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LEGISLATIVE INTENT AND IMPASSE RESOLUTION UNDER THE NATIONAL LABOR RELATIONS ACT: DOES LAW MATTER?

Ellen J. Dannin*

"Impasse and implementation is the dominant consideration of virtually every negotiation" that he has been involved in, said Samuel McKnight, a union attorney . . . . "It is a prospect that is so attractive to employers and so menacing to unions and workers that we don't really like to talk about it."

The possibility of impasse implementation has reduced the language of collective bargaining to "a list of words and phrases that unions can never use and employers must always use," such as "deadlock," "bottom line," "best offer," and "final offer," said McKnight.1

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I. Introduction

From the enactment of the National Labor Relations Act (NLRA)\(^2\) in 1935 to today is more than the mere passage of sixty years' time. Today's NLRA is a different statute than the one originally enacted. A large, but often unnoticed, cause of that difference is the concretion of sixty years of court and NLRB interpretations. These judicial glosses have generated a law so different from the original statute, that the NLRA's drafters would likely see them as threatening to return us to the days the NLRA's Findings and Policies described as harmful to the country's stability.\(^3\) Chief among these changes has been a movement away from concern with the key problem NLRA § 1 decried: "inequality of bargaining power."\(^4\)

The NLRA's Findings describe inequality of bargaining power as leading to a depression of "wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries" and in turn to "recurrent business depressions."\(^5\)

The most important judicial interpretations which permitted and even promoted inequality of bargaining power have been those which created the doctrine permitting employers to implement their final offers when the parties reach impasse.\(^6\) Despite its importance, the impact of the implementation doctrine has gone virtually unno-


\(^5\) Id.

\(^6\) The details of this doctrine have been explained in other articles. See, e.g., Ellen Dannin & Clive Gilson, Getting to Impasse: Negotiations Under the National Labor Relations Act and the Employment Contracts Act, 11 Am. U. J. Int'l L. & Pol'y 917 (1996); Ellen J. Dannin, Collective Bargaining, Impasse and the Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment, 19 U. Tol. L. Rev. 41 (1987) (examining the historical development of the doctrine) [hereinafter Dannin, Collective Bargaining]; Clive Gilson et al., Collective Bargaining Theory and the Doctrine of Implementation of Final Offers Collide, 48 Lab. L.J. 587 (1997) (examining the impact implementation doctrine has on collective bargaining theory); Joseph E. Kolick, Jr. & Merle M. DeLancey, Jr., Can One
ticed and its role relatively unexamined in the industrial relations literature\(^7\) and even in law review articles.\(^8\) This neglect is even more surprising when one considers that impasse accompanied by implementation often leads to or accompanies striker replacement, something that has received a great deal of attention in recent years.\(^9\) Even harder to explain is how its role could have been overlooked when the employer’s power to implement upon impasse has been an important factor in some of the most protracted and almost irresolvable labor conflicts of recent years, some of which are ongoing as this article is written. Disputes involving Caterpillar,\(^10\) the Detroit News,\(^11\) the National Football League,\(^12\) the baseball players

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\(^7\) Industrial relations literature tends to overlook impasse and implementation, despite its being well known to labor lawyers and those who actually do collective bargaining. See, e.g., Thomas A. Kochan, et al., The Transformation of American Industrial Relations (1986). An example of how its role can remain unexamined can be found in Richard Block et al., Labor Law, Industrial Relations and Employee Choice: The State of the Workplace in the 1990s (1996). There the authors recount an incident in which an employer implemented its final offer and replaced all strikers, actions which show the strong relation seen between these two events. The authors, however, ignore the role the employer’s power to implement played in promoting impasse and in weakening the union. See id. at 88-93; but see Michael Yates, Power on the Job: The Legal Rights of Working People 121-26 (1994) (outlining steps unions can take rebutting employers’ actions; i.e. declaring impasse); Adrienne Eaton & Jill Kriesky, Collective Bargaining in the Paper Industry: Developments Since 1979, in Contemporary Collective Bargaining in the Private Sector 25, 44-49 (Paula B. Voos ed., 1994) (documenting UPIU’s failed attempts to further centralize bargaining).

\(^8\) Unlike the industrial relations literature which has failed to notice the importance of implementation upon impasse, law review articles have all but failed to discuss the issue, and there are only a few articles solely dedicated to its examination. See, e.g., Dannin, Collective Bargaining, supra note 6; Terrence H. Murphy, Impasse and the Duty to Bargain in Good Faith, 39 U. Pitt. L. Rev. 1 (1977).


strike, Exxon, International Paper, and Bridgestone/Firestone all involved the issue of implementation upon impasse. In those disputes and in countless other disputes throughout the country, this statutory gloss has played a central role in making collective bargaining less available, less useful and thus less desirable for the organized and unorganized alike.

Furthermore, it is likely that the employer's power to implement has contributed powerfully to the concessionary bargaining and union decline which stubbornly persist even after the economy has recovered from recession. Understanding the employer's power to implement may help relieve some of the puzzlement scholars evince when discussing phenomena connected with contemporary bargaining and provide a more accurate explanation for their persistence.

II. The Law and the Development of the Doctrine of Implementation Upon Impasse

A. How Implementation Upon Impasse Operates the Don Lee Distributors Case

On November 8, 1996, the NLRB issued its decision in Don Lee Distributors, Inc. That decision encompassed a consolidated complaint that involved ten cases filed over a period of two years, beginning in 1990. The hearing was held in Detroit, Michigan and lasted sixty nonconsecutive days, extending between November 16,
1992 and October 26, 1993. More than 1000 pages of briefs were filed.

The employers were six beer distributors in southeast Michigan, and the employees included warehouse workers, delivery drivers, driver/salespeople and allied workers. The employers were persuaded by Fred Long, the chief executive officer of West Coast Industrial Relations, that the wages and benefits provided by Teamsters contracts were too high and that his negotiating skills would eliminate many of the benefits that those contracts contained and cut costs, and that the numerous and broad services he provided would successfully counter any economic or other action that the Teamsters would take.

The employers entered into a secret agreement to engage in illegal joint bargaining. Their purpose in using joint bargaining was,

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20. The Administrative Law Judge's decision recites the agglomeration of NLRB charges which were eventually consolidated for hearing and decision:

The relevant docket entries are as follows: Local 1038, International Brotherhood of Teamsters, AFL—CIO filed charges against West Coast in Case 7-CA-31302 on December 14, 1990, and a complaint issued on January 31, 1991. The Union filed charges on April 3, 1991, against Don Lee (Warren) in Case 7-CA-31719(2), against Don Lee (Dearborn) in Case 7-CA-31719(3), against Powers in Case 7-CA-31719(4), against Eastown in Case 7-CA-31719(5), against Hubert in Case 7-CA-31719(6), and against Oak in Case 7-CA-31719(7). Amended charges in Cases 7-CA-31719(2)-(7) were filed by the Union on April 26, 1991. The Union filed its charge in Case 7-CA-32164(1) against Don Lee (Dearborn) and Don Lee (Warren) on August 2, 1991. The Union filed its charge in Case 7-CA-32896 against Don Lee (Dearborn) on February 10, 1992, and amended it on February 11 and March 16. The Union filed another charge in Case 7-CA-32896 against Don Lee (Dearborn) on March 2, and amended it on March 16 and 19. The charge in Case 7-CA-33649 against Powers was filed by the Union on August 26, 1992, and the charge in Case 7-CA-33707 against Don Lee (Warren) and Don Lee (Dearborn) was filed on September 10, 1992. The first complaint issued on July 29, 1991, and subsequent complaints issued on September 30, 1991, April 28, August 28, and October 30, 1992.

See 322 N.L.R.B. 470, ALJD at 25 n.1.

21. See ALJD at 130 n.20.

22. See Don Lee, 322 N.L.R.B. at 480.

23. Id. Fred Long's own words suggest that he was trying to persuade the employers that they needed his services because they needed to follow his advice about bargaining. See Memorandum from Fred R. Long to Oak, Don Lee, Powers, Hubert & Eastown 1 (Mar. 23, 1990) (on file with the Hofstra Labor & Employment Law Journal). In this respect, there appears to be some similarity to the tactics used by "union busters." See Martin Jay Levitt & Terry Conrow, Confessions of a Union Buster (1993).

24. See Don Lee, 322 N.L.R.B. at 470. The Board explained its reasoning:

It is a violation of the statutory bargaining obligation for either a union or an employer to insist to impasse on a nonmandatory subject of bargaining, i.e., a
in part, that it would not only prevent the union from whipsawing the employers, but would also allow the employers to put the union in a position where they could easily reach impasse with the result either that the employees would strike and the employers could permanently replace them or the employers could implement their final offer.25 The ALJ described the power relation this form of bargaining created for the union:

This form of bargaining, if done correctly, can produce the maximum bargaining power for wholesalers. Unilateral implementation of the respective wholesaler’s final offer after impasse is the ultimate power tool. Utilizing a lock out can almost always be avoided. The union either accepts the wholesalers offer or refuses to accept. In the latter case, if the union does not strike, employees nevertheless work under the terms and condition of the wholesaler’s final offer. If the union does strike, [the] workforce can be permanently replaced with a distinct possibility the union will be decertified. Since the union knows or should know this, they will be more reluctant to strike and more likely to reach an agreement favorable to the wholesaler.26

In fact, hiring permanent replacements was particularly desirable because recent Board law has allowed the employer to implement any terms it desires as to them.27

The employers agreed that they would seek a wide range of concessions, including eliminating the eight hour minimum/maximum subject that does not concern the terms and conditions of employment in the bargaining unit to which the employer’s recognitional obligation extends. NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958). Change in the scope of a bargaining unit is a nonmandatory subject. When either employers or unions which have in the past bargained in separate units begin, without the consent of the other side, to bargain jointly as if bargaining for a single contract, they are engaging in unlawful insistence on a nonmandatory subject. “Neither an employer nor a union is free to insist, as a condition of reaching an agreement in one unit, that the negotiations also include other units, or that the terms negotiated in the first unit be extended to other units.” Utility Workers Local 111 (Ohio Power), 203 NLRB 230, 238 (1973), enforced 490 F.2d 1383 (6th Cir. 1974).

Id. at 471.

25. See id. at 489-90.


27. See Harding Glass Co., 316 N.L.R.B. 985, 991 (1995). Member Browning objected to this line of cases. See id. at 985 n.5.
day; removing limits on the number of cases of beer employees were required to deliver each week; paying only the overtime required by law; introducing a management rights clause; introducing a restrictive grievance procedure; lowering holiday pay; capping vacation at four weeks, a reduction of one week; requiring that deliveries be made to coolers and basements; reducing wages; changing pension rights and insurance; extending hours of the workday; instituting bulk deliveries; introducing a zipper clause which would waive bargaining rights during the term of the contract; extending the probation period; and increasing the use of part-time employees.  

The parties engaged in a protracted series of bargaining sessions, which occurred despite the employers' aim of securing the union's agreement as quickly as possible or getting to an impasse so they could implement their offer as quickly as possible. On March 23, 1990, before the first bargaining session was held, the employers' chief negotiator wrote the employers to assure them that he understood their concerns about "perfecting a final offer amongst you... Our concern is how quickly we reach an impasse, and savings (if an agreement is not possible as I believe)." The employers advertised for strike replacements even though there was no strike nor sign that the union would take the workers on strike.  

29. In fact, in their post-hearing brief to the Administrative Law Judge, Respondents argued that the union had engaged in bad faith bargaining because it tried to forestall reaching an impasse. See Respondents' Brief to Administrative Law Judge After Hearing at 315 (on file with the Hofstra Labor & Employment Law Journal). This argument suggests that they believed the normal state of NLRA bargaining is to reach impasse and allow the employer to implement its final offer.  
31. See id. During April and May 1990, the employers undertook a massive campaign to recruit permanent replacements. See Letter from Samuel C. McKnight, Esq., Union Attorney to Ellen J. Dannin, Professor of Law, California Western School of Law 1 (March 14, 1997) (on file with the Hofstra Labor & Employment Law Journal). They used the services of Huffmaster Associates and a Texas firm, Strike Management Consultants. See id. To prepare for interviews, they purchased 8500 12 page application packets. See id. They advertised in many newspapers and set up interviews throughout southeastern Michigan over a period of several weeks. See id.  
32. In fact, any union going into this situation would have been concerned about the problem of permanent replacement and have tried to avoid a strike. They would also have tried to stave off the employer's right to implement and would thus try to avoid reaching a state that could be declared an impasse. Ideally, the point of collective bargaining is to reach an agreement. However, the implementation upon impasse doctrine forces unions to focus simply on avoiding a state that can be declared a bona fide impasse, rather than on narrowing
In other words, the employers contemplated that the result of their negotiations would be an impasse and implementation.

The union did not know that the employers were engaged in these actions until they were able to obtain documents from the employers in connection with the NLRB trial. During bargaining, however, the union did suspect what turned out to be the truth. Indeed, the state of the law now means that any union entering into negotiations today would have to be at least concerned, if not suspicious, that the people sitting across the table have no interest in real negotiating and agreement, that they want only to get to an impasse and implementation.

As for the employers, they were advised that the union could not win a strike and that the union leadership would do whatever was possible "to delay an impasse." On February 7, 1991, the employers implemented most of their final offers. Certain economic proposals, including wages and the reduction of holiday and vacation pay were implemented on April 15, 1991.

During the hearing, testimony was elicited that the terms providing greater discretion which had been sought by the employers and implemented by them when they declared impasse, actually were neither of any practical use, to at least some of the employers, nor were they used. Moreover, they did not result in different working conditions than had been available in the past through bargaining with the union. Their usefulness to the employers was that they were freed from having anything to hinder their unilateral control of the workplace.

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33. See Letter from Samuel C. McKnight, Esq. to Ellen J. Dannin, Professor of Law, California Western School of Law 1 (Mar. 14, 1997) (on file with the Hofstra Labor & Employment Law Journal).
34. See id.
36. See Don Lee, 322 N.L.R.B. at 481.
37. See id.
38. See id. at 490.
39. For example, the employers uniformly demanded eliminating limits on starting times and implemented this in their final offers. See id. In fact, it was little used, because most of
The NLRB found that there was no bona fide impasse because the employers had engaged in illegal joint bargaining, illegal because they had claimed to be bargaining as individuals and had not secured the union’s agreement to bargain jointly. As a result, the implementation was unlawful and the employers were ordered to rescind the changes and to restore the status quo before those changes, including making the employees whole for pay they lost when their pay was cut and they were laid off. The totals, complete with interest accumulating through six years, will be enormous. The case will yield back pay to approximately 450 employees, some of whom lost $17,000 a year. That back pay has been growing since 1991. In 1994, after the Administrative Law Judge issued his decision, Tinamarie Pappas, one of the NLRB attorneys who tried the case, estimated that the back pay liability for the drivers’ lost commissions alone could then be $20 million. In addition, there are losses from cutbacks in pensions, vacations, holidays, and other parts of employee compensation. As this is written, those figures continue to grow, both in terms of basic backpay and interest on the outstanding amounts. Losses of this magnitude mean that those employees have suffered enormous disruption in their lives and in the lives and hopes of their families.

The costs to all parties have been enormous. The government was put to the expense of trying and deciding a case that extended over their customers did not open earlier than the prior starting time and the two drivers scheduled to start earlier came in only 15 minutes before they had in the past. See id. When asked why then they had wanted to eliminate all the starting times, the answer was that if a customer wanted an earlier delivery, it should be the company’s decision to grant that request. See id. The ALJ concluded: “Thus, in all the discussions of starting times, Respondents were wedded to rid themselves of any restrictions, despite the fact that to Eastown it was hardly of practical necessity.” Id. In addition, under the prior contract, an employer could request the Union to agree to an earlier start. Only a couple requests were made, and the union board never turned down the request. See id.

Similarly, although the employers had demanded the right to use bulk unloading with mechanical devices and had implemented this right, Eastown only used bulk unloading at Joe Louis Arena and Tiger Stadium, where the old agreement permitted the use of mechanical devices. See id. at 491. Other terms were also insisted upon to impasse and then not used. See id.

40. See id. at 491-92.
41. See Don Lee, 322 N.L.R.B. at 497.
43. See Don Lee, 322 N.L.R.B. at 481.
44. See Beer Distributors supra note 42, at D13.
45. See Beer Distributors supra note 42, at D13.
sixty days.\textsuperscript{46} The employers have been found to owe amounts of back pay so enormous they may be put out of business.\textsuperscript{47} In the meantime the workers have suffered and continue to suffer from the employers' actions. Their lives have been destroyed. They have lost homes and suffered broken marriages and mental stress as a result of the employers' use of implementation upon impasse. On the other side of the scale, the employers' purpose was not to gain important business ends that can balance out these costs. Rather they have wrecked lives and possibly their businesses in order to destroy workplace codetermination and worker participation in the decisions that affect workers lives'—rights guaranteed in the NLRA—so they could have unilateral control of their businesses.

All this has come about even though the worst that could have happened from the union and workers' point of view did not occur—they did not strike and were not permanently replaced. Other workers in other situations have not been as lucky.\textsuperscript{48}

These events raise a serious question about whether the judgment the employers demonstrated during this period supports the wisdom of their having that control. The employers, though, would argue that the back pay figure constitutes money they saved their businesses and, in fact, they can attribute their problems solely to a law that does not support an employer's need to run its own business. The story of how implementation upon impasse arose from judicial action, not from statute, represents evidence that, at least in this instance, the law has been reshaped precisely to provide employers with this ability.

\section*{B. How Did the Doctrine of Implementation Upon Impasse Arise?}

1. \textit{The NLRA's Legislative Intent on Bargaining:} Everyone who deals with the NLRA should reread at least some of the testimony and other documents associated with its enactment from time to

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\item \textsuperscript{46} See supra note 20 and accompanying text.
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time. They make surprisingly exciting and fresh reading. Congress could easily have heard the concerns expressed there last week, rather than over half a century ago. For example, when Dr. Francis J. Haas described the failures of bargaining under § 7(a) of the NIRA, he said:

Again and again cases have come before the National Labor Board in which the employer flagrantly violated section 7(a) but took refuge in the claim that he observed the language of the statute. He made the defense that he met, received, and conferred with representatives of his employees. In one extreme instance an employer came to the National Labor Board and held that he had observed the law, although it was clear that he has had no intention of coming to an agreement. He had held conversations with the workers' representatives extending over several weeks and climaxed a 2 days' negotiation with them in Washington by throwing them along with their attorney in jail on their return home.

... Paragraph 2 of section 5 of the bill is therefore of utmost importance, especially that passage which requires the employer "to exert every reasonable effort to make and maintain agreements" with representatives of employees.49

Dr. Haas testified that the NLRB should operate in a way that would create models to educate the public in how to resolve their problems.50 He was confident that this modeling would take place even if the legislation was silent on this point:

Another function of the Board is one that is nowhere provided for in the bill, but one that it will exercise with uncalculable benefit to the public interest. It is the silent preventive work that the Board will do in the way of educating disputants to settle their differences between themselves rather than go to the expense and inconvenience of appearing before the Board. Moreover, in the course of time, the Board will develop a body of precedents and these will act as guiding principles in effectuating mutual agreements.51

50. See id. at 150.
51. Id.
Dr. Haas contended that the new law had to recognize that the issue of bargaining impasses was a fundamental problem:

In the immediate present and perhaps for some time to come, two important problems must be met. One is the matter of bringing collective bargaining negotiations to a conclusion . . . .

As already indicated, since last June not a few employers have, by unduly protracting negotiations and even by refusing to do anything more than talk with employees' spokesmen, clearly violated the National Industrial Recovery Act.\(^5\)

Other witnesses also advocated ensuring that the new law would deal with impasses explicitly. Arthur Suffern, for example, argued that the draft NLRA was deficient if it merely declared the right of labor to bargain, but did nothing to provide the means to make that right meaningful:

It [the draft] is merely a pious declaration of the right of labor to organize and to bargain collectively. Then it goes on to assure the right of every employer to determine his own course as he will, regardless of the wishes of the workers. It means that the employer can say, "All right boys; come in and we'll talk it over"; hear the demands for higher wages and say, "Sorry—we can't pay more."

If the men object, he can answer: "We've had our collective bargaining. The act doesn't say anything about reaching an agreement."

. . . [T]here is nothing in the law that requires an employer even to confer with employee representatives. With these handicaps, the remarkable thing is that the National Labor Board has succeeded as well as it has in mediating and conciliating industrial disputes . . . .

This is a good illustration of how meaningless some rights are in our economic system unless those to whom the rights belong have the economic power to enforce them. It also illustrates the fallacy of expecting that the rules of the game will be fair, if those with power and selfish interests at stake are allowed to make them.\(^5\)

\(^{52}\) Id.

When the Senate issued its Report No. 573 on Senate Bill 1958, it was clear that Arthur Suffern’s fears had not been heard:

The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

But, after deliberation, the committee has concluded that this fifth unfair labor practice should be inserted in the bill. It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement . . . . Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace.  

This point, that the new law would do nothing to force the parties to agree, was made explicit.

Most emphatically this provision does not imply governmental supervision of wage or hour agreements. It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met. But the right of workers to bargain collectively through representatives of their own choosing must be matched by the correlative duty of employers to recognize and deal in good faith with these representatives. . . .

Without this duty the right to bargain would be sterile * * *.

The incontestably sound principle is that the employer is

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55. *79 CONG. REC. 7571 (1935), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2335-36 (1949).*
obligated by the statutes to negotiate in good faith with his employee’s representatives; to match their proposals, if unacceptable, with counterproposals; and to make every reasonable effort to reach an agreement. 56

Thus, the NLRA emerged from Congress with a declaration of the duty to bargain but with nothing express to make that obligation a real one. 57 In particular, it provided no method for resolving impasses, leaving that problem to the parties. 58

2. The Courts and Board Develop the Doctrine: Over sixty years’ experience interpreting the NLRA has shown that the courts have been unwilling to leave the matter of reaching an agreement setting new terms with the parties. What is now clear is that the decision to include nothing on resolving impasses in the statute has merely transferred the decision of how to resolve impasses to the Board and the courts. 59 They have responded by creating the complex legal doctrine that now governs the area. 60 I have explored the development of this doctrine elsewhere in some depth, 61 however, a

56. Id. at 2336 (quoting Houde Eng’g Co., 1 N.L.R.B. 35 (1934)).
57. See Brudney, supra note 54, at 953-55; cf. Matthew W. Finkin, Legal Craftsmanship? The Drafting of the Wagner Act, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION PROCEEDINGS OF THE FORTY-EIGHTH ANNUAL MEETING, JAN. 5-7, 1996 381 (Paula B. Voos ed., 1996) (stating that there was—and is—room within the NLRA to remedy this problem). Section 10(c) of the NLRA provides that the Board has the power to fashion appropriate remedies. See 29 U.S.C §160(c) (1994). This power could be used to address the problems addressed here. This would be in addition to the Board’s ability to limit, modify, or eliminate the employer’s ability to implement upon impasse. See id.
59. The role of the Court of Appeals is a significant one in NLRA jurisprudence. See Joan Flynn, The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review, 75 B.U. L. REV. 387, 388, 391 (1995). The NLRB is unique among federal agencies in making almost all its policy through adjudication as opposed to rulemaking. See id. In addition, the NLRB has no power to issue enforceable orders. See 29 U.S.C. § 160 (c), (e). As a result, the Courts of Appeals play a critical role beyond that of merely reviewing decisions the NLRB has made; no NLRB order is enforceable until the Court of Appeals issues its decision. See id. Since 1975, the number of Supreme Court decisions interpreting the NLRA has declined, placing even more power in the appellate courts. See Brudney, supra note 54, at 960-961.
60. Even though both the courts and Board have been responsible for developing the impasse doctrine, there is evidence that the courts are less sympathetic with the NLRA’s collective values than is the Board. See Brudney, supra note 54, at 953-55. This lack of sympathy with legislative purpose occurs in reviewing other agencies. See Flynn, supra note 59, at 390.
thumbnail sketch of the issues covered in that article would be helpful here.

The doctrine began to take form in 1940 when there was a change in wage law and an employer unilaterally implemented the changes required rather than securing the union's consent.\textsuperscript{62} The Board permitted the implementation despite this, because it was clear the employer had to comply with the law and because the manner in which the implementation took place did not undermine the union.\textsuperscript{63} The next year, however, the Board permitted an enormous change.\textsuperscript{64} An employer implemented its final offer after four negotiating sessions by posting new wages and hours.\textsuperscript{65} The union protested this at the next negotiation session, and the employer offered to enter into a contract on those terms. The workers then struck in protest. The Board upheld the implementation because it was done in good faith and because the employer had continued to negotiate with the union.\textsuperscript{66} The majority opinion noted that there was no precedent to support this decision,\textsuperscript{67} and there was a strong dissent.\textsuperscript{68} Although not mentioned, the issuance of these decisions during wartime may have been a factor urging the need to cut back union bargaining rights. Implementation cases during this period tend to fall into special categories that can be seen as supporting the reasonableness of the doctrine: either there had been a bona fide attempt to reach agreement; the union was at fault for failure to reach an agreement; or the implementation was done in a manner that did not denigrate the union's status as representative.\textsuperscript{69}

During this period, the doctrine developed three safeguards designed to prevent its undermining the fundamental rule that permitted only negotiated changes which resulted from good faith bargaining: (1) any changes unilaterally implemented had to be comprehended by, that is, included among those matters presented to the union as part of the employer's final offer; (2) an implementation could take place only if an impasse had been reached in the course of good faith bargaining, that is, bargaining untainted by any

\textsuperscript{62} See \textit{In re Westchester Newspapers, Inc.}, 26 N.L.R.B. 630 (1940).
\textsuperscript{63} See \textit{id.} at 642-43, 645.
\textsuperscript{64} See \textit{In re Sam M. Jackson}, 34 N.L.R.B. 194 (1941).
\textsuperscript{65} See \textit{id.} at 200.
\textsuperscript{66} See \textit{id.} at 200-202, 212.
\textsuperscript{67} See \textit{In re Sam M. Jackson}, 34 N.L.R.B. 194 (1941).
\textsuperscript{68} See \textit{id.} at 219 (Smith, dissenting).
\textsuperscript{69} See Dannin, supra note 61, at 44-45 & n.11.
employer unfair labor practices; and (3) the employer could only implement changes if it did so in a manner that did not disparage the employee's collective bargaining representative or the collective bargaining process itself.

The Board has tended to view implementation as an important aid in breaking impasse, permitting the parties to move forward within the relationship. The logic in support of the concept of unilateral implementation, particularly with safeguards to protect the process, is founded on a particular view of the uniqueness of the institution . . . . The parties to a collective bargaining relationship do not choose each other and are not free to seek other partners, in the manner that other contracting parties might. The Board has thus conceived of implementation of final offers as a controlled escape route to put a stalemated relationship onto a new, more positive path. 70

The problem is that eventually the safeguards were pared away so that what was conceived of as a little-used escape route has become a thoroughfare, now seen by some as the most desirable route. 71 This did not occur, however, until the mid-1980's. 72 Until that time, most of the safeguards remained intact. The legacies of the 1980's mean that today—and for the past fifteen years—the burden of proving the existence of an impasse was lessened so that at times so little examination of the affirmative defense took place that it began to seem more like a presumption in favor of impasse; the concept of what was seen as comprehended by a final offer became distorted; and, most important, the requirement of nondisparagement was eliminated. 73

Today's law concerning implementation can be sketched out as follows. 74 Parties under the jurisdiction of the NLRA have no obligation to reach an agreement. They can insist to impasse on any

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70. Dannin, supra note 61, at 46 (citations omitted); cf. Brown v. Pro Football, Inc., 50 F.3d 1041, 1053-54 (D.C. Cir. 1995) (stating that implementation upon impasse is a tool available as a tactic in collective bargaining).
71. See Dannin, supra note 61, at 47.
72. See Dannin, supra note 61, at 53 & n.36, 56 & n.42.
73. See Dannin, supra note 61, at 53 & n.36, 56 & n.42. Recently, the Board issued a decision in which it has tentatively suggested it will look at the content of offers, at least to determine whether a proposal is severe and predictably unacceptable. See ConAgra, Inc., 321 N.L.R.B. 944 (1996).
74. See Robert Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining 403-04 (1976); see, e.g., Richard Block et al., Labor Law, Industrial Relations and Employee Choice: The State of the Workplace in the
issue, as long as that issue is one the NLRB or courts have defined as a mandatory—as opposed to a permissive—subject of bargaining. Mandatory subjects concern wages, hours, and other terms and conditions of employment; while all other legal subjects are permissive subjects. A party may legally insist to impasse on a mandatory subject of bargaining; whereas, creating an impasse by insisting on a permissive subject is not only a violation of the duty to bargain in good faith, it also means that no bona fide impasse exists.

When a bona fide impasse is reached, the employer may implement its final offer, if the impasse is not bona fide—as the result of the employer's committing unfair labor practices—the employer may not implement. If it has already implemented, it must restore the status quo that existed before the implementation. It should be obvious from this that painstaking attention must be paid to whether a subject has been classified by the courts or Board as mandatory or permissive. Refusing to compromise on the one violates the duty to bargain; whereas, standing firm on the other creates an impasse and allows the employer to implement its final offer.

This blackletter law is relatively easy to state; however, dividing the universe of bargainable subjects into mandatory and permissive categories depends less on logic or the importance of an issue to the parties engaged in a negotiation than upon prior court and Board decisions. For example, the Supreme Court has defined retirees' benefits and the decision to subcontract work as permissive subjects of bargaining. Even though it is not difficult to construct an analysis that these issues do concern wages, hours, and other terms and conditions of employment, the NLRB or courts have defined them as permissive subjects.
and conditions of employment—to imagine that in many workplaces they would be seen as exactly that—the judiciary has decided otherwise and bargainers ignore these classifications at their peril.82

Indeed, these rigid classifications are fundamental to bargaining rights and power.83 If a subject is deemed to be permissive, neither union nor employer can insist on bargaining concerning it and the employer is free to change it.84 On the other hand, classifying an issue as a mandatory subject of bargaining does not necessarily place unions in a stronger position.85 True, a union can insist on a mandatory subject to impasse, but, if it does, this merely allows the employer to implement its final offer.86 Knowing how bargaining subjects are classified is no simple matter. One can only be certain as to the categorization of any subject by consulting current case law and a labor law treatise.87 Despite the quasi-abstruse nature of the classification system, it controls how bargaining takes place. No one should dare bargain without paying attention to the classification of the subjects involved and whether one wishes to achieve or avoid an impasse.88

C. Implementation Upon Impasse and Collective Bargaining Today

To date, virtually no studies have captured the frequency of implementation upon impasse, let alone made more detailed analy-
Legislative Intent and Impasse Resolution Under the National Labor

Those involved in NLRB work or collective bargaining know it plays an important role. NLRB cases and Industrial Relations case studies demonstrate that implementation and impasses play an important role in relation to deunionization and the permanent replacement of strikers. A rough sense of the relative incidence of these events can be gleaned from a Lexis search of both the BNA Daily Labor Reporter and of NLRB cases.

89. Recent survey work by Terry Wagar, Clive Gilson, and the author shows that impasse and implementation is involved in over half of negotiations and has a pernicious influence on how bargaining takes place. See Ellen Dannin et al., Bargaining Impasses: Global Reflections (Paper presented at the Industrial Relations Research Association 49th Annual Meeting, New Orleans, Jan. 4-6, 1997). Another recent study found that actual implementation occurred in 23% of negotiations. See Joel Cutcher-Gershenfeld et al., Collective Bargaining in Small Firms: Preliminary Evidence of Fundamental Change 49 INDUS. & LAB. REL. REV. 195, 204-05 (1996). In first contract negotiations, Kate Bronfenbrenner found that implementation occurred in seven percent of negotiations, with unions striking as a result of "blatantly unacceptable demands" in another seven percent of negotiations. See Kate Bronfenbrenner, Employer Behavior in Certification Elections and First-Contract Campaigns, in Restoring the Promise of American Labor Law 75, 86 (Sheldon Friedman et al. eds. 1994). She also found that when an employer declares an impasse and implements its final offer, unions won first contracts in only four of seven units. See id. at 84, 86.

90. In over a decade of work as an NLRB attorney, the author observed that the employer's ability to implement if the parties reached impasse affected every bargaining relationship she witnessed whether or not the employer used this ability and whether or not implementation was charged as an unfair labor practice. In fact, many other charges, particularly information requests made during bargaining for a complete contract, appeared to be an attempt to forestall an impending impasse and implementation. This area is one that could profit from a less anecdotal approach.

91. See, e.g., Block, supra note 74, at 89-93.
### Relative Frequency of Implementation and Replacement

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<th>Daily Labor Reporter&lt;sup&gt;92&lt;/sup&gt;</th>
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<td>1991–1995&lt;sup&gt;95&lt;/sup&gt;</td>
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The trend revealed by these figures shows that, whereas, the incidence of striker replacement has remained relatively flat through fifteen years, the number of cases involving impasse and implementation has increased dramatically. At the beginning of this period, implementation cases outnumbered striker replacement cases by a factor of 2:1. Fifteen years later, this factor had reached 3:1.

If anything, these figures understate the incidence and impact of impasse and implementation. My research and experience demonstrate that implementation and impasse often accompany and precede replacement or deunionization. They also occur when there is no strike and thus no replacement. The opposite is either impossible or, at least, far less frequent. Furthermore, there are few instances of collective bargaining today in which the impact of the employer's power to implement is not felt. This power leads unions to make concessions, not because of the employer's economic power or for the good of the bargaining unit, but solely to

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<sup>92</sup> Lexis searches are performed using key word in context (KWIC). It is impossible to construct a meaningful Lexis search as to the relative frequency with which "permanent replacement" occurred in this file, because many of the appearances of this search term deal with pending or contemplated legislation and not with specific incidents in which strikers were permanently replaced.

<sup>93</sup> Reports in NLRB cases will reflect events which occurred one to two years earlier.

<sup>94</sup> An analysis of NLRB case data shows that there was an average of roughly 10,000 refusal to bargain charges filed each year during this period. A merit factor of approximately 40% plus settlement resulted in an average of 3800 complaints issued a year (with the high being 6230 and the low 3252). Post-complaint settlements result in approximately 500 Administrative Law Judge decisions each year. The trend over this period has been for the number of judicial decisions to decline dramatically. This decline plus the increase in impasse and implementation cases means that they are an ever-larger percentage of NLRB cases.

<sup>95</sup> The year 1996 is not included because events such as the budget shutdown and severe understaffing make the results difficult to compare. By 2000, data in a five year band will provide more comparable data.
stave off impasse and the employer's legal ability to have full control of determining workplace terms and the conditions to deunionize. The data from a study recently completed by the author and two co-researchers is a first step to demonstrating—other than anecdotally—these qualities of impasse and implementation:

[W]e asked union negotiators to consider their most recent private sector negotiation and answer a series of questions about that negotiation. . . . When asked whether impasse or implementation was a concern in the negotiation, exactly 50% of the respondents indicated that it was. These negotiators were also asked additional questions about the negotiation. Among respondents indicating impasse was a concern, 61% reported that the union made concessions to avoid impasse (with about 57% of those engaging in concessions indicating that they made concessions although the employer said nothing about impasse). Fifty-six percent of respondents reported that the employer made the statement that impasse or implementation was likely, and in 26% of the negotiations in which impasse was threatened, the employer did in fact implement. However, board charges were filed by the union in only 16% of the negotiations in which impasse was a concern and in only two of the negotiations, the employer permanently replaced strikers. . . .

. . . Cross-tabulation results revealed that concern over impasse was reported in 68% of negotiations involving employers in manufacturing as compared with 35% among service employers. These data provide directional support for the notion that the doctrine of impasse and implementation is of concern to trade union negotiators and more important, that a significant number of collective bargaining outcomes are apparently influenced by it. Arguably, the process that should remedy the imbalance of power between employers and workers is itself delinquent and the original intent behind the NLRA is thereby undermined. This limited data set suggests that this is particularly the case when the labor-management climate is identified by trade union negotiators as being unhealthy. The manufacturing sector

96. In the Dannin, Gilson, Wagär study approximately 61% of union negotiators concerned about impasse made concessions. See Gilson et al., supra note 86. Fifty-seven percent did so even though the employer had said nothing about impasse. See id. Cutcher-Gershenfeld, McHugh and Power found that concession bargaining has continued to be a feature of negotiations. See Cutcher-Gershenfeld, supra note 89, at 201-02, 206. Employers' increasing use of implementation at impasse may explain this finding.
is also more associated with this phenomena than is the service sector.97

The phenomenon of impasse and implementation has been so little studied that it is difficult to know its full effect on collective bargaining in the United States; however, reasonable inferences can be drawn. Charles Morris observes that leaving the parties "free to establish whatever relationship they please," means that the NLRA does not require an adversarial relationship, that "the problem [of adversarialness] is not with the NLRA bargaining process as such, but rather with the attitudes which one or both of the parties bring to the bargaining table."98 While true in general, the power to implement distorts the Act’s contemplated operation. The NLRA, as written, did not create conflict. However, it was the NLRA’s hands-off approach that led to the creation of the power to implement, and this does foster adversarialness.99

No law can ignore the circumstances of the parties who will be affected and governed by it.100 Testimony warned the NLRA’s drafters that, when the law allowed it, many employers had avoided collective bargaining by either establishing supine company unions or simply refusing to bargain.101 Despite this, the drafters did nothing to encourage or require the parties to modify their natural opposition to one another. As a result of this failure employers

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97. Dannin et al., supra note 89, at 5.
99. Evidence of a high degree of adversarialness is apparent in current negotiations. That adversarialness, in terms of delayed settlements, is strongly associated with employer implementation. See Cutcher-Gershenfeld, supra note 89, at 203, 208-10.
100. Legal anthropologist Sally Falk Moore observes that innovative legislation or other attempts to direct change often fail to achieve their intended purposes; and even when they succeed wholly or partially, they frequently carry with them unplanned and unexpected consequences. This is partly because new laws are thrust upon going social arrangements in which there are complexes of binding obligations already in existence. Legislation is often passed with the intention of altering the going social arrangements in specified ways. The social arrangements are often effectively stronger than the new laws. Sally Falk Moore, Law as Process: An Anthropological Approach 58 (1983).
sought legal interpretations that reestablished their unilateral power to control the workplace. 102

The courts and the Board responded to these employer desires. 103 At one time, the Board and courts scrutinized proposals and the course of bargaining to ensure that bargaining was taking place. After the mid-1980's, however, there was little scrutiny, so impasse and implementation were easier to achieve and thus more desirable than agreement. 104 This change in interpretation has actively promoted adversarialness, for an employer cannot reach the impasse that precedes the right to implement without being adversarial. 105 Indeed, impasse and implementation are strongly associated with a poor labor-management climate. 106

The employer's ability to implement upon impasse has made a complex contribution to union decline. The decision that the appropriate way to resolve impasse is to allow the employer to implement its proposal, embodies and also fosters the vision that our paramount value is that the enterprise must operate efficiently and that the employer is the only one fit to determine how this should be accomplished. This idea persists even in the face of a clear under-

102. A similar trend can be observed in the reaction of employers to the courts' creating common law rights through breaches of implied employment contracts and torts based on employer actions in violation of public policy. See Richard Edwards, Rights at Work: Employment Relations in the Post-Union Era 177-82 (1993). Employers have either required their employees to agree expressly that the relationship is at-will or to waive their statutory or other rights by submitting workplace disputes to arbitration. See id. at 178-80.


To labor's constitutionalists, however, this linkage of rights and courts was entirely alien. In their experience, the judicial branch was the worst constitutional offender. Courts, not legislatures, had developed the labor injunction and used it to usurp not only the legislative and executive powers of elected officials, but also the power of juries to determine guilt or innocence.

Id. at 967.


105. Ironically, the increase in implementation cases—a sign of increased adversarialness—comes at a time in which the need for workplace cooperation is said to have been made a high priority by employers. See, e.g., Walter J. Gershenfeld, Future Industrial Relations: A Guide for the Perplexed, in Proceedings of the Forty-Eighth Annual Meeting of the Industrial Relations Research Association 1, 3 (Paula B. Voos ed., 1996).

106. See Dannin et al., supra note 89.
standing that employers oppose unions and may want to throw off union representation, regardless of whether this promotes the interests of the enterprise or its stakeholders. The power to implement also assumes without examination that the union/employees’ proposals are destructive to the enterprise’s existence; in other words, it is premised on a belief that the workers never know what is good for them and that the employer always does.

One intriguing line of inquiry for understanding the impact and development of implementation upon impasse lies within the mandatory-permissive distinction derived from NLRB v. Wooster Division of Borg-Warner Corp. On the one hand, it embodies a view similar in important respects to that at the heart of the implementation doctrine, that is, that union/worker input must be limited because only the employer can be trusted to govern the enterprise. The right to implement is thus based on a philosophy that recreates the pre-NLRA world even though the NLRA was

107. This holds true unless it is accepted that the workplace is always more productive and better off without unions. Cf. John Godard, In Search of Managerial Industrial Relations Ideologies, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION PROCEEDINGS OF THE FORTY-EIGHTH ANNUAL MEETING, JAN. 5-7, 1996 231, 234-35 (Paula B. Voos ed., 1996). See generally Don Lee Distrib., Inc., 322 N.L.R.B. 470 (1996) (lending support to the idea that employers will attempt to defeat unions even at the cost of their own economic lives).


109. 356 U.S. 342 (1958); see GROSS, supra note 80, at 132-33.


This vision of employees can also be seen in other employment legislation such as OSHA. See 29 U.S.C. § 651 (1994). There, employees are charged with contributing to their own safety in § 5(b), but their role and thus ability to do so is highly circumscribed. See id. at § 654(b). Employees cannot be cited for violating workplace health and safety. See id. at § 658(a). Even though it is employee health and safety which is to be protected, they cannot object to the abatement required or to the terms of a settlement. See id. at § 659(b). Employees are not even permitted to consent to an OSHA inspection of their own workplaces when they fear for their own safety. See id. at § 657. That power is given to the employer, even though the employer facing a search may have motives that do not foster employee health and safety. See id. The only active role employees can play is to object to the period for abatement of a citation. See id. at § 659(c).

111. Robert Castel observes that the meaning given to work before the seventeenth century was a mixture of moral, religious and economic values. See Robert Castel, Work and Usefulness to the World, 135 INT’L LAB. REV. 615, 616 (1996).

It was all at once a punishment for original sin, a means of redemption a trial that strengthened the soul, an instrument of moralization, etc., while also being necessary for ensuring personal survival and sustaining general prosperity. . . .
enacted to end it. In this vision, conflict means that changes essential to the workplace’s survival cannot be made immediately, so any impasse must be ended as expeditiously as possible to avoid harm to the workplace.112 To the courts, the only way to achieve this goal has been to return the employer to unilateral control of workplace terms. The employer is given this control, even when it is the employer who has created the impasse, even if the employer has not attempted to compromise, without regard to the nature of the changes being sought or opposed and without any evidence that they are essential to the workplace’s survival.113

The mandatory-permissive classification contributes to the ease with which the employer can abandon collective bargaining and act unilaterally,114 because it displaces attention from whether the law’s goals are being met to a minute parsing of doctrine. The legal complexities of the mandatory-permissive distinction and its role in determining the existence of a bona fide impasse, demand that parties focus on whether each bargaining issue is mandatory or not and whether impasse has been created by it or not. This focus diverts everyone from considering whether the NLRA’s express purpose of workplace co-determination by equal parties is being met to the question of whether a legal impasse exists.

This focus on the law’s details creates a world of collective bargaining in which those who understand this law well enough to perceive that the implementation doctrine is destroying collective bargaining are forced to become so involved in avoiding, creating or determining whether a bona fide impasse exists, that they can scarcely lift their heads to see where their efforts are leading. What they fail to notice—but what is obvious—is that the law, as now interpreted, profoundly undermines the NLRA’s core functions.

This distraction, focused on elaborating traditional reasoning systems, leads to an acceptance of the status quo of interpretation.

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[1] Work was not an unconditional requirement for everyone. People on the upper rungs of the social ladder were not only exempt from work, but actually excluded from the order of workers.

Id. at 616.


113. See id.

within collective bargaining. This displaced focus results in interpreting the key legal text “in such a way as to unbalance prior understandings of it and to rationalize new and often destabilizing possibilities of meaning.”

The complexities of implementation and impasse, and of the mandatory-permissive distinction and its role in deciding whether bargaining in good faith has taken place, distract us from remembering what the ultimate point of the statute is and who and what it is supposed to protect. We never ask whether there has been anything that resembles bargaining. We never ask whether the NLRB or a court decision in any case moves us closer to or farther from achieving NLRA § 1’s goals. We never even ask the simple question—why we spend so much time determining whether impasse has been reached or even why this is the only question to ask. The act of interpretation removes us from seeing the violence this application of law wreaks upon its victims.

If this idea helps us understand why lawyers have failed to overturn the doctrine of implementation upon impasse, why then have academics in general and nonlawyers—those who study labor rela-
tions—also failed to address the issue? As for scholars, one important reason seems to be a lack of interest in studying labor law as it is practiced and applied. If correct, this raises important questions about our roles as academics in grappling with the issues of our time.

The question why industrial relations scholars have missed this issue is likely to have different answers than in the case of legal academics. For industrial relations, its bias against studying law may be founded in the field's historic origins in economics. It is easy, and the trend for industrial relations scholars to overlook or minimize the role law plays, even though the results of legal process, such as deunionization or striker replacement, do attract study. This is unfortunate. We can never understand why labor has declined and what will remedy this decline unless more than superficial attention is paid to the processes by which statutes are interpreted, used, and applied by the judiciary and by legal practitioners.

Judicial interpretations which give an employer the power to implement its final offer at impasse provide a simple, legal way to deunionize. To do so, the employer presents a proposal, unac-


120. In an IRRA-L internet discussion during October 1996 as to why United States union density had declined, only one person mentioned law and then only superficially and briefly. Most explanations advanced economic factors. Similarly, a recent book reviewing industrial relations theory observed: "[T]o limit the term industrial relations scholars to economists seems inappropriate, especially since much analysis of employment relationships has occurred through other social science disciplines—psychology, sociology, and political science, for example." Hills, supra note 119, at 4. Conspicuously missing is "law". The book's index scarcely mentions law. See Hills, supra note 119, at 157-67. The NLRA is given scant mention twice. See Hills, supra note 119, at 79, 142.

121. James Zimarowski observes:

If a collective bargaining agreement can be avoided by employers as a matter of legal construction, the very existence of the labor union as a vehicle of industrial democracy is called into question. If the labor organization has no real power to effect changes in the workplace and protect the security interests of the employees, union membership becomes a poor return. Additionally, labor unions lose their ability to control their membership. At both the union and nonunion level, the intangible concepts of loyalty, confidentiality, pride in workmanship, job satisfaction, and organizational justice are subsumed to a harsh, authoritarian, economic calculus. A return to labor militancy or a hostile, subservient workforce may therefore become commonplace. The Board's and the court's balancing of interests process is skewed in favor of the employer—not as a matter of statutory command but as a matter of judicial construction.

Zimarowski, supra note 115, at 79-80.
ceptable to the union which represents its workers. The employer then refuses to make concessions, declares impasse, announces it will implement its final offer unless the union accepts it, implements its offer and, if the workers have struck, replaces them. The union tries to stave off impasse by making concessions to demonstrate that there is no impasse. Employers have long had the power to implement at impasse, but until the mid-1980's, the Board required evidence that the employer had made a real effort to compose differences. In the mid-1980's, the Dotson Board relaxed this obligation and made it easy to reach impasse. 122

This is not the way it was supposed to have been. The NLRA as enacted did not permit implementation. It is important to understand this when faced with the current unhappiness with the NLRA, because it is not the statute that is the source of the problem so much as how the judiciary—NLRB and courts alike—have applied the statute. It is unwise to assume that a new statute would not meet the same fate at the hands of the same judicial bodies. Thus, understanding the processes of judicial interpretation of labor law is a step that cannot be omitted by anyone considering law reform. Understanding how law has evolved and thus how law has mattered is not a sterile exercise in mere abstraction and theory.

III. WHAT COULD be Done?

We need to ask new questions. We need to return the NLRA's focus and its application to its original purposes. We need to ask why, in interpreting the NLRA's requirement that employers bargain in good faith, the law has chosen to see the employer's economic pain and need while it is blind to that of the worker. Why does it place the employer's view of how the workplace should be ordered above the vision of the worker, despite the NLRA's demanding that they both be engaged in the "friendly adjustment of disputes." We need to see how implementation upon impasse shifts the legal system's attention from a larger goal of promoting democracy to a minute parsing and classifying of complex behavior, 123

122. See Ellen J. Dannin, Collective Bargaining, Impasse and the Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment, 19 U. Tol. L. Rev. 41, 55-56 & n.42 (1987); cf. HARRY WELLINGTON, LABOR AND THE LEGAL PROCESS 60-61 (1968) (stating that it may be increasingly difficult to reach impasse).

123. Cf. Cover, supra note 118, at 1613-15 (discussing Milgram's psychological studies on subjects willingness to follow authority). It would be a mistake to ascribe these ideas merely
thus removing it from any meaningful factual or juridical framework or debate about what our labor policies should be.\textsuperscript{124}

The current system of interpretation forces us to focus solely upon the event of impasse because impasse signals when new rights are created for the employer and lost by the union and employees. Impasse has become so pivotal that it is difficult to conceive of, let alone construct, an alternative way to bargain. Difficult as it is for us now, we need to recognize that this is not the only interpretation possible.\textsuperscript{125}

Despite this, imagine an iteration of the NLRA in which impasse meant no more than that the parties were in disagreement. At this point one of the parties might decide to strike or lockout. They might also seek mediation or interest arbitration. They might redouble their efforts to resolve the impasse. They would be free to choose from a wide range of tools to resolve—really resolve—the deadlock. The only focus would be on reaching the best agreement each can achieve. In this system, no new terms could come into existence unless the parties agreed to them. Failing to agree would leave them in status quo.

Such a new system would have advantages and disadvantages, even for the most objective of persons. The chief advantage of this status quo, however, is greater than its simply being an impetus to reach agreement. At least this status quo—unlike implemented terms—is based on terms the two parties had once agreed were acceptable compromises.\textsuperscript{126} Having no way out of the status quo except agreement, eventually there would be an end of the contrivances and preparations setting the scene for impasses. There would be no rewards for failing to agree and no distractions from reaching agreement as there are under our current system.

Furthermore, we need to realize how much money, effort, and energy are currently wasted as the parties try to reach or avoid impasse and the employer’s right to implement and how little is
to a way of conceptualizing implementation upon impasse and the mandatory-permissive distinction. In the authors’ years with the NLRB, she found many who were involved with Board processes who took enormous pride in their ability to memorize which subjects were mandatory or permissive. Noticing or caring how arbitrary the categories were and how destructive the system is would have diminished this accomplishment.


\textsuperscript{125} See \textit{id. at} 64-81.

\textsuperscript{126} This would not be the case in first contract situations.
gained by the parties and the greater society. The Don Lee saga illustrates this problem perfectly. Collective bargaining now takes place in two sites simultaneously. In one, the parties appear to be trading offers and agreeing or refusing to agree. In another, less visible, but more important, arena, all actions are designed to create or thwart the reaching of impasse. Careful attention must be paid to whether any proposal is both unacceptable (and therefore likely to create impasse) and a mandatory subject of bargaining (for impasse reached on a permissive subject is not bona fide grounds for implementation). These efforts drain so much energy and are so strongly directed against agreement that there is no energy left that can be used to reach a settlement.

Eliminating the prize of implementation means eliminating the need for this complexity. More time and energy could be spent in real bargaining. There would be no easy exit from collective bargaining, and bargaining would be rewarded by achieving desired changes. The employer would have the benefit of the union and employees' input and could make more considered decisions. If there was a question as to whether there had been a violation of § 8(a)(5)'s duty to bargain, it would be resolved by asking whether the NLRA's goals had been achieved. With this new/old focus, it is more likely they would be. When collective bargaining sets workplace terms, unions will have something to offer workers—a voice in the codetermination of their working conditions and a way of learning to be citizens in a democracy. This would be a return to the NLRA's original vision. As drafted, the NLRA was not supposed to result in imposing any agreement. If there was to be a change, it had to come through bargaining. Impasse and implementation permits meddling by imposing new terms where there has been no agreement.

What are the negatives of the proposed system? There is our fear that the unions might exercise a veto over necessary changes. We worry this might lead desperate employers to capitulate to terms that are not in the best interest of the workplace.

In trying to formulate alternatives, we know that there are only four ways to resolve impasses in bargaining: get the parties to agree, for example through mediation or their own means, such as a strike or lockout; let the union impose its terms; let the employer impose

127. See supra text accompanying notes 18-48.
its terms; or let a neutral third party impose the terms, as through interest arbitration. None of these but the first seems wholly desirable. Allowing one side to implement is the antithesis of bargaining. Having a third party make the hard decisions may also destroy the parties’ relationship over time, although it is possible to tinker with interest arbitration by making it difficult to trigger or by creating an arbitral process that forces the parties to make their own agreement to the extent possible.

The first and fourth alternatives certainly have drawbacks. However, they are no worse than what now exists. As the doctrine of employer implementation has taken root, it has come to shape a lawless vision of labor law. Collective bargaining law is now akin to a wink in the direction of employers. The law says: “There are hurdles to overcome, but it is possible to control the workplace unilaterally.” Even employers who have long had successful partnerships with unions may be unable to resist this powerful temptation. For employers with rocky relations, it would be tempting to overthrow the employees’ choice to unionize. Employers who reach impasse and then implement successfully need feel no sense that they are lawbreakers, for impasse and implementation is but a tool that the law sanctions.128 As this mode of operation becomes the norm—rather than collective bargaining—it progressively justifies an understanding that this is how workplace terms should be determined.

The power to implement has reimposed a pre-NLRA image of employer as rightful and sole owner of the workplace, worker as one present only upon sufferance, unionized worker as traitor, and union as enemy.129 This is our vision even when many promote labor-management cooperation and claim that workers and managers are partners. This vision prevents our perceiving that most employers are corporations, not individual entrepreneurs, and that


most corporations are managed by persons who are likely to be transients on their way to better jobs and thus not necessarily concerned about an employer’s longterm viability. We rarely think that only the employees may see their fates linked to the employer, its survival, and the longterm. These employees—real human beings, unlike the fictional corporations for which they work—are scarcely visible now, in a legal sense, even though they are the ones the NLRA was enacted to protect.

Given what the law has said and what society now collectively believes, is it any wonder workers have concluded that unions are not effective agents on their behalf and that collective bargaining has little to offer them.\(^\text{130}\) Organizing is virtually impossible when the law enacted to protect workers’ rights to organize instead protects employers’ unilateral control of the workplace.\(^\text{131}\)

**IV. Conclusion**

A statute with the longevity of the NLRA can easily be dismissed as one no longer relevant to new or unforeseen circumstances. The NLRA’s underlying perceptions about the dynamics of bargaining are, however, as true now as ever. In the case of impasses, the defects are not to be found in its philosophy. At this point it is difficult to know with certainty where the defect is and, thus, how to remedy it. If the defect stems from a failure to specify an impasse procedure, as this article argues, then it can be treated by creating one. If, on the other hand, the defect is one that develops through the process of adjudication and judicial review, a change in the statute may not be necessary or may not be effective. Judicial interpretations of other aspects of labor law have imported values which diverge radically from those expressly embodied in the laws passed by the legislature.\(^\text{132}\)

At this time, we lack adequate information to know how to rectify and prevent the tendencies that created the doctrine of implementation. The time has come when students of labor relations must focus attention on this important doctrine and begin to con-

\(^\text{130}\) See Gary N. Chaison, Union Mergers in Hard Times: The View From Five Countries (1996); Edwards, supra note 128, at 90-91.

\(^\text{131}\) See Edwards, supra note 128, at 90.

sider its origins and its impact. Until we do so, we can observe, as
did those who advocated enacting the NLRA, that "neither obedi-
ence to law nor respect for law is encouraged by holding forth a
right unaccompanied by fulfillment."\textsuperscript{133} A better assessment of
impasse and implementation could not be written. As was true sixty
years ago, we know this course provokes constant strife, not peace.

\textsuperscript{133} Hearings on S. 1958 Before the Senate Comm. on Educ. and Labor, 73d Cong.
(1934), reprinted in 2 Legislative History of the National Labor Relations Act,
1935, at 2321 (1949).