given subject."). According to the Westlaw website, West Publishing (now Thompson-West) hornbooks, first introduced in 1895, "are a resource [law students] can trust to explain the law and provide references to cases, statutes and articles." Westlaw, *Hornbook Series, at* http://lawschool.westlaw.com/shared/marketinfodisplay.asp?code=BK&id=5&subpage=2 (last visited July 3, 2005).

2. ROBERT A. GORMAN AND MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING (2d ed. 2004).

3. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING (1976).

Relations Act (NLRA)[4] in a comprehensive and cohesive fashion. But significantly, Professor Gorman interwove those rules with a rich tapestry of policy analysis. Paralleling the organization of labor law's most prominent casebook,[5] the hornbook deftly provided a window to the statute's policy underpinnings and overarching theoretical debates. This perspective was focused and enriched by the fact that private sector labor law, for the most part, involves the interpretation of one statute by one administrative agency, the National Labor Relations Board. The Board's periodic tugs of war with the Supreme Court, as highlighted by the first edition, provided law teachers with considerable material for administrative law and statutory interpretation lab sessions.

A good example of the book's methodology is provided by its handling of that "most vexing [problem] of statutory construction," the role of motive and business justification in determining the existence of a section 8(a)(3) unfair labor practice violation.[6] In its usual application to employee discharge cases, an employer will be found to violate section 8(a)(3) only if the discharge was motivated by the employee's union membership.[7] The Board and the courts, however, long have struggled with the question of whether some employer countermeasures to union-sponsored concerted activities, such as a strike, may be found to discourage lawful activity and violate section 8(a)(3) even when motivated by sound business reasons rather than by antiunion animus. In *NLRB v. Erie Resistor Corp.*, for example, the Supreme Court sustained a ruling of the Board finding that an employer's grant of superseniority to entice employees to abandon a strike violated section 8(a)(3) as conduct that is "inherently discriminatory or destructive," a finding based not upon a determination of motive but upon a balancing of the relative interests of the employer and its employees.[8] Just two years later, however, the Supreme Court admonished the Board for substituting a balancing analysis for an inquiry into motive in ruling that an employer's offensive lockout violated section 8(a)(3), stating "that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management."[9]

This debate has raged through a series of decisions that began in 1938

4. 29 U.S.C. §§ 151–169 (2000).

5. *See, e.g.*, ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW (8th ed. Foundation Press 1977). The casebook now is in its thirteenth edition. ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW (13th ed. Foundation Press 2003).

6. GORMAN, *supra* note 3, at 326. NLRA § 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.* (quoting NLRA § 8(a)(3)).

7. *Id.* at 327.

8. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228–29 (1963).

9. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965).

and continues to have relevance today.[10] The cases are difficult for professors to teach, for students to understand, and for practitioners to reconcile. Professor Gorman's hornbook tracked the principal cases in chronological order by laying out both the specific rulings and explaining how each decision contributed to the underlying policy debate.[11] The book then extracted a summary of the current state of the law, thereby providing a framework for analyzing future cases.[12] The end result was a dazzling illumination of an otherwise murky area of labor law jurisprudence.

The first edition also has had an impact on the substantive development of labor law. The best known instance of this sort involved the so-called "Gorman presumption" relating to the standard for determining when an employer has a reasonable basis for doubting a union's claim of continued majority support so as to justify a withdrawal of recognition. In the first edition of the treatise, Professor Gorman wrote that "if a new hire agrees to serve as a replacement for a striker (in union parlance, as a strikebreaker, or worse), it is generally assumed that he does not support the union and that he ought not be counted toward a union majority."[13] Although the Board subsequently changed its position to adopt first a presumption of union support and then later to dispense with any presumption at all in this context, at least three courts of appeal cited to the "Gorman presumption" as a basis to reverse Board decisions based upon its newer standards.[14] A dissenting opinion in one of these cases commented in a footnote that "[a]s an astute labor law scholar, I expect that Professor Gorman would be among the first to disavow that policy under the National Labor Relations Act is to be made by a single-author textbook or even by the courts rather than by the NLRB itself."[15] The Supreme Court, in 1990, eventually intervened to uphold the Board's "no presumption" stance, but the controversy demonstrates the substantive clout of the first edition's pronouncements.[16]

In short, the first edition of *Basic Text on Labor Law: Unionization and Collective Bargaining* had such a huge impact because, unlike most

10. *See* Contractors' Labor Pool, Inc. v. NLRB, 323 F.3d 1051, 1056–60 (D.C. Cir. 2003) (reversing a ruling of the Board that had found an employer's policy of refusing to hire applicants whose recent wages were thirty percent higher or lower than its own starting wages was inherently destructive and in violation of section 8(a)(3) on the grounds that such a violation requires a finding of anti-union animus).

11. GORMAN, *supra* note 3, at 328–37.

12. *Id.* at 337–38.

13. *Id.* at 112.

14. Curtin Matheson Scientific, Inc. v. NLRB, 859 F.2d 362, 367 (5th Cir. 1988); Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1110 (1st Cir. 1981); Nat'l Car Rental Sys., Inc. v. NLRB, 594 F.2d 1203, 1206 (8th Cir. 1979).

15. *Curtin Matheson Scientific, Inc.*, 859 F.2d at 371 n.4 (5th Cir. 1988) (Williams, J., dissenting).

16. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990).

law school hornbooks, it was an invaluable tool not only for law students, but also for law teachers and practitioners as well. The strengths of the first edition, however, also became its Achilles heel—the book was so ambitious that keeping it up to date posed a monumental task. A simple supplement of new cases hardly would serve the book's variegated objectives. As a result, twenty-seven years passed without a second edition, and the book became dated and almost fully amortized in value.

No other publication took the first edition's place as king of the labor law hill during those decades. To be fair, two other publications carved out very impressive niches in their own right. The American Bar Association's Section on Labor and Employment Law, under the editorship of Professor Charles J. Morris, launched a superb group effort at creating a multi-volume compendium of labor relations case law in *The Developing Labor Law*, now in its fourth edition.[17] For labor law practitioners, it is the essential encyclopedia of labor law doctrine. At the other end of the spectrum, three professors of academic labor law have authored an extremely well-written and accessible book—*Understanding Labor Law*—primarily positioned as an easy to understand resource for students taking the basic labor law course.[18] While both of these publications are noteworthy and very valuable, neither bridges the classroom and practice divide as did Professor Gorman's first edition.

Given the impact of the first edition, the reprise of that classic publication in the form of Gorman and Finkin's second edition has been highly anticipated. Whether the 2004 edition matches the luster of the initial version, of course, depends upon both the contents and the context of the new edition.

In terms of content, the authors have combined the best attributes of the first edition with a considerable amount of updated material and a handful of positive innovations. The continuity of the two editions is demonstrated most vividly by the fact that they share the same thirty-two chapter headings set out in identical order. Both versions eschew string cites and instead focus on the leading case or two to lay out the legal principles relevant to the topic at hand. The second edition also follows the original by interspersing its description of doctrinal law with a discussion of policy concerns and the law's chronological evolution. The authors' discussion in Chapter Six concerning recent changes in the standard for determining when an employer may withdraw recognition of an incumbent union aptly replicates the highly valuable technique illustrated above with respect to the first edition's treatment of section 8(a)(3) violations.

On the other hand, the second edition offers some notable changes

17. ABA SECTION OF LABOR AND EMPLOYMENT LAW, THE DEVELOPING LABOR LAW (Patrick Hardin & John E. Higgins, Jr., eds., BNA Books 4th ed. 2001).

18. DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW (1999).

from the first edition. First of all, the authors update the discussion of case law by inserting approximately 340 pages of additional text, representing a more than forty percent expansion in the book's size. The second edition, however, does not merely add new text. The authors re-worked a number of the sections, such as the chapter on preemption of state regulation, to cover both new and old material in a more rational framework. The authors also gave in to the "savage criticism" of the first edition's lack of footnotes and now incorporate "full footnotes and citations on the bottom of the page, where they belong."[19] Finally, the second edition adds an appendix providing a helpful guide to undertaking labor law research, albeit primarily focused on the publisher's Westlaw electronic databases.

The only real quibble that I have with the contents of the second edition is with the authors' decision not to include material covering labor relations in the public sector and under the Railway Labor Act. Taken together, these two areas excluded from NLRA coverage now account for nearly one-half of all union members in the United States.[20] While such additional coverage would have enriched the book, it admittedly would have been very daunting to do justice to the myriad of state laws governing public sector labor relations in anything short of a book of its own.[21]

While the contents of the second edition continue to warrant high praise, the context in which the two editions first appeared is very different and somewhat diminishes the luster of the second edition. In 1976, the union movement in the United States was still quite strong and the NLRA, initially enacted in 1935, had matured to become one of the most significant pieces of New Deal legislation. By 2004, in contrast, the strength of the union movement and the proportionate coverage of the NLRA had declined dramatically.

Union membership in the United States peaked in 1954 at 34.7% of the nonagricultural labor force[22] and then began a long and steady decline. Union density dropped to 24.7% in 1976[23] and continued downward to 16.1% in 1990.[24] The decline has slowed but not stopped as the most

19. GORMAN & FINKIN, *supra* note 2, at v (quoting from the Preface to the Second Edition).

20. 29 U.S.C. § 152(2) (2000) (defining a covered "employer" as not including public employers or employers subject to the Railway Labor Act).

21. Although the NLRA does not apply to public sector employers, *see id.*, the vast majority of states have enacted statutes of their own governing public employment labor relations. Many of these statutes provide rights and obligations similar to the NLRA, with the notable exception that a majority of the state statutes do not protect the right to strike. *See* JOSEPH R. GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 82, 277–79 (2004).

22. MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 10 tbl. 1 (1987).

23. *Id.*

24. 26 Daily Lab. Rep. (BNA) B-8 (Feb. 7, 1991).

recently available data in 2004 shows union membership at 12.5% of the nonagricultural labor force.[25]

The actual drop in private sector union membership is even more severe once the simultaneous rise in public sector unionism is considered. While union membership among public employees was negligible in the mid-1950s, public sector union density grew five-fold during the decades of the 1960s and 1970s.[26] By 2004, 36.4% of all government workers were union members, accounting for approximately forty percent of total union membership.[27] Once this public sector boom is factored out, union members comprise only 7.9% of the current private sector labor force.[28]

Many factors have contributed to the decline of the American labor movement. Among those factors typically cited are the following: (1) the new global economy; (2) employer opposition to unions and deficiencies in the NLRA's regulatory structure; (3) changing workforce composition; (4) the increase in contingent work; (5) the nature of American unionism; and (6) American rugged individualism.[29] While each factor has played a role, the first two are particularly significant and are discussed below.

The term "globalization" is commonly used to refer to the increasing economic integration among countries. As recently as the 1970's, most economies were principally national in scale. In such a climate, internal labor markets and stable industrial relations systems generally prevailed. As Peter Capelli noted:

> Especially for large companies, product markets were stable and much more predictable because many industries were explicitly regulated by the government to ensure stability. Foreign competition was very limited, and domestic competition often operated as an oligopoly where unions effectively took labor costs out of competition with standardized union contracts.[30]

Advances in trade and technology during the second half of the twentieth century has altered this climate and spawned a global economy in

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25. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members Summary (Jan. 27, 2005), *available at* http://stats.bls.gov/news.release/union2.nr0.htm.

26. In 1956, only 915,000 federal, state, and local government employees were union members. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. 1865, HANDBOOK OF LABOR STATISTICS 1975, 382 tbl.155 (1975). By 1980, more than five million public employees belonged to unions. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE & LABOR, LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS: 1980, at 1 tbl. B (1981).

27. *Id.*

28. *Id.*

29. *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 362–77 (2002).

30. Peter Capelli, *The New Deal at Work*, 76 CHI.-KENT L. REV. 1169, 1174 (2000).

which business firms now compete on an international basis. Free trade policies have prevailed since the end of World War II, spurred on by the General Agreement on Tariffs and Trade (GATT) and the creation of the World Trade Organization (WTO). As a result, average U.S. tariff rates on manufactured goods that exceeded fifty percent in 1930, have now fallen to less than four percent.[31] On the technology front, advances in information and communication technologies have enabled multinational corporations to perform or purchase work in an ever shrinking global environment.[32]

Three dimensions of globalization illustrate the profound impact of this phenomenon. The first dimension is international trade—the cross-border flow of goods and services. The value of international trade in 2000 was $5.473 trillion for goods and $1.35 trillion for services and is growing steadily.[33] In the United States, exports have jumped from ten percent of merchandise produced in 1960 to forty percent today.[34]

A second dimension of globalization is foreign direct investment (FDI) which consists of cross-border flows of investment by multinational corporations that establish an interest in or control over an enterprise in another country. The World Bank reported that global FDI in 1999 was $880 billion, a figure that is nearly 4.5 times larger than as recently as 1990.[35]

International investment portfolios represent a third component of globalization. This refers to the cross-border flow of investment securities such as foreign stocks and bonds. The magnitude of this activity is illustrated by the fact that foreign exchange markets currently handle $1.5 trillion of such transactions each day, as compared to between $10 and $20 billion in the 1970s.[36]

Globalization tends to lead to lower union density rates in two related ways. First, trade and technology have made capital considerably more mobile than labor.[37] Technological advances, in particular, now enable

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31. DOUGLAS A. IRWIN, FREE TRADE UNDER FIRE (2002).

32. *See* R. Blanpain, *The Changing World of Work*, *in* COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 23, 24–26 (R. Blanpain & Chris Engels eds. 1998); Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 1–2, 11 (2000).

33. WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE STATISTICS 2000 18, tbl. 1.3 & 1.4 (2000).

34. IRWIN, *supra* note 31, at 5, 8.

35. WORLD BANK, WORLD DEVELOPMENT INDICATORS 342 (2001).

36. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999 15 (1999).

37. *See* ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM 113–22 & 263–64 (1991); BEVERLY J. SILVER, FORCES OF LABOR: WORKERS' MOVEMENTS AND GLOBALIZATION SINCE 1870, at 3–4 (2003).

employers to produce goods wherever labor costs are the most attractive.[38] American employers, accordingly, have shifted production to the Sunbelt and to developing nations as a means of lowering labor costs and escaping unions.[39] This mobile capacity, whether or not actually acted upon, greatly enhances the relative bargaining power of employers vis-à-vis employees.

In addition, American firms, whether or not they relocate operations, face intense pressure to cut costs in order to compete in the new global economy. Since unionization tends to come with a sizeable wage premium,[40] union avoidance and resistance to union wage demands have become a prime business strategy.[41] Less directly, American businesses, particularly beginning in the 1980s, have turned to reorganization, downsizing, and contingent work arrangements as cost-cutting measures.[42] These more flexible work measures destabilize long-term work arrangements and are inimical to union strength.

Globalization has had particularly deleterious consequences for organized labor. Unions fare best in a climate in which they enjoy monopoly power in product markets.[43] Where unions are successful in organizing an entire sector of the economy, they reduce the amount of competitive resistance from employers and consumers by "taking labor out of competition."[44] One of the reasons underlying the higher union density in the 1950s was the fact that organized labor was able to achieve wall-to-wall representation of workers in a variety of American industries.[45]

American unions enjoy this status in few product markets today. With globalization, American firms must compete on an international basis. Given the lower wage structures of most developing nations,[46] American unions now face intense resistance in virtually every sector in which international production is feasible.[47]

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38. *See* R. Blanpain, *supra* note 32, at 24–26; Dau-Schmidt, *supra* note 32, at 1–2, 11.

39. *See* SANFORD M. JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL 255–56 (1997) (describing the relocation of manufacturing operations to southern states); CHARLES CRAVER, CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 42–47 (1993) (describing the flight of American business to a "foreign production platform").

40. *See* FREEMAN & MEDOFF, WHAT DO UNIONS DO? 46, 64 (1984) (describing a twenty to thirty percent union wage effect).

41. *See* THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 70, 107–08 (describing the financial incentive for American business to avoid unions).

42. *See* PETER CAPPELLI ET AL., CHANGE AT WORK 66–88 (1997) (describing various changes in business practices beginning in the early 1980s).

43. Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 10 (1993).

44. FREEMAN & MEDOFF, *supra* note 40, at 82.

45. KOCHAN ET AL., *supra* note 41, at 114.

46. CRAVER, *supra* note 39, at 43–47.

47. Estreicher, *supra* note 43, at 13.

Second, a unique attribute of the American system of labor relations is the active opposition of many American employers to unionization.[48] Much of this opposition is made possible by the NLRA's adoption of an electoral model for determining representational status. In many other industrialized countries, an employer automatically must bargain with a union concerning the rights of its members.[49] Under such a system, employers play no overt role in an employee's decision to join a union, and any opposition to union demands typically does not occur until the parties meet at the bargaining table. Under the NLRA, in contrast, an employer is not obligated to bargain until after a union first establishes its majority status in a representation election.[50] U.S. employers, moreover, may participate actively in this election process. The NLRA permits an employer to express its opposition to union representation so long as it does not engage in threats of reprisal for union support or make promises of benefits to entice union opposition.[51] Misstatements of fact and even intentional lies are permissible.[52] Many employers hire professional consultants for the purpose of orchestrating sophisticated anti-union campaigns.[53] These campaigns not infrequently spill over to include illegal tactics such as the discharge of union supporters,[54] which go undeterred by the tepid remedies of the NLRA.[55] A number of empirical studies show

48. *See* WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 45 (1993) ("The fact is that American employers have never accepted trade unionism to the extent that their counterparts have in other industrialized countries throughout the world, a phenomenon sometimes encapsulated by the term 'American exceptionalism.'").

49. *See, e.g.*, Richard E. Lutringer & Mark S. Dichter, *Germany*, *in* I INTERNATIONAL LABOR AND EMPLOYMENT LAWS 4-1, 4-40 to 4-41 (William L. Keller & Timothy J. Darby eds., 2d ed. 2003) (Germany); Stephen F. Befort & Virginia E. Cornett, *Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States*, 17 COMP. LAB. L. J. 269, 289 (1996).

50. 29 U.S.C. § 159(a) (2000).

51. 29 U.S.C. § 158(c) (2000).

52. *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 132–33 (1982).

53. *See* WALTER GALENSON, THE AMERICAN LABOR MOVEMENT, 1955–1995, 88 (1996) (reporting on a 1983 survey conducted by the AFL-CIO finding "that outside consultants or lawyers directed counter-organizing drives" on behalf of employers in approximately seventy-five percent of union organizing campaigns).

54. For a discussion of both the legal and illegal tactics used by U.S. employers in opposing union organizing efforts, *see* Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776–81 (1983).

55. The usual remedy under the NLRA for the illegal discharge of an employee organizer is a cease and desist order coupled with reinstatement and back pay. 29 U.S.C. § 160(c) (2000). The NLRA does not provide for fines, punitive damages, or any other "penalty," and the discharged employee is subject to a duty to mitigate losses by finding alternative work. *See* CRAVER, *supra* note 39, at 151. This "make whole" approach provides little in the way of deterrence for employers who realize that they can chill union

that these anti-union tactics often are successful in influencing election outcomes.[56]

The weakness of the NLRA's regulatory structure also encourages employers to continue to oppose unions even if the latter successfully has run the election gauntlet. American employers often dispense with union representatives by refusing to bargain in good faith for an initial contract[57] or by pushing unions into a strike and hiring permanent replacement workers.[58] Both strategies frequently result in a decertification election or an employer's lawful withdrawal of recognition.[59]

In short, the labor law environment in the United States is not kind to employees who desire union representation. Given management's natural economic leverage in the workplace, the significance of employer

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organization efforts by immediately firing employee organizers. *See id.*; Weiler, *supra* note 54, at 1788–90.

56. *See* FREEMAN & MEDOFF, *supra* note 40, at 233–39 (summarizing empirical studies concerning the impact of anti-union campaigns); *but see* JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976) (finding that most employees do not change their support for or against union representation because of an employer's anti-union tactics).

57. The only remedy recognized under the NLRA for a party's refusal to engage in good faith bargaining is an order requiring that party to return to the bargaining table. *See* H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970); Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970), *rev'd by* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971), *enforced by* Ex-Cell-O Corp., 449 F.2d 1058 (D.C. Cir. 1971). Thus, an employer may engage in protracted "surface" bargaining with little fear of meaningful administrative intervention. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 250 (1990) (noting "the incidence of bad faith bargaining has risen" as employers "appreciate the lack of force in their obligation to recognize and deal with a certified union"). This problem is particularly acute when used as a tactic to avoid the consummation of an initial collective bargaining agreement. *See* U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT 73–74 (1994) (reporting that approximately one-third of all newly certified union representatives fail to conclude a first contract).

58. The Supreme Court has ruled that an employer does not act unlawfully in hiring permanent replacement workers to fill positions vacated by those engaged in a lawful strike. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938). In addition, an employer lawfully may decline to reinstate a striker at the conclusion of a strike so long as the position continues to be occupied by a permanent replacement. Laidlaw Corp., 171 N.L.R.B. 1366 (1968). The threat of permanent replacement deters strikes and decreases a union's ability to use the threat of a strike as leverage in collective bargaining. *See* Charles B. Craver, *The National Labor Relations Act Must be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 421 (1992); Daniel Pollitt, *Mackay Radio: Turn it Off, Tune it Out*, 25 U.S.F. L. REV. 295, 296–97 (1991).

59. *See* GOULD IV, *supra* note 48, at 169 ("If the union cannot negotiate an agreement, the result is virtually the same as decertification or lack of certification during the organizational campaign."); Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 565, 567 n.138 (1990) (noting that permanent replacements frequently vote to decertify the union in an election held a little more than twelve months after being hired).

opposition activities is not lost on the employee electorate. Many employees who voluntarily would choose union representation lack the practical ability to convert that desire into reality. While polling data reveals that more than forty percent of American workers, including almost a third of currently nonunion workers, desire to have union representation,[60] labor organizations currently represent less than thirteen percent of the workforce.[61]

During this same period of union decline, the United States experienced a significant increase in the amount of governmental regulation affecting the employment relationship. Until the mid-1960s, the NLRA and the Fair Labor Standards Act[62] were the only two federal statutes that comprehensively regulated the workplace. That situation has changed dramatically. Congress since has enacted a host of statutes that can be grouped into two basic categories. Some of these statutes, such as Title VII[63] and the Americans with Disabilities Act,[64] prohibit workplace discrimination on the basis of certain protected characteristics. A second category of statutes, such as the Occupational Safety and Health Act[65] and the Family and Medical Leave Act,[66] substantively establish minimum workplace requirements. In addition, state legislatures and courts have adopted several limitations to the at-will presumption, such as statutes protecting employee whistle-blowing[67] and court decisions authorizing tort claims for dismissals that offend public policy.[68]

The simultaneous decline in unionization and rise of governmental regulation likely are related developments. With the shrinking union sector less capable of providing a meaningful counterweight to undeterred

60. *See* RICHARD FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 68–70 (1999).

61. *See supra* note 25 and accompanying text.

62. The Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000), mandates that employers pay covered employees a minimum hourly wage, currently pegged at $5.15 per hour, and compensate work performed in excess of forty hours in a week at one and one-half times the employee's regular rate of pay.

63. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e–17 (2000).

64. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

65. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2000).

66. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000).

67. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.361–15.369 (protecting both private and public sector employees from retaliation for blowing the whistle on alleged illegal acts); *see also* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 1000 (5th ed. 2003) (reporting that thirty-seven states have enacted some form of statutory protection for employees reporting illegal activity).

68. *See, e.g.*, Tameny v. Atl. Richfield Co., 610 P.2d 1330, 1336–37 (Cal. 1980) (finding a public policy cause of action for an employee discharged for refusing to participate in an unlawful price-fixing scheme); *see also* Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 400–05 (1989) (citing forty-three states as recognizing the public policy cause of action).

employer discretion, many view governmental regulation as the next best line of defense.[69]

The continuing decline of union density combined with the displacing effect of increased employment regulation has reduced labor law's clout in governing the workplace. Thus, even though the contents of Gorman and Finkin's new edition of the *Labor Law* hornbook remain at a very high level of quality, the shrinking importance of labor law in the United States necessarily lessens the impact of the new 2004 edition when compared to its 1976 predecessor.

This decline, however, should be viewed in perspective. Union membership in the United States today still numbers almost sixteen million workers.[70] And, the reach of labor law exceeds that base to have continued relevance to workers who are engaged in concerted activities, who are subject to possible organizing campaigns, or who have their terms and conditions of employment set by comparison to the union sector. In spite of its relative decline, labor law remains a vital area of study and practice.

In the end, the second coming of *Basic Text on Labor Law: Unionization and Collective Bargaining* is a cause for celebration. The new edition clearly reclaims its predecessor's place as the leading single volume resource for students, teachers, and practitioners of labor law. I plan to keep it within easy reach on my bookshelf.

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69. *See* GOULD IV, *supra* note 48, at 55–58 (discussing the interrelationship between the decline of unionization and the rise of governmental regulation); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 15 (1988) (stating that with the decline in labor unions, "[s]ociety is now looking to the courts and legislatures to protect employees not covered by collective bargaining").

70. Press Release, Bureau of Labor Statistics, U.S. Department of Labor, Union Members Summary, Table 1 (Jan. 27, 2005), *available at* http://stats.bls.gov/news.release/union2.t01.htm (reporting total union membership in the United States in 2003 at 15,776,000).