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PART I

In June 1984, a Joint House of Representatives Committee, consisting of the Subcommittee on Labor Management Relations of the Committee on Education and Labor and the Manpower and Housing Subcommittee of the Committee on Government Operations, held oversight hearings on the subject "Has Labor Law Failed." I, along with other representatives of labor, management, academia, and the public testified. The proposition I urged then was, quite simply, as follows:

> When I was asked to discuss the state of the Nation's labor laws, my initial reaction was to join in the outcry of protest by my brothers and sisters in the labor movement against the blatant anti-labor bias displayed in recent decisions of the National Labor Relations Board. . . . However, my experience as a union member and a labor lawyer convinces me that these criticisms, while fully justified, amount to flogging a dead horse. That dead horse is the promise that Congress made to American working people in 1935 when it passed the Wagner Act to protect their right to gain control over their working lives through a labor union.[1]

It was my opinion then, and is my opinion even more firmly now, that the problem of labor law is not merely one of personnel at the National Labor Relations Board (NLRB or the Board), or of adjusting administrative minutiae, or of striking miscellaneous balances in the definition and administration of our labor laws.

My view is that labor law has become a dangerous farce. That view has been confirmed in the time since my house testimony in the summer of 1984. I fear that we will pay a large social price for labor law's failure. It is an aspect of the failure of American democracy because it represents a retreat from the principles of pluralism. In rejecting the notion that workers organized through unions should have rights and should share in power, the National Labor Relations Board has excluded a vital force from economic and social decisionmaking. That working

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[1] *Has Labor Law Failed?: Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor and the Subcomm. on Manpower and Housing of the House Comm. on Government Operations*, 98th Cong., 2nd Sess. 6 (1984) (Statement of Richard L. Trumka, President, U.M.W.A.).

men and women—wage earners—will reassert their rights at the workplace is inevitable. That they will use the legal process to do so becomes daily more doubtful. That process has, by now, lost all credibility.

Because we live in a time of pervasive media coverage, with the attendant misuse of "buzz words," I feel compelled to violate a fundamental principle of legal advocacy in this talk. The normal rule is to start out affirmatively with the premise you wish to sustain. However, because the propagandists of big business and the political right have so distorted basic vocabulary in the field of labor relations, I must first step back and review some of the basic premises of our civil society.

First, the United States is a wealthy and pluralistic society. Since Abraham Lincoln, it has been the premise of our progressive thinkers, including the two Presidents Roosevelt, President Wilson, Justice Brandeis, Justice Frankfurter, and others, that America was endowed with sufficient resources to provide political and industrial democracy for the bulk of our citizens. That is the basic premise of the best of American social thought over the past 150 years—the sharing of wealth and decisionmaking power.

That is also the fundamental premise of the labor movement. The labor movement has always heartily endorsed the statement Albert Gallatin, an early Secretary of the Treasury, made in 1797: "The Democratic principle on which this nation was founded should not be restricted to the political process, but should be applied to the industrial operation as well."

I speak to you here as the President of the United Mine Workers. I do *not* represent any special interests because labor is *not* a special interest. On the contrary, I represent young workers with growing children; older workers looking forward to, and at times fearing, retirement; women workers raising a family on their own; and thousands of retired and disabled persons in our coal mining communities. If these are "special interests," then so be it. You should be aware, however, that to apply that term to my constituents is to rob it of all meaning and to reduce it to the status of a mindless epithet.

I suggest that the far right's distortion of the term "special interest," a term so important to our progressive history, should be rejected at the outset. The true special interests are the same today as they were in 1890 and 1935 when financial interests ruined workers, communities, and the environment to extract profits, unrestrained by any countervailing power. The only reason that these real special interests have always opposed unions is that unions take some of their power away and redistribute some of the wealth of this country.

Of course, no employer has ever opposed unions without at least invoking universal principles to mask naked greed. When confronted at last with the or-

ganized power of workers, employers say that unions infringe upon the rights of individuals to make free choices, that unions push wages too high so that workers lose jobs, or that unions are corrupt. If you believe that employers today are more considerate of their workers than those of the past and that unions are, thus, superfluous, you are naive. In the past ten years, employers have deindustrialized vast areas of America in order to maximize short-term profit. By shifting capital investment to third-world countries, employers have literally created depressions in many American communities—from Birmingham, Alabama to the iron ore fields of Minnesota. In this past year, we have seen one coal company alone spend millions on concrete bunkers, machine guns, and armed guards just to defeat my union and the coal miners who risk their lives to produce coal. Short-term greed remains what it has always been—the lack of social conscience and lack of responsibility in the pursuit of immediate dollars.

Having applied the label "special interest" where it belongs, we can now proceed to a fundamental discussion of labor law. In 1955, Sylvester Garrett, then the chief arbitrator under the GM-UAW collective bargaining agreement, wrote these words:

> Today unions are an established part of our society. There is little likelihood of a frontal assault upon unions, as such, by either industry or government in the foreseeable future. It is not surprising, therefore, that many, if not most, employers carrying on collective bargaining with unions do so with a conviction that unions are solidly established institutions. Many, too, look upon free unions as an essential bulwark of democracy against the totalitarian flood. Collective bargaining, in any event, must be regarded today as the continuing development of a long-term relationship, rather than as an isolated series of skirmishes with unions.[2]

Those suppositions are outdated. Today, thirty years later, capital investment has been diverted to third-world countries, our industrial base has been dismantled, our skilled work force has been dispersed, and unions have been pilloried as unfashionable, unneeded, and dying institutions. We are told that workers and their unions are redundant. The terms of the debate, we are told, are confined to how the burial service should be conducted. And what does this brave new world without labor unions and prosperous workers look like?

Gone is the skilled worker who earns a middle class income, has a decent home, and sends his children to college. Gone is the basic humanity of an industrial enterprise where the employer cannot fire a worker at will. Gone is the intricate supporting web of community relationships that made our industrial heartland a dynamic and prosperous place at the time Sylvester Garrett wrote. In its place, we have the much heralded "service" and "information" economy.

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[2] Garrett, *Some Results of the Struggle for Unionization*, READINGS ON LABOR LAW 20 (C. Reynard ed. 1955).

I fear, as do most disinterested and sober observers, that this will be an economy of shoddy, or no, service to the consumer and of underpaid workers locked into an increasingly stratified class system. It is a world, I fear, of the poor and the rich. It is a world that the special interests will rule unchecked by pluralism.

This is not the world that Albert Gallatin wrote about in 1797, of industrial and political democracy, of pluralism and fair bargaining over the distribution of the wealth of the society. This is not the world that Theodore or Franklin Roosevelt envisioned or of which Justices Brandeis and Frankfurter wrote. This is not the world of the best of our history. This is the world of the worst of our history: a world of unemployment, of low paid workers, and, at its center, of unparalleled greed and conspicuous consumption.

It is without question that the National Labor Relations Board has transformed itself under Ronald Reagan into an active and conscious proponent of the destruction of labor unions, of American industrial democracy, and ultimately, of workers' rights and prosperity. Not only has labor law failed, labor law as administered by the National Labor Relations Board has become an active factor in the destruction of the rights of ordinary working men and women. It has become a conscious weapon in the hands of the special interests. No amount of parsing of Board decisions or suggestions for administrative reform will change this. The day has long past for such quibbles.

I do not propose therefore to give a scholarly exegesis of this or that decision, to recommend that this or that person be replaced, or to urge anybody to return to fundamental principles. I fear it is too late for that. I wish to leave you only with these thoughts. Recently, the general counsel of the National Labor Relations Board issued her quarterly report covering the second quarter of the 1985 calendar year. That report discusses cases of significance decided during that period. In that report, the NLRB unwittingly displayed its bias against working people.

In one case, workers at an Arkansas chicken-rendering plant left work because of a snowfall. They had to drive long distances between home and work and the roads were becoming progressively more hazardous as the snow fell. They left early The employer fired them.[3] With respect to those workers, the Board said: "They did not ask the employer to permit them to leave earlier. Rather, they *told* the employer that they intended to leave work early."[4] Because of this, the Board sustained the discharge of the employees.[5]

I do not know the identity of these employees. I do know that chicken-rendering workers are low paid, probably mostly women. They probably had children at home. They probably feared that the snow would prevent them from

[3] NLRB, OFFICE OF GEN. COUNSEL QUARTERLY 2 (Mar. 17, 1986).
[4] *Id.* (emphasis added).
[5] *Id.*

returning to their child care responsibilities. Thus, they told the employer that they would leave. How unruly. How disrespectful. For this crime—telling rather than begging—they lost their jobs.

In another case, a union picketed the home of a management collective bargaining representative.[6] Why did the general counsel of the Board find this improper? "The picketing at the home of the vice-president negotiator did have a demonstrable effect on the spouse of the employer's negotiator. It was especially upsetting to *his wife who had a history of hypertension.*"[7]

I doubt if the NLRB knows what it revealed in those two decisions. The labor law coming from the NLRB said that poor people do not matter, that their problems are not important, and that they can be fired without any humanitarian concern. Human concern, as expressed in those cases, extends only to the wives and families of the rich and the representatives of the rich. It would seem that only the rich and powerful matter.

I do not, of course, approve of picketing people's homes. At the same time, I do not approve of this blatant bias. The concern for humans should be applied to the problems of poor workers in Arkansas as it is to the wives of management representatives. My response to this anti-human bias could be to suggest that decisionmakers more attuned with industrial America and the needs of working people should be put in NLRB jobs. Maybe persons who can look at a case and visualize the human elements behind it more clearly should be appointed to key NLRB positions. However, to make such a suggestion is to misunderstand fundamentally the role now allotted to labor law in our society. That role is to make sure that chicken-rendering workers stranded at their workplace by a snowstorm do not get home to their children on time by their own unilateral choice, but only by their employer's favor.

Of course, this Board has dusted off the old and discredited "open shop" doctrines of the 1920s. They tell us that workers should be treated as individuals and are best represented without the interference of a third party, such as a union. But the chicken-rendering workers' case I have referenced had nothing to do with unions. These were nonunion workers. It had to do with human beings and how the labor law treats human needs.

At this point, let me remark on the horrible position of chicken-rendering workers. It is hard, low paid work. Frank Perdue, the Maryland chicken czar, recently testified before the President's Commission on Organized Crime that he got in touch with the mob to get some muscle in his fight against efforts of his workers to unionize.[8] Where were the howls of outrage from the right when Frank

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[6] *Id.* at 3.

[7] *Id.* (emphasis added).

[8] Wash. Post, March 7, 1986, at A-1, Col. 2 (statement by Frank Perdue before the President's Commission on Organized Crime).

Perdue testified about seeking mob help in order to keep people from organizing into a union? My heart goes out to the chicken-rendering workers faced with the likes of Frank Perdue and the NLRB.

The Board is far beyond surgery. I say, let's bury it. At least I can join in one proposition espoused by principled conservatives: deregulation. The power of the special interests is such that they no longer need government officers to do their bidding. Why burden our taxpayers with the associated personnel and other costs. Labor law has done its job. Let's bury it, forget about it, and tell everybody that the premises of American industrial democracy have been abolished. Then maybe we can all see where we stand.

There can be no doubt that the NLRB has reduced itself to the status of a tool of special interests and has lost even the appearance of fairness. The statistics concerning its case handling are a clear indication of its bias. During the second of the two years in which chairman Dotson and member Hunter commanded a majority, the National Labor Relations Board continued to exhibit a marked aversion to finding employer unfair labor practices and an equally notable willingness to find union unfair labor practices.

Over the two-year period from September 1983, when President Reagan's appointees attained a majority of the Board, through August 1985, when member Hunter left the agency for an acknowledged employer-side practice, the percentage of unfair labor practice cases decided favorably to employers has remained constant: from September 1984 to August 1985, as from September 1983 to July 1984, complaints against employers were sustained in whole or substantial part in approximately fifty percent of the contested section 8(a) cases decided, while complaints against unions were sustained in whole or in substantial part in about eighty-five percent of the contested section 8(b) cases decided.[9]

This decisional pattern contrasts sharply with that of the Board in two previous time periods: September 1975 through August 1976, when the members of the Board were all Republican appointees, three of whom had been or later became management labor lawyers; and September 1979 through August 1980, when three of the four Board members were Democratic appointees. Although different in their political complexions, the Board under chairman Betty Murphy in 1975-76 and under chairman John Fanning in 1979-80 ruled against employers and against unions with almost equal frequency. During both of these earlier periods, complaints against employers were sustained in whole or substantial part in eighty-four percent of the contested section 8(a) cases decided, and complaints against unions were sustained in just under seventy-four percent of the contested section 8(b) cases decided.[10]

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[9] 4 LAB. L. EXCH., *The Dotson Board's Decisions, 1983-1985* 7-8 (1985).
[10] *Id.*

Put another way, the figures show a *three hundred percent increase* during the Dotson Board's tenure in the percentage of decisions dismissing complaints against employers in whole or substantial part, and almost a *forty percent decrease* in the percentage of decisions dismissing complaints against unions in whole or substantial part.

The same contrast is also evident upon review of the Dotson Board's decisions in representation cases. The percentage of representation cases decided in accord with the employer's positions was thirty-five percent in 1975-76 and forty-six percent in 1979-80. In 1983-84, the first year of the Reagan majority of the Board, the percentage of representation cases decided in accord with the employers' position jumped to seventy-two percent.[11]

In my opinion, the NLRB is simply not fair. It is purely result oriented. The underpinnings of labor law—fairness, rights of employees, and collective bargaining—have been cynically rejected. My only question is—can't the special interest fire chicken-rendering workers without the tax burdens imposed by the NLRB? I say yes. I say deregulate. I say discard the illusions of labor law, and let's fight it out—in politics, in mass action, in state courts, and before juries.

You will note that I have not talked about the many cases pending betweeen my union and the National Labor Relations Board. I have not complained that the Board wishes to abolish picketing, or that the Board thinks that it has become the police chief for West Virginia, Pennsylvania, Ohio, and Kentucky, or that the Board does the bidding of employers with such alacrity and slavishness that all respect evaporates. Faced with the fundamental inhumanity of that agency, such complaints are really trivial. Labor law has totally failed. We should all recognize it and go on from there.

PART II

Yesterday, I spoke generally, and I fear somewhat emotionally, about the failure of labor law today. My proposition was that labor law has failed in its announced task of securing the rights of working persons. A fundamental premise of my approach was that it is far too late for parsing Board decisions, suggesting administrative streamlining, or proposing personnel changes at the NLRB. The job of the Board in the 1980s is to execute the rights of American working men and women. Whether the scaffold is large or small, or who the hangman is, are details that really do not matter. Now, I wish to address the future—what the world without the Wagner Act, without Taft-Hartley, and without Landrum Griffin would look like.

Increasingly, the lawyers in my legal department and other labor-side labor lawyers, are coming to the conclusion that workers' rights should be asserted

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[11] *Id.*

somewhere other than before the National Labor Relations Board. Its bias on the merits is fatal to virtually any claim of workers' rights. Even if the Board does grant an occasional victory to workers or their unions, its administrative processes are so impossibly drawn out that the victory is pyrrhic.

The drafters of the Wagner Act had three hopes. First, they hoped that legal recognition of the rights of workers to bargain collectively would eliminate strikes and industrial warfare[12]—the clash of embittered strikers with the police or with the employer's own special police force. Second, they hoped that collective bargaining would provide an effective mechanism for recognizing and adjusting labor's economic claims[13] once the position of unions had become legally recognized and protected. By recognizing unions, the law would place power—impossible to obtain by individual bargaining or individual action—into the hands of wage earners, thereby providing a countervailing force to the power of capital. Finally, the drafters of the Wagner Act hoped that an expert administrative agency comprised of disinterested and experienced persons would establish a rule of law applicable to industrial controversies.[15]

It is the latter focus that I now wish to address. Frances Perkins, Franklin Delano Roosevelt's Secretary of Labor, outlined the hope of American progressives for the establishment of a rule of law in labor relations in 1935 testimony before the senate considering the Wagner Act. She said:

> We have found it necessary under the development of our common law and our statute law, to provide for *judicial tribunals to determine certain items which men even in a democracy were not able to adjudicate fairly for themselves, and, so, it seems to me, we have come to a time when the establishment of a judicial tribunal to determine certain things in the relationship between employers and employees is as definintely indicated,* that we shall be making real progress in an orderly and democratic life if we establish on a permanent basis a National Labor Board which will have certain definite powers and duties which we all understand.[16]

To paraphrase Secretary Perkins, once the law recognized unions, the establishment of an adjudicative body to administer labor law would remove industrial disputes from the streets and transfer them to the bargaining table and to the hearing rooms of the administrative law process. Secretary Perkins, Senator Robert Wagner, Justice Frankfurter, and many other American progressives thus saw administrative law that was administered by specialized experts as a means to

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[12] National Labor Relations (Wagner) Act, ch. 372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1982)).

[13] *Id.*

[14] *Id.*

[15] 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1935, at 18 (1985).

resolve fundamental tensions within our society according to rules of law. This was a key plank in the progressive platform.

Prior to 1935, labor relations were really class war. Even good Republicans, like Chief Justice Taft, recognized, as early as 1923, that violence was endemic to the lawless clash of forces—employers and their paid guards and corrupt law enforcement officials on the one hand and unions and their army of workers, many of whom were immigrants, on the other. In writing about a dispute in the early 1920s between the mine workers and a mine owner, that good Republican, Chief Justice Taft, perceptively stated:

> [The employer's] breach of his contract with the [United Mine Workers] in employing non-union men three months before [the contract] expired, *his attempt to evade his obligation by a manipulation of his numerous corporations, his advertised anticipation of trespass and violence by warning notices, by enclosing his mining premises with a cable and stationing guards with guns to defend them, all these in the heart of a territory that had been completely unionized for years, were calculated to arouse a bitterness of spirit entirely local among the union miners against a policy that brought in strangers and excluded themselves or their union colleagues from the houses they had occupied and the wages they had enjoyed.*[16]

The battle to the death between naked economic forces that characterized labor relations as described by Chief Justice Taft would, the progressives hoped, be replaced by legal recognition of the rights of labor and disinterested and expert adjudication of its claims in key areas. That the Board would serve that expert judicial function in resolving industrial disputes by a rule of law was a hope that has been thoroughly dashed. For example, the expert agency in charge of administering our law for industrial relations has a hard time with the elemental concept of concerted activity. The basic concept is that when workers combine, whether in a union or in a nonunion setting, to assert common economic and social rights, they may not be fired or otherwise disciplined, harassed, and intimidated. The Board, as an expert agency, is chartered to enforce that legal recognition of collective activity upon employers so that industrial strife does not flare up when workers combine to assert their rights against employers, and so that the struggle of the streets is replaced by the rule of law.

In *Center Ridge Company*,[17] the Board sustained the discharge of a security officer, Michael Kemp, who had complained to the news media about a conflict between county licensing requirements for guards and the employer's new work procedures. The employer was not living up to public policy. Chairman Dotson found that, although the employee's complaints to the news media concerned

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[16] UMWA v. Coronado Coal Co., 259 U.S. 344, 411-12 (1921) (emphasis added).

[17] Center Ridge Co., 120 L.R.R.M. (BNA) 1065 (August 27, 1985).

work issues of importance to himself and other security guards, Kemp's discharge did not violate the National Labor Relations Act (the Act) because:

> It is undisputed that the Respondent did not know of any employee other than Kemp who took umbrage at the new procedures. As far as the Respondent knew, Kemp's concern about a conflict between its procedures and the county's licensing requirements for security guards was not shared by any of his fellow employees.[18]

Poor Michael Kemp did not even get the benefit of his shared name with a leading star of the New Right. Because he could not prove that the employer knew that his protests were shared by others, there was no concerted activity to protect. In short, the "expert" agency has imported into the concept of concerted activity specific intent requirements; requirements that the employee prove the employer's bad state of mind. We all know such a burden of proof is impossible to satisfy. A Board that has trouble with the fundamental labor law concept of concerted activity cannot perform the function envisioned for it by the progressives—as an expert adjudicator of industrial disputes.

You cannot be an agnostic on such a basic term of industrial relations and, at the same time, claim expertise. This is so because no expert adjudicator would place the risk of failing to prove the employer's bad state of mind on the worker. Such an approach shifts the focus from what the workers *did* to what the employer may have *known,* a standard that commits the protections of the Act to the ultimately unknowable vagaries of the employers' mental attitude. Since day one, it has been clear that protections which require proof of a bad *mens rea* on the part of the employer are no protections at all.

The message of the Board is that if you engage in concerted activity, you had best never speak anywhere alone about workplace issues; you should bow three or four times to Mecca and engage in other formalities before you will be accorded any protection under the Act. Compare the Kemp decision with the decision of Justice Roberts in *New Negro Alliance v. Sanitary Grocery.*[19] There, black workers protested their employer's racial discrimination. The employer sought an injunction, contending that this racial protest was not a labor dispute or concerted activity regarding the terms and conditions of employment.[20] Justice Roberts, construing the Norris-LaGuardia Act as barring an injunction in the instant case, wrote:

> The [Norris-LaGuardia Act] deprives those courts of jurisdiction to issue an injunction against, *inter alia,* giving publicity to the existence of, or the facts involved in, any labor dispute. . . . It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor

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[18] *Id.*

[19] New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

[20] *Id.* at 554.

> dispute concerning the "terms and conditions of employment" in an industry or a plant or a place of business should be lawful. . . .[21]

Thus, had the dreaded anti-labor Justice Roberts decided Kemp's case, he would have done far better by Mr. Kemp than chairman Dotson does today. At least Justice Roberts felt some duty to construe statutes fairly. Similarly, I submit that the chicken-rendering workers in Arkansas whom I spoke about yesterday would have received fairer treatment from a jury of twelve or six lay persons than they received from the "expert agency," the NLRB.

This is the world I envision: the world without preemption and the expert agency. It is a world of struggle within the political and social arenas and of jury trials in the legal arena. We do not need an expert agency anymore. It only hurts labor and working people.

I say abolish the Act. Abolish the affirmative protections of labor that it promises but does not deliver as well as the secondary boycott provisions that hamstring labor at every turn. Deregulate. Labor lawyers will then go to juries and not to that gulag of section 7 rights—the Reagan NLRB. Unions will no longer foster the false expectations attendant to the use of the Board processes and will be compelled to make more fundamental appeals to workers. These appeals will inevitably have social and political dimensions beyond the workplace. That is the price we pay, as a society, for perverting the dream of the progressives and abandoning the rule of law in labor relations.

I have a profound faith in the judiciary and jury system as it exists at common law. It has been the enduring bulwark against biased decisionmaking by "experts." The Board has transformed itself into a bureaucratic mechanism for defeating the rights of workers. Let unions get political, let unions get involved in the selection of state court judges, let labor law cases go to the jury.

I recognize that this prescription for the future is at odds with the wisdom of the past. That wisdom prescribed that union lawyers argue preemption when faced with hostile claims in state courts. The labor union bar unanimously believed that the expert agency would understand labor's cases and concerns better than generalist judges and lay juries. However, I ultimately have more faith in lay juries and in judges endowed with general jurisdiction than in the expert labor law administrators of the New Right.

I also recognize that at times this prescription for labor law practitioners will mean that unions may sustain damage judgments in state courts. However, in the long run, generalist judges and lay juries will be more expert in, and more sympathic to, the conditions of workers than will a Board populated by the ideologists of the New Right, and those bureaucrats who seek to curry favor with

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[21] *Id.* at 561-62.

their New Right masters. In conclusion, my message is: deregulate. Get rid of the administrative "experts" who have been dominated by the industry they are supposed to regulate. Take the fox out of the henhouse and let the chickens scratch for themselves.