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Questioning the Unquestioned in Collective Labor Law

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Enacted in 1935, the Wagner Act declared the public policy of the United States to be one of "encouraging the practice and procedure of collective bargaining." The premises and purposes of collective bargaining were threefold. First, in section 1 of the statute, the drafters recognized the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of collective ownership." They echoed Holmes's classic expression, "[c]ombination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way." The inequalities of individual bargaining led to unacceptable social and economic results. Consequently, it was to be replaced with collective bargaining which would provide more bargaining power and produce more acceptable social and economic results.

Second, individual bargaining inevitably led to demands for government intervention to protect employees from oppressive terms. Establishing a collective labor market would reduce the need for government regulation. In Senator Robert F. Wagner's words, it was "the only key to the problem of economic stability if we intend to rely upon democratic self-help by industry and labor, instead of courting the pitfalls of an arbitrary or totalitarian state." Terms and conditions of employment would be determined by market forces in the collective labor market, not by government. Free collective bargaining was viewed as a market alternative to legislative control.

2. Id. § 151.
3. Id.
Third, collective bargaining would serve the social purpose of enriching democracy by giving workers a voice in decisions of industry affecting their working lives. Again, in the words of Senator Wagner, "we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood." The workers were to participate in those decisions through representatives of their own choosing in collective bargaining.

These three purposes—economic, political, and social—were sought to be achieved by "encouraging the practice and procedure of collective bargaining." Unfortunately, the last two purposes, relying on collective bargaining to reduce government intervention and providing workers a measure of industrial democracy, have been largely lost from view, not only by courts and commentators, but by unions which were intended to be the instrument for achieving these purposes. Collective bargaining is commonly viewed almost solely as an economic instrument to give workers greater bargaining power.

Courts have taken an additional step in clouding the first purpose by declaring that the purpose of the statute is "industrial peace." The industrial peace envisioned by the Wagner Act, however, was not a peace to be achieved by employer unilateral action and control, but was to be achieved by "encouraging practices fundamental to the friendly adjustment of industrial disputes... and by restoring equality of bargaining power between employers and employees."

The three motivating purposes of the Wagner Act are, in my judgment, as valid today as they were in 1935. There is a great disparity of bargaining power between most individual workers and their employers and, unfortunately, nearly ninety percent of workers in the private sector must now bargain individually. In the last fifteen years, the economy has grown nearly fifty percent, while the real wages of ordinary workers

8. See, e.g., First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674 (1981) ("[A] fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce.").
10. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 436 (1996). Only 10.3% of the wage and salary workers in the private sector are union members and another 1% of non-members are covered by collective agreements. See id.
11. See id. at 443. In 1992 dollars, the Gross Domestic Product was $4,661.9 billion in
have shrunk. Meanwhile, the salaries of management have multiplied and shareholders have profited handsomely. To keep up, many workers are burdened with increasing overtime or second jobs and families need two or three wage earners. Collective bargaining is necessary if workers, particularly low wage workers, are to share in the country’s general prosperity.

Collective bargaining can significantly reduce the need for governmental intervention. Family and medical leave can be better managed through collective bargaining and grievance procedures than through administrative regulations. Union-employer safety committees can provide greater worker protection with less governmental intrusion than inspections conducted by the Occupational Safety and Health Administration (OSHA) inspectors. Collectively, the parties can work out mutually acceptable rules for compensatory time off for overtime that Congress cannot legislate. The path toward deregulation of employment is collective bargaining.

Research indicates that workers have a desire to have a voice in the performance of their job and the decisions of their employers that vitally affect their jobs. Studies demonstrate that worker participation increases production and this is acknowledged, at least verbally, by most management. The dispute is over what form the participation should take. Collective bargaining is one form of limited participation and it provides a process for developing other more effective forms that will have the support and confidence of the workers.

The Wagner Act has failed to achieve its purposes, but not because collective bargaining is unable to serve those purposes. Where collective

1980 and was $6,739.0 billion in 1995. See id.
12. See id. at 424. The average hourly wages in constant dollars of workers in the private sector shrank by five percent between 1980 and 1995. See id.
15. See Richard B. Freeman & Joel Rogers, Who Speaks for Us? Employee Representation in a Nonunion Labor Market, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 13 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993). In a Gallup poll, 90% of all respondents agreed with the proposition that “employees should have an organization of co-workers to discuss and resolve legitimate concerns with their employers.” Id. at 32.
bargaining has been accepted, it has served those intended purposes. It equalized bargaining power, improving the wages and conditions of employment of those covered. It tempered the demand for legislation for the first thirty years of the statute as the proportion of workers covered grew to thirty-three percent of the non-farm work force. \(^{18}\) It served the social purpose of providing workers a voice in the work place, but perhaps more importantly, it provided workers a system of industrial justice. Collective bargaining established a system of rules governing the employment relation, the grievance procedure provided a process for administering those rules, and arbitration provided for interpretation and application of those rules. Potential arbitrariness was replaced by the rule of law.

The Wagner Act has failed in its purpose only because collective bargaining has not become the dominant pattern for managing employment relations. It has never covered more than thirty-five percent of the private sector and now covers less than eleven percent. \(^{19}\) Many reasons are propounded why this is so. Clearly one of the major reasons is that most employers have never accepted the Act, at most considering it a "hair shirt" to be shed at the first opportunity. Many employers have strenuously resisted unionization, often expending large amounts to persuade their employees to reject the union. Some break the boundaries of the law, finding limited sanctions more acceptable than bargaining with the union.

For those who believe in the purposes of the Wagner Act, there is the difficult question of what might be done to achieve those purposes. Proposals range from requiring equal access to the plant premises by union organizers to increased sanctions for unfair labor practices, from certification based on authorization cards to arbitration of first contracts where

\(\text{\footnotesize 18. Union membership grew in numbers until the 1980s. However, the percentage of non-agricultural workers in unions decreased after 1955. The following chart illustrates the total union membership and the percentage of nonagricultural employment:}
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<table>
<thead>
<tr>
<th>Year</th>
<th>Union Membership</th>
<th>Percentage of Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940</td>
<td>8,944,000</td>
<td>26.9</td>
</tr>
<tr>
<td>1950</td>
<td>15,000,000</td>
<td>31.5</td>
</tr>
<tr>
<td>1955</td>
<td>17,749,000</td>
<td>33.2</td>
</tr>
<tr>
<td>1960</td>
<td>18,117,000</td>
<td>31.4</td>
</tr>
<tr>
<td>1970</td>
<td>19,757,000</td>
<td>28.0</td>
</tr>
</tbody>
</table>


\(\text{\footnotesize 19. By 1996, union membership in the private sector was 10.3% and in the public sector, it was 37.7%. See U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 436 (1996).} \)
the employer engages in surface bargaining. Many of the proposals have merit, but most are only patchwork on an existing system. It seems to me that we should look deeper and question some of the more basic rules that we have come to take for granted. It is time to question the unquestioned in thinking about how to reconstruct our labor relations system.

My purpose is not so much to make proposals, but to raise some provocative questions, though proposals may follow explicitly or implicitly. I want to raise questions about fundamental premises in five areas: exclusive representation, employer free speech, mandatory subjects of bargaining, non-union representation, and regulation of economic force. I recognize that these questions and what they may imply have no immediate political reality. But in this they do not differ from the more modest current proposals, for the present Congress is not likely to enact anything that will increase effective collective representation by workers.

I. EXCLUSIVE REPRESENTATION

The principle embodied in section 9(a) of the statute, that the majority representative "shall be the exclusive representatives of all the employees in [the bargaining] unit," is commonly considered the taproot and trunk of our collective bargaining system. I want to raise the question whether this principle has outlived its usefulness. I am emboldened to ask this heretical question by an awareness that this is a uniquely American principle. In Belgium, Germany, Italy, Sweden, and Japan, for example, the basic legal principle is that the union bargains for and legally binds only its own members. Those countries have effective working collective bargaining systems, all presently more substantial and effective than our own.

George Schatzki raised this question twenty years ago, but no one listened. Matthew Finkin reraised the question in 1993, but few gave it a second thought. I suggest that it is past time to give it serious consideration.

22. Id.
24. See Matthew W. Finkin, The Road Not Taken: Some Thoughts on Nonmajority
There is no need for me to canvass all the reasons for replacing exclusive representation with a "members only" rule, nor explore all the potential problems such a change might present. Schatzki and Finkin have done both with thoughtful and comprehensive detail. I need only summarize and focus on some considerations that they did not emphasize.

First, there is a fundamental conflict between section 7 and section 9(a). Section 7 guarantees employees the right "to bargain collectively through representatives of their own choosing"; section 9(a) denies the minority that right and compels them to accept as their representative a union not of their own choosing. They are bound legally by the contract negotiated by that representative and under J.I. Case Co. v. NLRB they are barred from bargaining for better terms, either individually or through representatives of their own choosing. Under Emporium Capwell Co. v. Western Addition Community Organization, they may lose the protection of section 7 "to engage in . . . concerted activities for . . . mutual aid [and] protection" without the consent of the representative they did not choose.

The imposition of majority rule on minorities may be somewhat reduced by carving up an employer's workforce into multiple bargaining units and determining the boundaries on the basis of community of interests. Two provisions in section 9(a) are products of the desire to mitigate the impact of majority rule. These provisions provide professional workers a choice of whether to have a separate bargaining unit and the use of "globe" elections for craft severance. Indeed, the creation of multiple bargaining units in the same establishment gives the term "exclusive representation" a Pickwickian character. But small or special bargaining units do not wholly eliminate the problem of minorities being bargained for by representatives not of their own choosing.

The difference in practical results between exclusive and members only bargaining is not as great as it may first appear. In members only bargaining, as foreign experience shows, the contract with the dominant union establishes the pattern for agreements with other unions. This is not unlike what occurs with exclusive representation when there are mul-

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26. See id. § 159(a).
tiple bargaining units. The contract with the dominant union largely shapes the terms of the lesser union's contracts and substantially influences the terms that are applied by the employer to those not represented by any union.\textsuperscript{31}

Members only bargaining, however, provides more potential flexibility for individual bargaining by non-members for better terms. Also, members only bargaining almost inevitably carries the corollary that the collective agreement establishes only minimum terms, otherwise members who could bargain for better terms would leave the union. Other countries with members only bargaining do not accept the Supreme Court's premise in \textit{J.I Case} that "[t]he practice and philosophy of collective bargaining looks with suspicion on such individual advantages."\textsuperscript{32}

Encroachments on individual and minority rights is much more serious when a union exercises exclusive representation in handling grievances. Section 9(a), it must be noted, does not give the union exclusive right to settle grievances. On the contrary, the proviso to section 9(a) states:

That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract.\textsuperscript{33}

Courts, however, have held that despite these words, the union and the employee can agree that the union shall have the exclusive right to settle grievances.\textsuperscript{34} By miraculous verbal alchemy, the courts have transformed the words "any individual or group of employees shall have the right" into "any employer can agree with the union to deny the individual that right and vest it in the union."\textsuperscript{35}

\begin{enumerate}
\item \textit{J. I. Case Co.}, 321 U.S. at 338; see also Finkin, supra note 24, at 210.
\item \textit{29 U.S.C. § 159(a) (1994).}
\item See Black-Clawson Co. v. International Ass'n of Machinists Lodge 355, 313 F.2d 179, 186 (2d Cir. 1962) ("Best [the grievant] is therefore without power to compel Black-Clawson to arbitrate the grievance stemming from his accusation of wrongful discharge. The Union is the sole agency empowered to do so by the statute and by the terms of the contract before us.").
\item Archibald Cox, \textit{Rights Under a Labor Agreement}, 69 HARV. L. REV. 601, 624 (1956) ("[A]n employer may lawfully promise the union not to process individual grievances and may give the union the only legal right to compromise or enforce substantive obligations.").
\end{enumerate}
The Supreme Court recognized in *Smith v. Evening News Ass'n*, that individuals acquired legal rights under collective agreements. In *Vaca v. Sipes*, however, the Supreme Court held that the individual could be denied access to any forum to enforce those rights by the majority union. The individual could not sue in court or demand arbitration; the union was the exclusive representative for enforcing the individual's legal rights and its decision not to arbitrate was binding on the individual unless the union violated its duty of fair representation.

As representative of the individual in enforcing his or her legal rights, the union acts as the individual's lawyer, a lawyer not individually chosen but collectively imposed. The imposed representative does not bear the responsibility of lawyer, but is held only to the standard of "fair representation." Under various court decisions, that duty is not violated by a union negligently failing to observe the contractual time limits for appeal, by failing to make a full investigation, or by failing to make relevant arguments. The unchosen representative can settle the case to serve its own interest or its view of other employees' interests without the individual's consent even on terms not consistent with the provisions of the contract. In short, by extending exclusive representation to the

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37. *See id.* at 200 (“[T]o exclude these [individual] claims from the ambit of section 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.”).
39. *See id.* at 195-98. “[W]e do not agree that the individual has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.” *Id.* at 191.
40. *See Graf v. Elgin, Joliet Ry. Co.,* 697 F.2d 771, 788 (7th Cir. 1983) (“[E]ven gross negligence . . . is not enough” to violate the duty of fair representation.); *Hoffman v. Lonza*, 658 F.2d 519, 520 (7th Cir. 1981) (noting that the union “forgot” to file a notice of appeal within the time limits); *Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1212 (6th Cir. 1981) (“[O]rdinary negligence, without more, cannot establish a breach of the duty of fair representation.”).
41. *See Dober v. Railway Express*, 707 F.2d 292, 294 (7th Cir. 1983) (“[N]egligence, even when gross, does not violate the duty of fair representation.”).
42. *See Harris v. Scherman Trucking Co.*, 668 F.2d 1204, 1206 (11th Cir. 1982) (“[N]either negligence on the part of the union nor mistake in judgment is sufficient to support a claim that the union has acted in an arbitrary and perfunctory manner.”).
43. *See Local 13, Longshoremen’s and Warehousemen’s Union v. Pacific Maritime Ass’n*, 441 F.2d 1061, 1067 (9th Cir. 1971) (“[A] breach of the duty of fair representation would not be established merely by proof that the International union swapped” the individual’s grievance for the benefit of other employees).
44. *See Union News Co. v. Hildreth*, 295 F.2d 658, 665 (6th Cir. 1961). In that case, the Union agreed to the discharge of an employee for cause without any proof of guilt. *See id.* at 666. The union used its best judgment to obtain the maximum benefits for the largest number of members. *See id.*
grievance procedure, courts have imposed on non-consenting employees a representative empowered to dispose of their legal rights under the collective contract. The representative is not held to the standard of a fiduciary to avoid conflicts of interest and exercise care; further, the representative is not even bound to exercise the ordinary care of a reasonable person.

Encroachment of exclusive representation on individual and minority rights to bargain through representatives of their own choosing has been justified by its contribution to the larger statutory purpose of encouraging and promoting the process of collective bargaining. That justification is less persuasive now than it was in 1935. Exclusive representation took root in a period of bitter union rivalry. While the Wagner Act was being drafted, the American Federation of Labor (AFL) split, with industrial unions forming the Congress of Industrial Organizations (CIO), and independent unions born out of proliferating employee representation plans. Every workplace risked becoming a battleground for competing unions, with employers manipulating the rivalries to avoid serious bargaining. Designating a single representative was seen as a way of resolving disputes between unions and establishing collective bargaining.\(^{45}\)

In the early years of the National Labor Relations Board, nearly one-half of all election contests were between two or more competing unions,\(^ {46}\) and in 1950, one-fifth of all elections involved two or more competing unions.\(^ {47}\) With the merger of the AFL and CIO, this number dropped to six percent\(^ {48}\) and by 1994 had dropped to four percent.\(^ {49}\) Elections now serve not to determine which union shall be the exclusive representatives, but whether there shall be any collective representative.

Elections no longer serve to encourage and promote the process of collective bargaining, but rather to minimize and impede constructive collective bargaining. When a union petitions for an election, it marks the beginning of a bitter campaign which may last for weeks or months.

\(^{45}\) See Houde Engineering Co., 1 N.L.R.B. (Old) 38, 39-40 (Aug. 30, 1934) ("[T]he only interpretation of section 7(a) which can give effect to its purposes is that the representatives of the majority should constitute the exclusive agency for collective bargaining with the employer."); Richard R. Carlson, The Origin and Future of Exclusive Representation in American Labor Law, 30 DUQ. L. REV. 779, 825-33 (1992).

\(^{46}\) See 3 NLRB ANN. REP. 49-50 (1938). In the fiscal year 1937-38, the NLRB conducted 1152 elections, and some union won 945. See id. at 49, table XXI. In the 945 that a union won, there were 1963 union choices on the ballot. See id. at 50, table XXII.

\(^{47}\) Cf. 15 NLRB ANN. REP. 13 (1950).

\(^{48}\) See 23 NLRB ANN. REP. 6 (1958).

\(^{49}\) See 59 NLRB ANN. REP. 14-15 (1994). In 1994, there were 3437 elections with one union on the ballot and 135 multiunion elections. See id.
The employer and the union each lay claim to the loyalty of the employees. Misinformation as to the employer's profitability and as to the union's effectiveness is spread widely by both sides. Accusations of dishonesty, bad conduct, and illegal action are exchanged and name-calling becomes commonplace. For both the union and the employer, the outcome of the election is viewed as a matter of life or death. If the union wins, it becomes the exclusive representative while management fears the loss of prerogative strikes and unprofitability. If the union loses, it becomes nothing and management continues to enjoy its union-free environment.

When the union wins, the effect of the election campaign is to poison future bargaining relations. Sitting across the bargaining table are representatives from each side who have spent weeks maligning each other. Each has difficulty believing that the other is bargaining in good faith and each is unable to recognize its mutual interests. The representation election contributes substantially to the destructive adversarial character of our collective bargaining system.

More importantly, majority rule deprives large numbers of employees of their right to bargain collectively. In 1994, unions failed to win a majority in 53.4% of elections, even though there were presumably a substantial number of employees, up to 50%, who wanted to bargain through representatives of their own choosing. It seems to me inappropriate that some employees can, for practical purposes, deprive other employees of their fundamental section 7 rights. These are not rights to be denied by majority vote. To be sure, the union that fails to win an election can seek to bargain with the employer, but as the statute has been interpreted, the employer can, and usually does, refuse to even meet with the employees' representative.

Times have changed since 1935 and we should question whether exclusive representation has outlived its usefulness. We should seriously consider substituting members only bargaining for exclusive representation bargaining. In members only bargaining, the employer would be re-

50. See id. Where more than one union was involved, "no union" won only 14% of the elections. See id. at 15. Where only one union was involved, "no union" won in 55% of the elections. See id. at 14.

51. This result is not compelled by the words of the statute. When the statute was passed, it was argued that section 8(5) obligated employers to bargain with non-majority unions when no majority union existed. See E.G. Latham, Legislative Purpose Administrative Policy Under the National Labor Relations Act, 4 GEO. WASH. L. REV. 433, 453 (1936); Clyde Summers, Unions Without Majority—A Black Hole?, 66 CHI.-KENT L. REV. 531, 538-39 (1990).
quired to bargain in good faith with any union that showed substantial support, perhaps twenty percent, by presenting membership cards.

Instituting members only bargaining would implement all employees' rights to bargain collectively through representatives of their own choosing; it would eliminate employees being forced to rely on representatives not of their own choosing to enforce their contractual rights. It would make collective bargaining available to many employees to whom it is now denied because they are a minority. It would not only eliminate the administrative burden of representation proceedings and elections, but also would avoid the hostility and antagonism generated by election campaigns which aggravate the beginning of collective bargaining relations.

I will not respond here to all of the arguments that may be raised against members only bargaining. Schatzke and Finkin have done that.\(^5\) I will deal here only briefly with two. First, it is argued that a minority union will lack the economic muscle to bargain effectively. That may be true, but perhaps no more than is true of most unions today. The economic strength of a union is not determined by its majority status, or even by the numbers of its members, but by how many employees will support its economic action. A minority union may obtain as much or more support in a strike than many majority unions. Second, it is argued that requiring employers to bargain with more than one union will create chaos. Perhaps, but at the present time how many competing unions are there? Any problem is significantly reduced by the AFL-CIO's No Raiding Pact. In any case, this danger can be greatly overdrawn. Many employers now bargain with multiple unions and employers in other countries, like Italy, and effectively manage collective bargaining with ideologically competing unions.

II. EMPLOYER SPEECH

One significant addition to the Wagner Act made by the Taft-Hartley Act was section 8(c), which was intended to immunize employer speech.\(^5\) Eliminating the unnecessary legal verbiage, section 8(c) provides that "[t]he expressing of any views . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."\(^5\)

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52. See Finkin, supra note 24, at 218; Schatzki, supra note 23, at 898.
54. Id.
I think that it is time for us to seriously consider repealing section 8(c) and to look to early understandings of the Wagner Act for limitation on employer speech. Prior to 1941, the Board strictly limited the employer’s activities during an organizing campaign. Efforts by the employer to discredit the union and disrupt it like denouncing the union as “racketeers,” “rotten,” or “corrupt,” and accusing union leaders of being self-serving or other statements manifestly designed to discourage organizational efforts were unfair labor practices. The Board had mixed success in these cases in the appellate courts, some courts holding that employers’ statements were protected by the First Amendment, with others holding that the Board could find such anti-union statements to be coercive. This latter view was articulated by Judge Learned Hand in \textit{NLRB v. Federbush Co.}:\textsuperscript{57}

No doubt an employer is as free as anyone else in general to broadcast any arguments he chooses against trade unions; but it does not follow that he may do so to all audiences . . . . Language may serve to enlighten a hearer, though it also betrays the speaker’s feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of “free speech” protects them: but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion . . . . What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.\textsuperscript{58}

In \textit{NLRB v. Virginia Electric & Power Co.},\textsuperscript{59} the Supreme Court held that the Board could not find company bulletins without any threat, standing alone, to be an unfair labor practice, however, the Board could raise them to the status of coercion by relying on surrounding circum-

\textsuperscript{55}. See 3 NLRB ANN. REP. 59 (1938).
\textsuperscript{56}. See 6 NLRB ANN. REP. 89 (1941); 5 NLRB ANN. REP. 92 (1940); see also NLRB v. New Era Die Co., 118 F.2d 500, 503 (3d Cir. 1941) (holding an employer’s speeches to be veiled threats); NLRB v. Ford Motor Co., 114 F.2d 905, 913-15 (6th Cir. 1940) (holding an employer’s labor views expressed in distributed pamphlets to be protected speech); Montgomery Ward & Co. v. NLRB, 107 F.2d 555, 559 (7th Cir. 1939) (holding an employer’s individual conferences with employees constituted unprotected speech); Jefferson Elec. Co. v. NLRB, 102 F.2d 949, 956 (7th Cir. 1939) (rejecting the Board’s findings regarding employer speech).
\textsuperscript{57}. 121 F.2d 954 (2d Cir. 1941).
\textsuperscript{58}. \textit{Id.} at 957.
\textsuperscript{59}. 314 U.S. 469 (1941).
stances. This case gave impetus to protecting employer anti-union speech and section 8(c) substantially codified the decision.

It is necessary to examine *Virginia Electric & Power* in the context of its time. In the two years before the decision, the Supreme Court twice declared peaceful picketing to be constitutionally protected as free speech. In *Thornhill v. Alabama*, the Court invalidated a state statute that broadly prohibited all peaceful picketing and in *AFL v. Swing*, the Court held that a state court injunction of peaceful organizational picketing by non-employees was "inconsistent with the guarantee of freedom of speech." This broad constitutional protection was short lived. Subsequent to *Virginia Electric & Power*, the Court in *Bakery & Pastry Drivers v. Wohl* explicitly recognized that "[p]icketing by an organized group is more than free speech." On the same day, the Court upheld an injunction against secondary picketing for organizational purposes. The constitutional protection was eroded further in a series of Court decisions and finally in 1957, the Court came full circle. In *International Brotherhood of Teamsters, Local 695 v. Vogt, Inc.*, the Court upheld a state court injunction prohibiting peaceful organizational picketing. We might paraphrase the language endorsed by the Court, "[o]ne would be credulous, indeed, to believe under the circumstances that the union had no thought of coercing the employer to interfere with its employees in their right to join or refuse to join the defendant union."

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60. See id. at 479.
63. 310 U.S. 88 (1940).
64. See id. at 105-06.
65. 312 U.S. 321 (1941).
66. Id. at 325.
67. 315 U.S. 769 (1942).
68. Id. at 776 (Douglas, J., concurring).
72. See id. at 294-95.
73. Id. at 286 (quoting Vogt, Inc. v. International Bhd. of Teamsters, 74 N.W. 2d 749, 753 (Wis. 1956)).
The decision in *Virginia Electric & Power*, it must be noted, was not placed on constitutional grounds, but it reflected the Court's view of the role of speech in the organizing context. In the years since *Virginia Electric & Power*, the union's freedom of speech has been significantly reduced, not only by the Court, but by Congress. For example, section 8(b)(7), limiting organizational picketing, and section 8(b)(4), limiting secondary picketing,\(^\text{74}\) generally upheld by the Court, reflect the narrowed constitutional protection. During the same period, protection of employer speech has not only been continued by section 8(c), but enlarged by the Board's captive audience doctrine.\(^\text{75}\)

Without attempting to develop the constitutional argument, there are at least two clues that an employer's speech to its employees is not considered equal to speech in other contexts and could constitutionally be narrowed significantly. In *NLRB v. Gissel Packing Co.*\(^\text{76}\) the employer argued that the line between an employer threat and a prediction was too vague and gave the Board too much discretion to withstand First Amendment scrutiny. The Court responded:

> It is true that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship. But an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "brinkmanship" when it becomes all too easy to "overstep and tumble [over] the brink."\(^\text{77}\)

This recognizes the special context of employer speech to its employees and contrasts with the accepted principle applied in other contexts that restrictions must be sufficiently clear that a speaker need not hold back for fear of tumbling over the brink.

There is a second clue that employer speech is to be treated differently. Section 401(g) of the Landrum-Griffin Act\(^\text{78}\) provides that "[n]o moneys...of an employer shall be contributed or applied to promote the candidacy of any person in any election subject to the provisions of

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75. *See* Livingston Shirt Corp., 107 N.L.R.B. 400, 405 (1953) ("Section 8(c) of the Act specifically prohibits us from finding that an uncoercive speech, whenever delivered by the employer, constitutes an unfair labor practice."); *see also* May Dep't Stores Co. v. NLRB, 316 F.2d 797, 799-801 (6th Cir. 1963).
77. *Id.* at 620 (internal citation omitted) (alteration in original).
This applies to any newspapers, leaflets, or captive audiences provided by any employer on behalf of a candidate. No one has argued that this provision violates the employer's freedom of speech, although the employer often has a significant practical interest in who is elected as a union officer. The union election is treated as none of the employer's business. There is a plausible parallel argument, one accepted by the NLRB in its first years, that the employees' decision to act through a representative of their own choosing is considered none of the employer's business.

I am not proposing that employers be denied their constitutional freedom of speech. Instead, I am raising the question of whether we should strike section 8(c) and limit employer speech to that which is constitutionally protected. I believe that today the constitutional protection is much narrower than *Virginia Electric & Power* and section 8(c), and that Learned Hand's perspective better reflects the constitutional context of an employer's speech directed to its employees whose working life and job the employer controls. Just as the Court in *Teamsters v. Vogt* recognized the coercive thrust of picketing, we should recognize that when an employer urges its employees to vote against the union, no matter how carefully phrased by the employer's lawyer, the employees see an iron fist inside the velvet glove. As the *Vogt* Court stated, one would be surprised to think that an employer had no intention of creating a climate of anxiety or fear that would interfere with its employees' free choice to join or refuse to join a union.

I cannot mark out here what might be the boundaries of constitutional protection, but it would seem certain not to protect three common practices. First, the captive audience, by which an employer uses its control over the employee's livelihood to compel the employee to listen, carries an obvious coercive thrust and clearly exceeds constitutional protection. Giving the union equal time does not give full equality, for the union lacks control over the employee's livelihood. Second, the use of supervisors to discuss with employees questions concerning unionization while at work carries an even more pointed coercive thrust because it comes from one who has direct daily control over the employees. Third, compelling supervisors, against their will, to engage in activities to influence

79. *Id.*
81. See *supra* note 45.
employees in their choice of collective representation is quite clearly not constitutionally protected. The employer can scarcely claim constitutional protection to deny its supervisors their freedom of speech.

Employer speech has become the primary instrument used by employers to discourage unionization and collective bargaining. Limiting employer speech to that constitutionally protected would help restore the original purpose of the Wagner Act.

III. SUBJECT MATTERS FOR BARGAINING

Prior to the passage of the Taft-Hartley Act, there was no developed body of cases limiting the subjects on which the parties were required to bargain. The Taft-Hartley Act described the subjects of bargaining as "wages, hours, and other terms and conditions of employment," 83 but it was not until 1958 that the Supreme Court, over the vigorous dissent by Justice Harlan, recognized the distinction between mandatory and non-mandatory subjects of bargaining. 84 The Court felt compelled to find meaning in the unilluminating words of Taft-Hartley as to what subjects were mandatory. The result has been that the collective bargaining process and legal scholarship have been burdened with continuing disputes over whether certain subjects, such as subcontracting, plant closings, or plant removals, are mandatory subjects or management prerogatives. 85

I think that it is time for us to consider seriously whether this distinction should be discarded and the duty to bargain in good faith extended to any subject that either party wants to bring to the bargaining table. My reasons go beyond the argument that it is an unenforceable distinction because either party, by insisting on some unacceptable mandatory

84. See NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958) (finding that outside of "wages, hours, and other terms and conditions of employment . . . each party is free to bargain or not to bargain, and to agree or not to agree").
term, can force the other to bargain on a permissive term.\textsuperscript{86} My reason is that restricting the subjects of bargaining undermines the purposes of the Act.

At the outset, it is necessary to recognize that the distinction between mandatory and non-mandatory subjects has three separate legal consequences. First, if one party makes a demand on a mandatory subject, the other party has a duty to bargain on that term in good faith. If the subject is non-mandatory, the other party can refuse to respond and banish the subject from the bargaining table. Second, if the subject is mandatory, unilateral action can be taken without first notifying the other party and bargaining to impasse. If the subject is non-mandatory, unilateral actions cannot be taken without notice or discussion. Third, if the subject is mandatory, either party can insist to impasse and use economic measures to enforce its will. If it is non-mandatory, resorting to economic measures is an unfair labor practice of refusing to bargain. Under decisions of the Board and the courts, all three consequences automatically follow from the designation of the subject as mandatory or non-mandatory. Neither the Board nor the courts have given any reason why these three quite different consequences are inextricably linked, perhaps because there is no defensible reason.

To examine the question of whether the distinction between mandatory and non-mandatory subjects should be discarded, we must begin with the question of why there is a duty to bargain. The duty to bargain in good faith serves the very practical purpose of reducing the likelihood of impasse and a strike or lockout. Meeting face to face and having to justify positions can temper the parties from making indefensible demands and loosen their inflexibilities. Full discussion, with explanation of positions, enables each party to better understand the needs and desires of the other. The union may come to understand and be persuaded that the employer genuinely has a productivity, market competition, or profitability problem. The employer may come to better appreciate the employees' desires for job security, concern for fairness by foremen, or need for medical insurance. Good faith bargaining may lead both to recognize that they have mutual interests in the survival and prosperity of the enterprise and in the welfare and morale of the workers. Because the parties have different orders of priority, particularly on non-economic terms, good faith bargaining can lead them to find trade-offs in which each gains more than it gives. Even on economic terms, the union may

propose a different distribution of benefits, which for the same costs to
the employer may better meet the needs and desires of the employees.
Experience has demonstrated that when engaged in good faith, bargain-
ing can bring these benefits and significantly reduce industrial conflict.
Indeed, one of the basic assumptions of the Wagner Act was that union
recognition and good faith bargaining would promote industrial peace.

The duty to bargain also serves a principled or social purpose. It is
through collective bargaining that employees have a voice in the deci-
sions that affect their working lives, being able to participate in making
the rules that govern the workplace. The duty to bargain is the obliga-
tion of the employers to give workers a voice; it is a command to em-
ployers to accept industrial democracy.

When we recognize the purpose served by collective bargaining, it is
difficult to understand why either party should refuse to meet and discuss
any matter in which the other party considered it had a significant inter-
est and which it believed might be better resolved by bargaining. When
the union is deeply concerned about subcontracting, plant closures, or
plant removal, why should the employer be able to close the door to dis-
cussions that may develop solutions, reduce the impact, or make the em-
ployer's action more acceptable? Nor is there reason to stop there. Em-
ployees may have a significant stake in a buyout, a merger, closing an old
product line and opening a new one, and many other decisions that affect
their work or job security. Does not the statutory purpose of industrial
democracy require the employer at least to listen to them and consider
their concerns?

There may be some situations where the employer needs to take im-
mediate action, without notifying and bargaining with the union, but that
should not make the subject non-mandatory where the situation does not
require peremptory action. There may be subjects, though I can think of
none, where differences should be resolved by some process other than
resorting to economic force, but that should not preclude discussion. In-
deed, barring employees from using their collective bargaining power
should make discussion all the more important. What I am suggesting is
that the duty to bargain in good faith should extend broadly, if not with-
out limit, to all subjects in which either party had a significant interest
and believed it useful to bring to the bargaining table. The practical
needs for resolving differences and avoiding conflict, and the social need
for giving employees a voice in the decisions that affect their working life
require this. 87 Situations that genuinely require employers to take action

87. See Ford Motor Co. v. NLRB, 441 U.S. 488, 498-99 (1979) ("[T]he basic theme of
before bargaining should require effects bargaining and we might con-
sider whether some subjects should not be resolved by economic action.

This may be rejected out of hand as destructive of management pre-
rogatives, but extending mandatory subjects only requires discussion, it
does not require the employer to make a concession. The employer re-
mains free to insist to impasse on maintaining its prerogatives. Under
NLRB v. American National Insurance Co., the employer can insist that
the collective agreement secure its right to act unilaterally over specified
mandatory subjects.

I am encouraged to suggest this rethinking of the scope of bargaining
by the experience of Sweden. For seventy years, the Swedish collective
bargaining system was based on an explicit guarantee of sweeping man-
agement prerogatives “to direct and distribute the work, to hire and dis-
miss workers at will, and to employ workers whether they are organized
or not.” In 1976, Sweden’s Codetermination Act abolished this pro-
tection of management prerogatives and obligated employers to bargain
collectively on all matters of interest to employees. This requires con-
sultation with the union on decisions such as new stock issues, mergers,
and naming of plant managers. Swedish unions have not supplanted
management, even though more than eighty percent of Swedish workers
belong to unions. I believe that, like the Swedes, we should seriously
consider opening up the subjects for collective bargaining by recognizing
that circumscribing bargaining is contrary to the original premises of the
Wagner Act. We should reject the rule that one party can refuse to dis-
cuss a subject which the other considers of mutual concern.

the Act was that through collective bargaining the passions, arguments, and struggles of
prior years would be channeled into constructive, open discussions leading, it was hoped,
to mutual agreement.”). “As illustrated by the facts of this case, substantial disputes can
arise over the pricing of in-plant-supplied food and beverages.” Id. at 499. “National la-
bor policy contemplates that areas of common dispute between employers and employees
be funneled into collective bargaining. The assumption is that this is preferable to allowing
recurring disputes to fester outside the negotiation process until strikes or other forms
of economic warfare occur.” Id.

88. 343 U.S. 395 (1952).
89. See id. at 409-10.
90. Clyde W. Summers, Worker Participation in Sweden and the United States: Some
91. See Lag om Medbestammande i arbetslivet. Den 10 jun 1976, reprinted in FOLKE
SCHMIDT, LAW AND INDUSTRIAL RELATIONS IN SWEDEN 234-46 (1977).
92. See id. Section 10 defines the union’s right to negotiation to include “any matter
relating to the relationship between the employer and any member of the organisation
who is or has been employed by that employer.” Id. at 235.
93. See Summers, supra note 90, at 198-200.
94. See id. at 181.
IV. NON-UNION REPRESENTATION

One of the principle purposes of the Wagner Act was to provide a measure of industrial democracy, to fulfill the historic function of unions, and to "introduce an element of democracy into the government of industry." Congress had only two models before it: independent trade unions and employer-controlled employee representation plans, mortal enemies of each other. The statute was deliberately designed to encourage trade unions and eliminate company unions.

The assumption was that unionization would expand to become the dominating pattern and provide a measure of industrial democracy in the employment relation. For fifteen or twenty years, it appeared that this purpose would be substantially fulfilled, but for forty years that goal has receded. Now only eleven percent of workers in the private sector have any fair participation in the decisions vitally affecting their lives and livelihood. The remaining eighty-nine percent have no representation and are subject to their employer's unilateral control.

During the period when participation decreased, there had been increased recognition that worker participation not only furthers democracy in society and recognizes the dignity and individual worth of workers, but it also increases productivity by giving workers a sense of belonging to a common enterprise with concern for its continued success.

This recognition of the importance of employee participation presents the problem of how such participation shall be provided. The present debate about section 8(a)(2) is a replay of 1935, with the issue being framed as a choice between employer created and dominated employee committees and independent trade unions. Is it now time that we reconsider whether the only alternatives are these two polar opposite models? Is it not time to ask whether there may be a third way to give voice to the eighty-nine percent of workers who are now voiceless?

I start with the premise that an employee representation system cannot further democratic values or give workers the sense of being partners in the enterprise unless it is completely free of employer domination and control. Otherwise, it is an empty shell or, at best, a half-cup of stagnant water. The question is whether we can create for employees, without union representation, an employee representation system sufficiently independent of the employer to give those not covered by collective bar-

95. See generally supra note 5 and accompanying text.
96. See supra note 10 and accompanying text.
97. See supra notes 15-17 and accompanying text.
gaining a meaningful voice in the decisions vitally affecting their working life. I believe we could, if we would.

I see no reason why we could not devise employee representation plans or councils to provide a measure of participation for workers not covered by collective agreements. I am not suggesting “European style” work councils, though European experience might give useful guidance at some points. Any employee representation system must be designed to fit with our collective bargaining system.

The fundamental requirement of any council system is that the council must be independent of employer control and be seen by the employees as independent of employer control. This can be achieved by three quite simple requirements.

First, council members must be elected by the employees without any interference or influence by the employer. Elections of council members should be subject to the basic safeguards as elections of union officers under Title IV of the Landrum-Griffin Act, including section 401(g) which prohibits an employer from promoting the candidacy of any candidate.

Second, council members must be protected from any employer pressure or retaliation. Protection under section 8(a)(3) is not enough, for proof of discrimination is too difficult and administrative procedures too slow. The employer should have the burden of proving in an arbitration hearing good cause for any adverse action against a council member.

Third, the council must be provided the resources to perform its functions. These functions include time off for meetings, needed office space and secretarial support, and financial support for educating council members and hiring needed professional services and experts.

The function of the council should not be described as “collective bargaining,” but as “consultation” for developing solutions that serve the parties’ mutual interest in the welfare of the employees and the productivity of the enterprise. The object would not be necessarily to reach a comprehensive agreement, but to resolve problems as they arise. The subject matter for consultation should extend to all matters that substantially affect the employees’ working lives. Excluding subjects as “management prerogative” would have no place where the purpose is to make employees feel that they are partners, not adversaries, and that they have a stake in the enterprise.

The function of the council should include aiding employees in enforcing statutory rights and rights under individual contracts of employment. Disputes concerning rights under the employment contract should
be settled by arbitration with the council providing representation for the employee.

The most difficult question is whether employee councils should be able to call strikes when their consultation with the employer fails to reach an acceptable result. Availability of the strike would recreate the adversarial attitude which the establishment of such a council seeks to avoid. Lack of the strike would leave the council with no economic leverage. Unilateral employer action, however, would not be cost free. It would undermine employee loyalty and the sense of partnership needed to increase productivity. More importantly, if the employees concluded that the council was ineffective, they might look to the alternative, a union and collective bargaining. Finally, the existing statutory right of two or more employees to engage in concerted action would continue, so that dissatisfied employees could strike without authorization or support of the council.

Employee representative councils might be established in two ways. First, section 8(a)(2) could be amended to permit employers who seriously desired worker participation, other than through unions, to voluntarily establish a representation system if it met minimal standards. I doubt, however, that many employers, despite their declared desire for worker participation, voluntarily will establish a plan that they cannot control. A second alternative would be to mandate the establishment of councils by statute, providing minimum standards for their structure, function, and powers. Councils should not be mandated for smaller employers, and should be established only on petition by a limited number of employees.

I am not proposing any particular plan for employee participation. My point here is that we should question the assumption that workers can participate meaningfully only through unions, and should seriously consider how we can construct an alternative to provide employees representation independent of employer influence or domination. I would emphasize that I am not suggesting that we supplant our system of collective bargaining, but rather that we supplement it. The purpose is to provide a voice to those who are not covered by collective bargaining, to provide voice to the voiceless. Councils would be established only for employees not represented by unions.

Coordinating two systems of representation raises problems, but they are not insuperable. If there is no union in the plant, there is no difficulty. The council would speak for all employees on all matters within its functions. The presence of the council need be no bar to the union organizing a bargaining unit and covering those employees with collective
agreement. If there is union in the plant, the union and the council would each represent separate groups of employees. This may create some friction and present the employer with opportunities for manipulation, but it is not significantly different from present situations where two or more competing or hostile unions represent two groups of employees in the same plant.

Such employee councils may be much less effective representatives of employees than unions and they will not serve to equalize bargaining power. But we are confronted with eighty-nine percent of workers with no representatives to speak for them on any matters of concern. There is little prospect that in the foreseeable future they will have unions to speak for them. Therefore, it is time for us to work out alternatives that will give them some voice so that the purpose of bringing some measure of democracy to their working lives will be achieved.

V. REGULATION OF ECONOMIC FORCE

The economic purpose of the Wagner Act was to remedy the inequality of bargaining power between individual employees and employers. The assumption was that the collective economic power of the union would roughly balance the collective economic power of the employer, and the terms and conditions of employment would be determined by free play of the collective labor market.

What constitutes "balance" is, of course, a question of social policy, not law; the question is whether the relative economic power of the two parties produces socially acceptable or desired results. Relative economic power, however, obviously depends on the forms of economic pressure each side can bring to bear on the other when they are unable to agree on the terms and conditions of employment. This, in turn, depends largely on the legality of various forms of economic force available to each side.

Congress, the Board, and the courts have studiously avoided acknowledging, even adamantly denied, that when they permit or prohibit certain economic measures, they are determining the balance of bargaining power.98 They thereby avoid inquiring into whether the legal rule shifts

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98. This adamant denial is epitomized by the Court's language in NLRB v. Insurance Agents' International Union:
   
   And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. . . .
   
   Our labor policy is not presently erected on a foundation of government control of the results of negotiations. Nor does it contain a charter for the National La-
the balance in the socially desirable direction. Troublesome and contentious as that inquiry may be, should we not, in examining various legal rules governing economic measures, confront directly the question whether a particular legal rule moves the balance in the socially desirable direction?

The Wagner Act has one basic limitation on the employer's use of economic power; an employer cannot discriminate against an employee for engaging in concerted activity for mutual aid and protection. This prohibits discharge of strikers, potentially depriving an employer of one of its most potent economic weapons to combat a strike. Because some statutory words also protect other concerted action, such as joining a union or distributing leaflets, the effect of those words in defining the balance of bargaining power is lost from view. But Congress, in affirming the union's right to strike and prohibiting the employer's discharge of strikers, determined what it considered was a socially desirable balance of bargaining power. That determination was reaffirmed in section 13, which provides: "[n]othing in this [Act] . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike."99

The courts, without acknowledging they are doing so, have shifted this balance towards the employer. In C.G. Conn, Ltd. v. NLRB,100 decided by the Board before the enactment of the Fair Labor Standards Act, the employees demanded pay at the rate of time and a half for all hours over forty-eight in a week. When the employer rejected this demand, they refused to work any overtime and the employer discharged them. The Board held that the employees were engaged in concerted activity for mutual aid and protection and could not be discharged. The Seventh Circuit reversed, writing "[w]e are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him," and "the men were discharged because of their insistence upon working under their own terms."101 But the statute prohibits discharge of employees who refuse in concert to work except on terms acceptable to them. The dispute was an economic dispute for overtime pay. The court gave the employer the weapon of discharge to use against the union's weapon of refusal to work overtime, but the court did not even pretend to consider where the balance of bargaining power should be.

100. 108 F.2d 390 (7th Cir. 1939).
101. Id. at 397.
A number of other cases have held that the employer can use the economic weapon of discharge against the union’s weapon of “piecemeal” or intermittent strikes such as a refusal to drive buses on Sunday, a refusal to do work considered not part of the job, a refusal to process orders from a struck plant, reducing production to protest wage reduction, or walking out for remainder of the day when the employer refused to settle a grievance. All of these are forms of concerted economic action to resolve an economic dispute. The only Board or court explanations for striking the balance against such economic action are unilluminating declarations that the union’s actions are “indefensible” or “improper,” or that an employee cannot work and strike at the same time.

The expected clue is found in the Supreme Court’s opinion in International Union v. Wisconsin Employment Relations Board. The union engaged in intermittent stoppages by calling special union meetings during working hours. The Court held that this was not protected activity, describing it as “improper” and “unlawful,” but then said, “management also would be disabled from any kind of self-help to cope with these coercive tactics of the union except to submit to its undeclared demands.” In short, the intermittent strike was not protected because the Court found it too effective. To protect the union’s use of it would shift the balance too far toward the union.

My point here is not that the balance point is wrongly placed and that unions should be able to use the intermittent strike. My point is two-fold. First, the Board and the courts are determining the balance of bargaining power, and without any explicit direction from Congress, indeed, contrary to the bare words of the statute guaranteeing employees the right to engage in concerted activity for mutual aid and protection. Second, the Board and the courts make these decisions without any open consideration of where the balance should be. There is no exploration of

104. See NLRB v. Montgomery Ward & Co., 157 F.2d 486, 496 (8th Cir. 1946).
108. See id. at 250.
109. See id. at 260.
110. Id. at 264. In later overruling this decision, the Court openly acknowledged that a state court’s enjoining of employers from refusing to work the increased hours scheduled by the employer altered the balance of bargaining power. See Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm’n, 427 U.S. 132, 149-50 (1976).
other measures available to the employer short of discharge, such as refusing to allow the employees to work until they agree not to engage in such interruptions. Nor is there consideration whether particular measures used by the union are directed specifically at the disputed employer action.

The Court engaged in a similar process of determining the balance of bargaining power in *NLRB v. Mackay Radio & Telegraph Co.* The Court, without any reference to the words of section 7 or section 8 (a)(3), flatly declared that the employer could refuse to reinstate strikers who had been permanently replaced. This clearly discriminated against the strikers because they had engaged in concerted activity, and weighed in favor of replacements, who had refused to join in that concerted activity. The only explanation was an *ipse dixit* that the employer had "the right to protect and continue his business." But shutting down the business is the very purpose of the strike, and continuing its business is one of the principal economic measures an employer can use to contest the strike. Moreover, the Court protected more than the employer's right to continue its business, for the employer was not required to prove that promising replacements permanent employment was necessary to continue the business. Hiring replacements clearly shifts the balance in favor of the employer, and promising them permanent jobs at the expense of the strikers will, in many cases, have the practical effect of discharge. The Court does this without even a glance at the impact of its decision on the balance of bargaining power.

Had the Court given a moment's consideration, it would have realized that this rule would be of little help to employers who were relatively weak, and would give greatly increased power to employers who were already relatively strong. In highly unionized trades or areas, there will be few employees available or willing to cross the picket line. An auto-parts plant in Detroit may find hiring replacements a right without reality, but a textile mill in Alabama may find it the key to defeating a strike or even destroying the union. The rule also may aggravate the business cycle. In periods of high unemployment, *Mackay* reduces the effectiveness of strikes and has a depressing effect on wages. In periods of low unemployment, it does not discourage strikes and it increases the risk of wage inflation. This leaves aside the rule's incitement to violence on the picket line when strikers see those crossing the line taking their jobs. If

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111. 304 U.S. 333 (1938).
112. See id. at 345-46.
113. Id. at 345.
the Court had confronted the fact that it was determining the balance of bargaining power and examined the consequences of its decision, it might have recognized that the striker replacement weapon distorted the balance within the system and had negative economic and social consequences.

Another example of unacknowledged determination of relative bargaining power is *Pattern Makers' League of North America v. NLRB*, a Taft-Hartley by-product. The Board held that the union violated section 8(b)(1)(a) by prohibiting members from resigning their membership when a strike was imminent and fining members who crossed the picket line. The Court, hiding behind the deference doctrine of *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, deferred to the Board's questionable interpretation of the statute. The Board and the Court thereby deprived the union of an important instrument for making the strike effective, an instrument most needed where unions were relatively weak, and particularly needed when the employer is hiring replacements. Neither the Board nor the Court confronted the fact that it was determining the balance of bargaining power. Instead, both slithered through the crevices of prior court decisions and massaged the conflicting words and the intent of Congress concerning the rights of employees and the rights of unions to prescribe their own rules.

Finally, Congress, by enacting section 8(b)(4) of the Taft-Hartley Act, significantly shifted the balance of bargaining power. Congressional debates paraded a succession of examples of secondary boycotts, all of them involving the use of secondary economic pressure for organizational purposes. The debates failed to distinguish between the use of economic pressure on one employer to persuade employees of another employer to join the union, and economic pressure to persuade another secondary employer who was on strike to agree to terms and conditions of employment. Indeed, Senator Taft declared, "[o]ur committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts," so as a result, all were prohibited.

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115. See id. at 100.
117. See *Pattern Makers' League*, 473 U.S. at 100.
The ink was scarcely dry on the published statute when *Douds v. Metropolitan Federation of Architects*\(^{119}\) came before Judge Rifkind. Ebasco, while on strike, farmed out struck work to another company, Project Engineers Company (Project).\(^120\) The union picketed Project to persuade its employees not to perform the struck work.\(^121\) This picketing fell squarely within the words of section 8(b)(4), but Judge Rifkind refused to give the words their plain meaning, openly acknowledging that balance of bargaining power was involved. Judge Rifkind stated, "[t]he effect of a strike would be vastly attenuated if its appeals were limited to the employer's conscience. I shall proceed on the assumption, warranted by the history of the Act, that it was not the intent of Congress to ban such activity."\(^122\)

Project was an "ally" of Ebasco and the farming out of the struck work had the same economic effect on Ebasco employees as that which would flow from Ebasco's hiring strike breakers.\(^123\) Secondary action was permitted to make the strike effective. Senator Taft, now seeing the difference between a "good" secondary boycott reinforcing a strike and a "bad" secondary boycott compelling organization, approved the decision by stating, "[t]he spirit of the act is not intended to protect a man who... is cooperating with a primary employer and taking his work... which he is unable to do because of the strike."\(^124\)

There were some hints that the courts would follow this lead and develop an extended distinction between boycotts in support of organizational efforts and boycotts in support of economic demands, by prohibiting boycotts that exerted economic pressure on employees' decision to join a union but allowing boycotts that countered the employer's operating during an economic strike.

In *Local 761, International Union of Electrical, Radio & Machine Workers v. NLRB*,\(^125\) a General Electric (G.E.) plant was on strike and the union picketed a gate previously established solely for outside contractors doing work not normally performed by G.E. employees.\(^126\) The Court, in dicta, stated that the union would be barred from picketing only where the gate was used by "independent workers... performing

\(^{119}\) 75 F. Supp. 672 (S.D.N.Y. 1948).

\(^{120}\) See id. at 674.

\(^{121}\) See id. at 674-75.

\(^{122}\) Id. at 675.

\(^{123}\) Id. at 676-77.

\(^{124}\) 95 CONG. REC. 8709 (1949) (statement of Senator Taft).


\(^{126}\) See id. at 669-70.
tasks unconnected to the normal operations of the struck employer." The union, however, could picket gates used for regular plant deliveries, customers, and replacement workers; it could picket "to compel the trucking firm not to do business with the ... manufacturer during the strike." In short, it could use economic pressure on outsiders who were making it possible for the struck employer to continue struck operations and thereby make the strike effective.

In *NLRB v. Fruit & Vegetable Packers* [hereinafter *Tree Fruits*], the union struck the Washington apple growers, but the apple growers continued operations despite the strikebreakers. The union picketed supermarkets, asking customers to support the strike by not buying Washington apples. The Board held that the picketing violated section 8(b)(4), but the Supreme Court set aside the Board's order. The Court found that the legislative history did "not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing." It held that appeals to customers not to buy the struck apples, as contrasted with appeals not to patronize the stores generally, was not prohibited by section 8(b)(4). It thereby allowed the union to use limited secondary pressure in aid of an economic strike.

The Court acknowledged that in limiting consumer picketing to following the product, a crucial consideration is the balance of economic power. The Court spelled out how picketing, which persuades only a portion of the customers, has limited effectiveness when only the product is picketed, but may have compelling effectiveness when the store is picketed generally. The implication was that secondary action would be allowed when it is not too effective in countering the employer's use of strikebreakers, a decision rooted in balancing bargaining power without any inquiry as to where the balance is or should be.

With this harbinger, *NLRB v. Retail Store Employees Union, Local 1001* in 1980 came as no surprise. The employees of Safeco Title Insurance Co. struck and picketed title companies selling Safeco title insur-

127. *Id.* at 680.
128. *Id.* at 681 (omission in original).
130. *See id.* at 60-61.
131. *See id.* at 60.
132. *See id.* at 61-62, 73.
133. *Id.* at 63.
134. *See id.* at 63-64.
135. *See id.* at 64 n.7.
136. *See id.*
The picketing urged customers of the title companies not to buy Safeco insurance from the title companies. The Court held that although the picketing was only following the product, Safeco insurance was the principal product of the title companies. The picketing caused more than "incidental injury" to the title companies by threatening them with ruin or substantial economic loss if they did not cease doing business with Safeco. In short, consumer picketing would be allowed except when it had the effect of compelling the secondary party to conduct its business as if the strike were fully effective.

Congress, the Board, and the courts have failed to distinguish between secondary boycotts used to achieve organization and recognition and secondary boycotts used to support strikes. There are strong arguments that an employee's decision to join or not to join a union should be insulated from all economic pressure, if that were practically possible. But when the issue is not union membership or union recognition, but terms and conditions of employment, our collective bargaining system assumes that the issue is to be settled by a contest of economic power. In picketing struck products or operations, the secondary boycott is the union's economic countermeasure to the employer's economic weapon of continued operations during a strike. Limiting boycotts used to support a strike shifts the balance of bargaining power in favor of the employer.

There is no persuasive reason in principle why secondary boycotts should be treated differently from other economic weapons. The characterization of secondary boycotts as "enlistment of neutrals" is no more than emotion-laden rhetoric. Strikes and lockouts commonly injure and conscript neutrals. A newspaper strike deprives neutral readers of the news, sports, and comics, and deprives advertisers of a main means of promoting their business. A city bus strike keeps neutral workers from work; a strike by apartment house maintenance workers forces tenants to live with clutter and dust, endure cold, and walk upstairs; a strike in an auto parts plant may shut down a neutral's assembly line. In all of these cases, the injured neutrals are conscripted to demand settlement and the return of services and supplies. When all the clichés are cleared away, the secondary boycott is prohibited because it is judged too effec-

138. See id. at 609.
139. See id. at 609-10.
140. See id. at 614-15.
141. See id. at 614.
tive. As *Tree Fruits* and *Safeco* show, if it is not effective, it may be allowed.

These legal rules regulating the parties’ economic measures are not peripheral but go to the very heart of the parties’ relative economic strength—the effectiveness of the strike. *Mackay* gives the employer a major economic weapon to defeat the strike. *Pattern Makers*, *Tree Fruits*, and *Safeco* curb the union’s countermeasures to *Mackay*, reinforcing the employer’s ability to operate during the strike. The rules combined shift the balance significantly, often decisively, in favor of the employer and against the union.\(^3\)

My point here is not that secondary boycotts, or any other particular economic weapons, should be barred or allowed. My point is that Congress, the Board, and the courts are allowing some economic weapons and disallowing others: they are thus determining the balance of bargaining power, but are doing so often without acknowledging that they are affecting that balance and never making an explicit judgment of what that balance is or what it should be.

This studied blindness is not surprising, for to confront the issue would require acknowledging that they were making policy judgments about whether unions were too weak or too strong. Better to ignore the problem or pretend that they are not involved, than to admit what they are in fact doing. But blindly or disingenuously, they are determining the balance of bargaining power. In my view it would be better to face the question frankly, so it can be fully considered and openly debated.

If this difficult question is faced, there may be some rough guides as to the direction in which we should move, even if we cannot determine where we should end. During the first twenty-five or thirty years of the Wagner Act, collective bargaining expanded and the institution developed in a way that might lead us to say that the system seemed to be evolving and functioning satisfactorily. Real wages grew, workers got in-

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143. Other Board and court decisions governing the legality of economic weapons similarly affect the balance of bargaining power. See, e.g., NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32 (1967) (finding that paying benefits to one group of employees while withholding them from another group “who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on . . . concerted activity”); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310 (1965) (holding that “the employer’s use of a lockout solely in support of a legitimate bargaining position is [not] in any way inconsistent with the right to bargain collectively or with the right to strike”); NLRB v. Erie Resistor Corp., 373 U.S. 221, 231 (1963) (finding that a super-seniority plan “render[ed] future bargaining difficult, if not impossible, for the collective bargaining representative”). In these cases the Court similarly refused to acknowledge that it was determining bargaining power or to disguise what it was doing with obscuring euphemisms. In no case did the Court openly consider which way the balance should move.
creased protection in benefits and job security, and an increasing number
had a voice in their working lives. The balance might have been judged
generally acceptable. If we had looked more closely, we would have seen
the growing wage disparities between areas and industries where unions
were relatively strong and where unions were relatively weak. This de-
veloping "two tier unionism" might have prompted us to examine how
the strike replacement rules and other rules regulating union economic
measures served to widen the gap. We could have then debated whether
such disparities were socially desirable and could have tailored rules to
move toward the desired goal.

At the present time, most unions are so totally out-matched in eco-
nomic power, in major part because of the combined legal rules strength-
ening the employer's weapons and barring union countermeasures, thus
the strike is seldom a viable option. It is difficult to say that there is a so-
cially suitable balance of bargaining power in a system with a declared
purpose of protecting and encouraging the process of collective bargain-
ing. The legal rules weakening the union's economic measure have con-
tributed to the shrinking of collective bargaining. Add to these consid-
erations the fact that in the last twenty years the real wages of workers
have remained stagnant or decreased while the gross domestic product
has increased more than forty percent, the values of stocks has multi-
plied, and salaries of top management have joined the satellites.

Does not this suggest that we should change the legal rules to shift the
balance at least a bit away from the employer and toward workers and
their unions? With the gap increasing between low wage and high wage
workers, might we not sensibly consider how to adjust our rules of labor
law to narrow the gap? It is possible for us to do this only if we acknowl-
edge that we are, with our legal rules, determining the balance of bar-
gaining power and set ourselves to selecting and designing rules to
achieve the socially desired balance.

VI. CONCLUSION

No argument is needed to conclude that the structure of collective la-
bor law built in the first half of the century has failed to achieve its noble
goals in the second half of the century. The inequality of bargaining
power is great or greater than when the Wagner Act became effective,
and much greater than when the Taft-Hartley Act was passed in 1947.
Fewer workers have an effective voice in their workplace than before the
Wagner Act was passed\textsuperscript{144} and government regulation of terms and condi-

\textsuperscript{144} In 1933, union density was 14.7%. See Leo Troy, The Rise and Fall of American
tions of employment has proliferated. The present course provides little hope for the future.

Minor modifications are not likely to reverse the trend and achieve the fundamental purposes of the Wagner Act which are as valid and compelling today as in 1935. Only a major remodeling of our system can provide hope for those purposes.

We need to go beyond peripheral changes and question the continued validity of more basic legal principles which have outlived their usefulness, if they ever deserved to be born. I have focused on five such principles which are too easily assumed with too little questioning. These are but examples; there are others which I do not have time or space to elaborate, and perhaps many that my unquestioned assumptions have failed to recognize. But it is at this level that we should direct our attention and energies.

Each principle questioned may stir our imagination to possible changes, as they have here. Each proposed change may stand on its own, but with more creative imagination they might be woven together for a remodeling that approaches reconstruction.

As acknowledged at the outset, none of these possible changes have any present political reality. The present political battle is to prevent further undermining of the basic goals. Even peripheral improvements are politically impossible. But it is now that we should seriously study and discuss what changes are needed and desired if, and when, reaffirmation of the values of collective representation makes changes possible. Without a new vision, there can be little hope.

Trade Unions: The Labor Movement from FDR to RR, in Unions in Transition: Entering the Second Century 75, 81 (Seymour Martin Lipset ed., 1986). In 1996, union density in the private sector was 10.2%. See supra note 10 (stating current union membership rates).