1989

NLRA Section 8(a)(3) and the Search for a National Labor Policy

Joan Baker

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation
Baker, Joan (1989) "NLRA Section 8(a)(3) and the Search for a National Labor Policy," Hofstra Labor and Employment Law Journal: Vol. 7: Iss. 1, Article 2.
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol7/iss1/2

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
I. INTRODUCTION

The focus in this Article on section 8(a)(3) of the National Labor Relations Act [hereinafter "NLRA" or "the Act"] is for the primary purpose of revealing and examining some of the underlying problems of national labor policy. The interpretation and application of the National Labor Relations Act, since its enactment by the Board and the courts, especially by the United States Supreme Court, has led to the evolution of a confused national labor policy that does not effectively serve any of the basic social, political or economic values which are sometimes claimed for it. The problems encountered in a variety of cases decided under section 8(a)(3) and their resolution by the Board and the courts, especially by the Supreme Court, illustrate a number of the important features of labor policy and the underlying values they have served and disserved.

Section 8(a)(3) is, of course, not separable from the rest of the provisions of the NLRA, nor from other labor legislation. However, it is significant because it is the most frequently litigated section of the Act, and policy decisions under it probably have been among

* Professor of Law, Cleveland State University; JD George Washington University; LLM Yale Law School. The author gratefully acknowledges the research assistance of Debora S. Lasch, Esq. and Jack Remaley.

5. Section 8(a)(1) is included in all unfair labor practice charges filed against employers, and might be considered to be the most frequently litigated for that reason. However, it
the most controversial and the most difficult to harmonize of all the NLRA provisions. The section 8(a)(3) cases provide an opportunity to explore labor policy as it actually exists in the United States, as well as an opportunity to suggest how different policies, embodied in new legislation, might better achieve the social, political and economic needs of people in the United States.6

The legislative proposals that conclude this Article suggest that sweeping changes be made to existing labor legislation by requiring fundamental clarification or redefinition of national labor policy.7 This Article suggests changes to existing rights and duties of its institutional and individual participants that would better serve shared social, political and economic values. The proposals undoubtedly are controversial. Such controversy may assist in finally moving Congress toward closely examining all the issues connected with existing labor policy in a comprehensive fashion.

Fiddling with the existing problems under the labor statutes will not cure them nor will it correct the course the Supreme Court has taken in interpreting and applying those statutes. The problems are fundamental and divisive. They are of central concern to all who work and to the businesses that employ them. Their importance extends far beyond labor-management relations or what happens in the workplace. If Congress cannot find the time to examine and redefine national labor policy, then it can and should appoint a national commission, consisting of experts in the field as well as representatives of the constituencies most affected by labor policies. The commission would report to Congress periodically in a timely fashion with conclusions and legislative proposals developed through a well defined and methodical study. Such important issues must no longer be left to the sole and unguided judgment of the courts. Nor should they be buried because they are controversial. It is time for the controversies to be aired and resolved.

was alleged as the central or sole violation in only 15.4 percent of charges filed in 1984, whereas section 8(a)(3) was implicated in 53.1 percent of employer unfair labor practice charges filed that year. See 49 NLRB ANN. REP. 175, table 2 (1988).

6. See infra text accompanying notes 122-29.

7. The Article will focus primarily on section 8(a)(3) analysis in an attempt to reveal existing de facto national labor policy under the National Labor Relations Act as amended. See infra text accompanying notes 82-121. What little exists of de jure national legislative policy is contained in the preamble to the NLRA as amended. See National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1982)).
II. SOME VALUES IMPLICATED IN NATIONAL LABOR POLICY

A. Social Values

Work is central to the physical survival of most people in any society, and has a great deal of influence on the nature of any given society. Engaging in work is one of the principal ways in which a person becomes a participant in the life of a society. Work helps both to define people as members of society and to give them the means to live within it.8 Access to a job that will provide a decent standard of living (adequate food and shelter and other benefits which are essential for well-being, such as health care, education, safe and pleasant communities with adequate public support services, and the means to have and support families) is socially essential for everyone who can learn to perform a job.9

8. See E.H. Phelps Brown, THE ECONOMICS OF LABOR 9 (1962) (suggesting that work does not necessarily provide people with social status that is satisfactory to them, nor does it necessarily provide them with adequate means to live in their societies).

9. This is a frankly moral statement and does not reflect the real world in which we all live today. The statement has a basis not only in moral philosophy, however, but also in certain international statements of policy. See, e.g., The International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 (1976) [hereinafter International Covenant]. The United States is not a party to this multilateral treaty, allegedly, “because of concerns related to the constitutional distribution of federal-state powers.” R. Bledsoe & B. Boczek, THE INTERNATIONAL LAW DICTIONARY 74 (1987).

The International Covenant is intended to effectuate, in part, policies adopted in the Universal Declaration of Human Rights. See International Covenant. The preamble to the International Covenant states that the rights enumerated in it “derive from the inherent dignity of the human person” and also that “in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.” International Covenant, at 5.

Article 11 of the International Covenant states that the parties to it shall “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” Id. at 7.

The United States did vote to adopt the Universal Declaration of Human Rights in 1948. UNITED NATIONS, 1948 Y.B. ON HUM. RTS. 467-68 (1973). Relevant provisions of this Declaration state:

Art. 22. Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Art. 23. 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supple-
In the United States there are many who lack meaningful work and, therefore, cannot participate fully in society. Some of

mented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

* * *

Art. 25. 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Id.

10. The number of reported unemployed persons in the United States at the end of the first half of 1989 was 6.5 million. Haugen, Employment Gains Slow in the First Half of 1989, 112 MONTHLY LAB. REV. 3 (1989). However, not all of the people reported as unemployed remain unemployed for long periods of time. In 1989, between 600,000 and 700,000 were out of work for 27 weeks or longer, whereas over 5,000,000 were unemployed for 14 weeks or less. See Current Labor Statistics: Employment Data, 112 MONTHLY LAB. REV. 72, table 10 (1989). These official statistics may not include some people who have not actively sought jobs or who have been unemployed for very long periods of time.

11. The inability of those who lack money, because of lack of work, to participate fully in social and cultural activities that cost money is self-evident. There are other aspects of living in a society which the unemployed poor do not enjoy that may not be so obvious, and which bear mentioning. See HOUSE SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILY, U.S. CHILDREN AND THEIR FAMILIES: CURRENT CONDITIONS AND RECENT TRENDS, 1989, H.R. Doc. No. 101st Cong., 1st Sess. (1989) [hereinafter SELECT COMMITTEE].

Throughout the 1980’s, the most profound influence on American families has been the mounting economic pressures which have diminished their resources and made more children more vulnerable. The combined effects of persistently high rates of poverty, declining earnings, underemployment and single parenting have made childhood far more precarious and less safe for millions of America's children. Because these conditions are significantly worse for Black and Hispanic families, their children grow up in disproportionately greater jeopardy.

Id.

According to the Committee, children constitute the single largest poverty group. See id. at 5. One in five children, and one in four preschool children, live in poverty. See id. “Black and Hispanic children are two-to-three times more likely to be living in poverty than are white children.” Id. Between 1970 and 1987, the median income of children in single parent families declined by 19 percent; in low income families with children, the average income declined by 14 percent. See id. This compared with an increase for the highest income families of 19 percent. See id. In 1988, 20 percent of all children had no public or private health insurance. Id. at XI. The Committee concluded its introductory statement by stating:

Statistics may appear cold and impersonal, but they depict a reality which calls for action. The numbers presented in this report and its predecessors tell us that not just for one or two years, but day after day in this decade, children continue to be assaulted by volatile economic and social forces. The persistent problems of poverty and poor health are compounded by alarming rises in homelessness, youth violence and the emergence of drug addiction and AIDS among babies.

Id. In a brief Summary of the Report, prepared for distribution prior to publication, the Committee stated that “there have been continued disparities along racial and income related lines in child health indicators such as life expectancy, infant mortality, low birth-weight, homicide,
those people lack the education or skills essential to perform the work that is available. Others simply cannot find work or have given up looking for it. Perhaps a certain amount of this social failure may be inevitable at any given time in a modern industrial state, but the fear is that we now may have in the United States a growing permanent underclass of the unemployed and chronically unemployable.

Even large numbers of those who work do not earn enough to provide adequately for their families. Growing numbers of single

and overall health status.” Id. at 8.

The Chairman of the Committee, Rep. George Miller (D-Calif.) stated in connection with the Report that “[w]e’re launching millions of children on courses of failure” because of the increase in the numbers of children living below the poverty level. The Plain Dealer (Cleveland), Oct. 2, 1989, at A-2, col. 1.

The latest Census Bureau reports indicate that there are currently 31.9 million people living below the poverty level in the United States, or 13.1 percent of the population. See The Plain Dealer (Cleveland), Oct. 19, 1989, at A-2, col. 3. Commenting on these figures, Robert Greenstein of the private Center on Budget and Policy Priorities, claimed that the poorest fifth of the population received 4.6 percent of total national family income in 1988, while the richest fifth received 44 percent, the highest level ever recorded. Id.

In a further comment on the same Census statistics, it was reported that the President’s Office of Management and Budget may decide to create a new definition of “poor” that would make the statistics look better by lifting 3.6 million Americans to just above the poverty line. See The Plain Dealer (Cleveland), Oct. 29, 1989, at 1, col. 1. This would be accomplished by dropping the poverty threshold for a family of four from $11,600 to $10,997. Id. If this were done, many families “could lose eligibility for Medicaid, food stamps, free and reduced school lunches and breakfasts, the Special Supplemental Food Program for Women, Infants and Children (WIC), Head Start and others,” according to Brazaitis. Id. The income of the average poor family fell $4,851 below the poverty line last year. Id. Brazaitis stated that, “U.S. bookkeepers may shove poor out of sight.” Id.


13. See Current Labor Statistics: Employment Data, 112 MONTHLY LAB. REV. 100, table 46 (1989). The latest reported U.S. unemployment rate is 5.5 percent of the civilian working-age population. Id. The reports may not show those who are no longer receiving unemployment compensation or who are no longer seeking work. Id. Some sense of the gap may be indicated by the discrepancy in the latest participation rate in the labor force as a percentage of the civilian working-age population, 65.9 percent, as compared to employment as a percentage of the civilian working-age population, 62.3 percent. Id. Another possible indicator is that of the 557,000 work-age persons who reported, as of March 1988, that they were unemployed for the previous year because they had not been able to find jobs, 414,000, or 74 percent, were living below the poverty level. See U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, table 21 Feb. 1989 [hereinafter BUREAU OF CENSUS]


parents, mostly women, are below the poverty level, which means that their children also live in poverty, destined to grow up in circumstances that are bound to rob them of their dignity and opportunity to become fully participating members of society.\textsuperscript{16}

Although the causes of those conditions are uncertain, most people would agree that the existence of large amounts of poverty and its attendant evils are not compatible with a good society, or even morally tolerable within it. Providing public support for individuals who cannot support themselves or their families through work is an increasingly limited solution because of our nation's declining ability to make these support payments.

The country was in an analogous situation during the 1930s, when the Wagner Act was introduced.\textsuperscript{17} When Senator Wagner presented the first draft of the proposed legislation, he addressed the problems of economic stagnation and unemployment and made it clear that curing those problems was a prime motivating reason for the legislation.\textsuperscript{18} The program he espoused, which remains in at least vestigial form in the preamble of the National Labor Relations Act,\textsuperscript{19} was to give workers greater economic power by giving them

\begin{itemize}
  \item \textsuperscript{16} According to the U.S. Department of Commerce, 3,636,000 families with women as head of household were below the poverty level; 3,296,000 of these families had children under 18 years of age, while 1,814,000 had children under 6 years of age. \textit{Id.}
  \item \textsuperscript{17} The original bill, S. 2926, was introduced by Senator Wagner on March 1, 1934. \textit{1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 15 (1985).} In introducing the bill, Senator Wagner indicated that his intention was to "clarify and fortify" certain provisions of the National Industrial Recovery Act, \textit{Pub. L. No. 67, 73rd Cong., 2nd Sess. 3443 (1934).} \textit{Id.} Moreover, it was based upon his experience as chairman of the National Labor Board established by that earlier Act. \textit{Id.} at 15-18. The legislation was therefore an extension of the existing federal government effort to correct the causes of recurrent economic depressions, including the "great" depression still affecting the nation in 1934. \textit{Id.} at 18-20.
  \item \textsuperscript{18} \textit{See id.} at 1400. Senator Wagner's comments on the legislation made in committee hearings and on the floor of the Senate, as well as the published comments he made elsewhere that were later inserted into hearing records or the Congressional Record are all recorded. \textit{Id.} The examples of his concern for the national economy are too numerous to cite in full. \textit{See, e.g., S. REP. No. 1958, 73rd Cong., 2nd Sess. 44 (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1410 (1985) (discussing the economic background of the bill).}
  \item \textsuperscript{19} The relevant language is currently in section 1 of the Act as amended:
  \begin{quote}
  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 ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing 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.
  \end{quote}
\end{itemize}
the political power as well as the means to collectively bargain with their employers over wages, hours, and other terms and conditions of employment.20 His concern, and the concern of those who shared his views, was not simply with organizational rights, but with the employees' effective use of those rights to increase their wages, and thereby to increase their purchasing power. The idea, which sounds economically unsophisticated today, is that if American workers had the money to buy more goods, an increased demand would lead to an increase in production and employment.21 Everyone, in his view, would benefit from the economic revitalization that would result.22

Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.


20. See 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 15 (1985). When Senator Wagner introduced the original version of the bill, S. 2926, he stated that:

The keynote of the recovery program is organization and cooperation. Employers are allowed to unite in trade associations in order to pool their information and experience and make a concerted drive upon the problems of modern industrialism. If properly directed, this united strength will result in unalloyed good to the Nation. But it is fraught with great danger to workers and consumers if it is not counterbalanced by the equal organization and equal bargaining power of employees. Such equality is the central need of the economic world today. It is necessary to insure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions.


21. Senator Wagner, in introducing his original bill, stated that the recovery program "has achieved remarkable results in increasing employment, swelling the volume of industrial activity, and promoting confidence." Id. at 17. He added:

It has made relatively slow progress in affecting that fair distribution of purchasing power upon which permanent prosperity must rest. Today, despite the minimum-wage provisions of the codes, the purchasing power of the individual employee working full time is less than it was during March of last year. This situation cannot be remedied by new codes or by general exhortations. It can be remedied only when there is genuine cooperation between employers and employees, on a basis of equal bargaining power. The only road to this goal is the free and unhampered development of real employee organizations and their complete recognition. Such development was promised by the Recovery Act. It should be guaranteed by enactment of the new legislation which is being proposed today.

Id.

22. Id.
By the time Taft-Hartley Act amendments were enacted, national concern was focused more intently on economically destructive strikes and the increasingly unacceptable practices of some unions, including, but not limited to, the closed shop. There is no indication that Congress considered the potential social value of national labor policy. Attention was limited to the labor situation as it then existed, but the broader questions concerning the need for meaningful work opportunities for all the people and the need for adequate levels of remuneration for that work, were not addressed in the legislation.

The question of adequate pay scales for the average working person to maintain a socially acceptable standard of living does not just affect the working and non-working poor. As the cost of living has increased in the United States over the last several decades, the ability of many wage earners to support families has been severely eroded. Now many working people cannot afford to buy houses in the communities in which they live and work. This means that it has become financially necessary for increasing numbers of women of child-bearing and child-rearing age to work. In many respects this change has served the interest of greater equality for women as

24. The “closed shop” under the original National Labor Relations Act was the practice whereby a union representing a majority of employees in the bargaining unit could lawfully agree with the employer that the employer would hire only union members to fill jobs in the bargaining unit. See R. Gorman, Basic Text on Labor Law 640 (1976); see also 2 NLRB, Legislative History of The National Labor Relations Act 1935, at 3275 (1985).
25. See Current Labor Statistics: Employment Data, 112 MONTHLY LAB. REV. 86, table 30 (1989). In terms of 1967 dollars, the Consumer Price Index for all items increased from 100 to 371.7 by June 1989. Id. The purchasing power of the June 1989 dollar was only 26.9 cents in 1967 dollars, and 80.6 cents in 1982 dollars. Id.
26. Homeowners’ costs increased 36.5 percent between December 1982 and June 1989. See id. However, the Hourly Earnings Index for all production or nonsupervisory workers in terms of 1977 dollars showed a slight decline between 1982 and 1989. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATS., table 1, Current Wage Developments, Feb. 1989. The Select Committee on Children, Youth and Families, in summarizing its as yet unpublished report, states that the proportion of children living in family-owned housing has dropped from 71 percent in 1981 to 64 percent in 1988, while the proportion in rental housing increased from 29 percent to 36 percent. See SELECT COMMITTEE, supra note 11. In 1988 3.7 million children, 6 percent of all children, lived in public housing. Id. The Committee estimates that between 35,000 to 100,000 children are homeless on any given night. Id.
27. According to the Select Committee, the number of children under 18 with working mothers increased from 53 percent in 1980 to 60 percent in 1988. See SELECT COMMITTEE, supra note 11. The Committee states: “Women with infants make up the fastest growing group in the labor force.” Id. The Committee also claims that while median family income increased slightly since 1985 it is still below 1970 levels in terms of real purchasing power. Id. at IX-X.

http://scholarlycommons.law.hofstra.edu/hlelj/vol7/iss1/2
it breaks down some old social barriers, but the implications for families with children have not been equally positive. When both parents work, adequate substitute care for children becomes costly. Even with two wage earners, many families are unable to afford that care, and the society as a whole suffers when children’s needs are neglected. Materialistically, the standard of living for working people with two incomes may appear to have improved, but the social cost may be higher than realized. A realistic national labor policy must confront the issues of how the resultant problems should be met, and how the financial costs of adequate child care for working families can best be paid.

Today’s social problems are, if anything, more complex than those of 1935 and 1947, but they are equally inseparable from political and economic considerations. Today we are, as a nation, committed to primary human values which were not of much concern to the nation as a whole in 1935 and 1947. This includes the social realization of the need for equality among all races and between the sexes, while protecting individual freedoms. At the same time, the society is becoming increasingly polarized, both socially and economically, and much of that class-based polarization finds minority groups still in severely disadvantaged positions. Work opportunities, education

28. See, e.g., id. This Report states that births to unmarried women have risen, while those to married women have declined. Id. “Among blacks, more than 60 percent of births now occur outside of marriage, as do about a third of Hispanic births and a sixth of white births. Id. In 1988, 4.3 million children were being raised by unmarried parents, double the number in 1980.” Id. at 4. The Committee points out that 83 percent of persons in families headed by never-married women received government assistance in the period 1983-1986, compared to 11 percent in married families. Id. The number of children in foster care systems has been increasing during the 1980s. Id. at 4-5. The number of child neglect and abuse reports doubled during the 1980s. There were 2.2 million reports of child neglect or abuse in 1987. Id. at 9.


30. See supra note 11 and accompanying text. Robert Greenstein of the Center on Budget and Policy Priorities reports that the poorest fifth (20 percent) of the American population received only 4.6 percent of total national family income in 1988, which is the lowest percentage since 1954, while the richest fifth received 44 percent, the highest percentage ever recorded. The Plain Dealer, (Cleveland) Oct. 19, 1989, at A2, col. 3. “Number of poor remains 32 million.” Id. In 1988 poverty rates were 10.1 percent for whites, 31.6 percent for Blacks, and 26.8 percent for Hispanics. Id. The impact of economic polarization on Black
for the knowledge and skills essential to work effectively in today's more sophisticated industries, opportunities for advancement, and the means to secure wages that will provide a decent standard of living, are all basic elements of the complex social problems confronting us. In addition, as workers become more skilled and have more education, they seek jobs that satisfy their desire to contribute more than physical labor in the workplace. These matters need to

families is illustrated by 1987/88 statistics on poverty. Id. Black families were only 11.3 percent of the total families in the U.S. in the year up to March 1988, but poor Black families constituted 32 percent of the total poor families in the United States. Id. Of the total number of Black families in the United States, 30 percent were below the poverty level that year, compared to 8 percent of the total white families. Id. A significantly higher percentage of Black below-poverty-level families were headed by unemployed householders (61 percent) than were white families (49 percent). Id.; see also BUREAU OF CENSUS, supra note 13, at table 20 (providing extrapolation of percentages in tables).

31. See supra note 9 and accompanying text. As President Woodrow Wilson, in his first inaugural address, so eloquently proclaimed:

We have been proud of our industrial achievements, but we have not hitherto stopped thoughtfully enough to count the human cost, the cost of lives snuffed out, of energies overtaxed and broken, the fearful physical and spiritual cost to the men and women and children upon whom the dead weight and burden of it all has fallen pitilessly the years through. The groans and agony of it all had not yet reached our ears, the solemn, moving undertone of our life, coming up out of the mines and factories, and out of every home where the struggle had its intimate and familiar seat. With the great Government went many deep secret things which we too long delayed to look into and scrutinize with candid, fearless eyes. The great Government we loved has too often been made use of for private and selfish purposes, and those who used it had forgotten the people. . . .

Nor have we studied and perfected the means by which government may be put at the service of humanity, in safeguarding the health of the Nation, the health of its men and its women and its children, as well as their rights in the struggle for existence. This is no sentimental duty. The firm basis of government is justice, not pity. These are matters of justice. There can be no equality of opportunity, the first essential of justice in the body politic, if men and women and children be not shielded in their lives, their very vitality, from the consequences of great industrial and social processes which they cannot alter, control, or singly cope with. Society must see to it that it does not itself crush or weaken or damage its own constituent parts. The first duty of law is to keep sound the society it serves. Sanitary laws, pure food laws, and laws determining conditions of labor which individuals are powerless to determine for themselves are intimate parts of the very business of justice and legal efficiency.


32. This may be one reason for the current interest in employee workplace participation schemes which, to varying degrees, allow workers at various levels to share in the ongoing process of plant and office decision-making. See generally S. SCHLOSSBERG & S. FETTER, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION 104 (1986); St. Antoine, The Legal and Economic Implications of Union-Management Cooperation: The Case of GM and the UAW, PROC. OF N.Y.U. FORTY-FIRST ANNUAL NAT'L CONF. ON LAB. at 8-1 (1988); C. BALFOUR, PARTICIPATION IN INDUSTRY (1973). In any event, modern technology is
be examined to formulate a meaningful national labor policy.

B. Political Values

The notion of industrial democracy\(^3\) is one political value that can be served by meaningful collective bargaining resulting in a binding contractual arrangement between employees and employers.\(^4\) Employee workplace and management participation schemes of all sorts are other forms of industrial democracy. Both of these schemes require recognition of some level of employee rights in the employment relationship and give the employees at least a small voice in the workplace. However, it is important to emphasize that even such minimal rights which are represented by this "voice" cannot be taken for granted in the United States.

Except for contractual relations, rights of employees to have jobs and to have rights in those jobs have never been acknowledged as worthy of basic common law or constitutional protection in the United States.\(^5\) The opposite is true. The fiction attributed to Horace Wood in the late 19th century is that in the absence of contract or statutory restriction, all employment is "at will" and may be terminated without cause by either the employer or employee.\(^6\) This is still the fundamental law of employment in the United States. Clearly the interests served by this doctrine are predominantly those changing the workplace and is requiring greater skills and knowledge on the part of employees. See supra note 12 and accompanying text.


34. Under our current law, the signatories to a collective bargaining agreement are the union, representing the employees, and the employer. Unions may maintain actions on behalf of employees under the agreement. Smith v. Evening News Assoc., 371 U.S. 195 (1962). Individual employees may, however, maintain suits against their employer for breach of the collective bargaining agreement. See Delcostello v. Teamsters, 462 U.S. 151 (1983).

35. See The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872). In The Slaughterhouse Cases, the Supreme Court had an opportunity to extend constitutional protection to some employment rights through the Privileges and Immunities Clause of the Fourteenth Amendment of the U.S. Constitution, but instead gave that clause a very restricted meaning. Id. Presumably Congress still could legislate such rights under the Privileges and Immunities Clause, by exercising its power under section 5 of the Fourteenth Amendment. Id.

36. See Bierman & Youngblood, Employment-at-Will and the South Carolina Experiment, 7 INDUS. REL. L.J. 28, 29 (1984). The authors contend that the concept of employment-at-will made its first appearance in Wood's treatise on master and servant law in 1877, and that his statement inspired the courts to reject the previously followed English rule that in the absence of agreement, a term of employment was presumed to be for a period of one year. Id.; see also Feinman, The Development of the Employment at Will Rule, 20 AM. J. LEGAL HIST. 118 (1976).
of the employer.

Some, but probably relatively few, employers voluntarily recognize and honor the rights of employees,\(^3\) notwithstanding the employment at will doctrine, because they consider industrial democracy as a political value deserving of encouragement and protection. There is no law securing to employees the right to even have a voice in the workplace or requiring employers to enter into collective bargaining agreements with their employees.\(^3\) Even if employers consent to alter the employment rights of employees contractually, or if they consent to worker participation schemes, it usually is easy for employers to terminate such arrangements.\(^3\) Except for the most minimal protection, most of it statutory, the common law of employment has not advanced democratic values in the workplace.

Even in industries with long histories of constructive collective bargaining relations between employers and unions, industrial democracy is threatened because of a number of Supreme Court decisions. The Court decisions provided employers with tempting opportunities to destroy or at least subvert the relationship if doing so might be advantageous.\(^4\) The right to strike was the one weapon unions used to have to secure agreements favorable to employees. Today, as a result of the court decisions, the strike has been rendered nearly as useless as a cap pistol in an atomic war.\(^4\)

---

\(^3\) For a recent example of enlightened treatment of employees by a private employer, see Berman, "Goat Cheese, Anyone?", FORBES 220 (Sept. 18, 1989) (regarding the former owners of the Coach Bag Company).

\(^4\) NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937). This is one of the many anomalies of the National Labor Relations Act, that it requires both parties to bargain in good faith (sections 8(a)(3) and 8(d)) but does not require them to reach an agreement on any terms. Id.

37. It is, of course, possible for an employer to enter into a contract of indefinite duration with an employee. See Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (Ct. App. 1981). But some courts have construed such agreements as being terminable at will. See Woolley v. Hoffman-La Roche, 99 N.J. 284, 491 A.2d 1257, modified, 101 N.J. 10, 499 A.2d 515 (1985). See generally M. ROTSTEIN, A. KNAPP & L. LIEBMAN, EMPLOYMENT LAW, ch. 11 (1987) (noting that the right to continuous employment, unless the employer has just cause for termination, is granted to university professors under most tenure agreements).

39. Under the NLRB's contract bar rules, a collective bargaining agreement will bar a new union certification for a maximum of three years. See A. COX, D. BOK & R. GORMAN, LABOR LAW 273 (10th ed. 1986). There is no statutory or common law protection for worker participation schemes in the United States. However, several European nations have mandated them legislatively and the European Economic Community has encouraged all member states to adopt such plans. See DEPARTMENT OF TRADE OF GREAT BRITAIN: REPORT OF THE COMMITTEE OF INQUIRY ON INDUSTRIAL DEMOCRACY 24, 25 (1977).


41. See, e.g., id.; see also American Ship Bldg. v. NLRB, 380 U.S. 300 (1965); NLRB
the security of the job protections contained in many of those agreements has been virtually nullified recently by the Supreme Court. All that remains of "industrial democracy" in collective bargaining arrangements is what the all-powerful employer consents to. That is sham democracy at best. If we have secured a measure of industrial peace as its result, that too will pass as soon as the illusion of employee rights and powers wears off.

The one aspect of industrial democracy that seems to be preserved, perhaps because it is too clearly written in the NLRA for easy dismissal by the courts, is the right of the employees to engage in or refrain from engaging in union or other organizational activities for mutual aid or protection. However, even that fundamental associational right is problematic in the workplace. Employees who try to organize against the wishes of their employers find themselves and their jobs at risk from employer retaliatory action. They have some statutory remedies, but those are expensive and time-consuming and don't begin to compensate for the trouble and pain (or cost to the public) of trying to put this form of industrial democracy into action in a hostile environment. For unions to organize employees is a difficult process, for unless they can prove to the satisfaction of the Board or a court that they have no other alternative means to


42. See Trans World Airlines, 109 S. Ct. 1225. Although the Trans World Airlines case was decided under the Railway Labor Act, the Supreme Court relied heavily in its analysis on decisions under the National Labor Relations Act. See id.


44. Section 8(a)(1) of the Act makes it "an unfair labor practice for an employer to interfere, restrain or coerce the employees in the exercise of their rights" under section 7. See 29 U.S.C. § 158(a)(1) (1982). Furthermore, section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees in order to discourage or encourage union membership. See 29 U.S.C. § 158(a)(3) (1982). Employees who are discharged in violation of either section may be reinstated with back pay if the NLRB finds that an unfair labor practice was committed by the employer. Id. The NLRB in that case will issue a cease and desist order against the employer. See 29 U.S.C. § 160(c) (1982). If the employer does not voluntarily comply with the order, the NLRB must seek enforcement in one of the United States Courts of Appeals. 29 U.S.C. § 160(e) (1982). The employer may also seek such review. 29 U.S.C. § 160(f) (1982).

45. The average time from the filing of a charge through the final decision of the National Labor Relations Board itself, was 660 days in 1984. See 49 NLRB ANN. REP., table 23, at 234 (1984). It is not possible to accurately estimate the time or cost of completing an appeal of a case in one of the U.S. Courts of Appeals, but a further two years would not seem unreasonable if the Court decided to grant full review on the merits instead of summarily disposing of the case. There were 286 cases reviewed by the various Courts of Appeals in 1984, of which 187 affirmed Board orders in full. 49 NLRB ANN. REP., table 19A, at 230 (1984). A further four cases were decided by the U.S. Supreme Court. Id.

reach the employees with their message, they can be legally denied entry to the employer's property to distribute literature and authorization cards to the employees.\textsuperscript{47}

Indeed the value of democracy in the workplace has active opposition in the form of other conflicting values that represent employers' interests in the employment relationship almost exclusively. Chief among these other values is the protection of private property rights of owners of businesses against all but the most limited intrusion mandated by clear statutory or common law directives. Thus, the law of owners' private real property rights has been interpreted by the U.S. Supreme Court to mean, as suggested above, that employees have a right to be on their employer's premise, (as "invites"?), during non-working times and in non-working areas, to discuss and per chance to encourage representation by labor unions in negotiations with their employer.\textsuperscript{48} However, the unions, which cannot legally represent the employees of the employer without securing authorization cards from a large percentage of the employees except in the rarest circumstances,\textsuperscript{49} cannot send representatives onto the employer's property, not even a parking lot, to provide the employees with the necessary information and encouragement to seek representation.\textsuperscript{50} Thus, the organizational requisites to the majority representation that is an essential condition precedent to collective bargaining under our current law is severely limited by common law concepts of owners' real property rights.\textsuperscript{51} Organization may be a "right" and a form of industrial democracy, but it is not one to be taken for granted.\textsuperscript{52} Nor is it, by itself, of any significant practical

\begin{footnotes}
\item[48.] Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
\item[49.] NLRB Statements of Procedure, reprinted as amended in 29 C.F.R. § 101 (1987). Section 101.18(c) provides:
\begin{quote}
[It is] the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.
\end{quote}
\item[50.] Babcock & Wilcox Co., 351 U.S. 105.
\item[51.] See generally H. TIFFANY, REAL PROPERTY 392 (1940).
\item[52.] See Alleyne, Commentary, in AMERICAN LABOR LAW 114 (Morris, ed. 1987); Bakaly, A Response to Murphy's Law, in AMERICAN LABOR POLICY 78 (Morris, ed. 1987); Benn, A Voice From the Trenches, in AMERICAN LABOR POLICY 95 (Morris, ed. 1987); Irving, The Board's Representation Process' Another View, in AMERICAN LABOR POLICY 109 (Morris, ed. 1987); Murphy, Establishment and Disestablishment of Union Representation, in AMERICAN LABOR POLICY 61 (Morris, ed. 1987); Craver, The Declining Status of the National Labor Relations Act, PROC. OF N.Y.U. FORTY-FIRST ANNUAL NAT'L CONF. ON LAB. 3-1 (1988); Summers, Past Premises, Present Failures, and Future Needs in Labor Legislation, 31 BUFFALO L. REV. 9, 19-23 (1982); Weiler, Promises to Keep: Securing Workers' Rights to
\end{footnotes}
value.

Other forms of private property rights, such as the rights of owners, or their managerial representatives, to make decisions about running the business even though those decisions impact on the employees' interests, pose increasingly impressive obstacles to the realization of industrial democracy.\textsuperscript{53}

To a limited extent provided by statutory guarantees, employees have rights that theoretically intrude on ownership and managerial rights, for example, the right to be free from discrimination for the purpose of encouraging or discouraging union activity,\textsuperscript{54} or the right to bargain with the employer about certain decisions or certain effects of decisions, taken by the employer, which affect the employees.\textsuperscript{55} But as a result of a long series of Supreme Court decisions, which will be discussed in a later section of this Article,\textsuperscript{56} those employee statutory rights have been severely curtailed in the interest of employers' rights to control their businesses.\textsuperscript{57}

Another employer property right inheres in the fundamental premise of business (especially corporate) law as it has developed as a conceptually distinct body of legal doctrine. The premise is that it is the primary function of a business to make a profit for its owners.\textsuperscript{58} In the case of corporations, the managers who actually run the

---


\textsuperscript{56} \textit{See infra} text accompanying note 82.

\textsuperscript{57} As one example, employees' statutorily protected right to strike (NLRA section 13) has been at the very least made less meaningful as an economic weapon by Supreme Court decisions granting the employer the right to lockout employees who have not struck. \textit{See infra} note 113 and accompanying text.

\textsuperscript{58} \textit{Principles of Corporate Governance} (Tent. Draft No. 2, 1984), \textit{reprinted in} Perkins, \textit{The ALI Corporate Governance Project in Midstream}, 41 Bus. Law. 1195, 1229 (1986). Section 2.01 of the Draft provides:

A business corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain, except that, whether or not corporate profit and shareholder gain are thereby enhanced, the corporation, in the conduct of its business

(a) is obliged, to the same extent as a natural person, to act within the boundaries set by law,

(b) may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business, and

---
business are held accountable to the owners for their actions at least partially on the basis of that fundamental premise.\textsuperscript{59} This has led to the situation, familiar to all law students, that for purposes of business law policy, labor is simply a factor of the cost of doing business. Good business policy requires keeping that cost to the lowest amount practicable under the circumstances in order to maximize returns to the owners.\textsuperscript{60} Although this premise may have some analytical utility in measuring corporate performance and the adherence of managers to sensible business practices, it does not warrant ranking it with other, more humanely oriented social policies.\textsuperscript{61} The risk of legaliz-

---

(c) may devote a reasonable amount of resources to public welfare, humanitar-
ian, educational, and philanthropic purposes.

\textit{Id.}

The latitude for the generosity suggested by subsection (c) is usually reserved in practice for charitable contributions and/or compensation for managerial employees and directors who have performed services for the corporation under the business judgment rule, and is limited by the demands of reasonableness. \textit{See, e.g.}, Hutton \textit{v.} West Cork Railway, 23 Ch. D. 654, 673 (1883) (wherein Justice Brown stated that "[t]he law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.").


A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

\textit{Id.} at 507, 170 N.W. at 684.

60. \textit{See} E.H. PHELPS BROWN, supra note 8, at 49, stating:

\textit{Economists . . . have sometimes tried to trace all output back to ultimate factors of production that make, but have not themselves been made. They have found these factors in labor, waiting, and land, or the gifts of nature. It is hard, however, to imagine what labor in that unshaped shape could be like. Every man is what he is, and works as he does, through nurture as well as nature: what sort of producer he will be depends on what sort of product he is.}


61. The New Deal policies of President Franklin Roosevelt that led to the enactment of the original National Labor Relations Act were inspired, at least in part, by such policies. In his first inaugural address, President Roosevelt stated:

\textit{The money changers have fled from their high seats in the temple of our civiliza-
\textit{tion.} We may now restore that temple to the ancient truths. The measure of the restoration lies in the extent to which we apply social values more noble than mere monetary profit.}

\textit{Happiness lies not in the mere possession of money, it lies in the joy of achieve-
\textit{ment, in the thrill of creative effort. The joy and moral stimulation of work no
\textit{longer must be forgotten in the mad chase of evanescent profits. These dark days
will be worth all they cost us if they teach us that our true destiny is not to be
ministered unto but to minister to ourselves and to our fellow men.}
ing regulation of labor law is that the familiar policies of the law of business will begin to take on a life of their own, and come to appear as deserving of special protection. Thus, unless there is some prospect of greater production and greater profits flowing from instituting programs that serve social and democratic political values, the tendency of business managers to resist programs that encourage democratic participation by employees or that grant increased benefits to them will persist. Such resistance, unless clearly unlawful, will often receive the sympathy of judges if for no other reason than because the judges also were schooled so extensively in business law in law school. Thus, employment values other than profit-making must be clearly spelled out if they are to be respected by employers and by the courts.

The system of private property rights, as it has been interpreted and applied to labor relations issues since the Wagner Act was enacted, occasionally has been endowed with an importance equal to

Franklin Roosevelt's Inaugural Address, March 4, 1933, reprinted in U.S. GOVERNMENT PRINTING OFFICE, INAUGURAL ADDRESSES OF PRESIDENTS OF THE UNITED STATES 236 (1965). Four years later he commented:

Our progress out of the depression is obvious. But that is not all that you and I mean by the new order of things. Our pledge was not merely to do a patchwork job with secondhand materials. By using the new materials of social justice we have undertaken to erect on the old foundations a more enduring structure for the better use of future generations.

In that purpose we have been helped by achievements of mind and spirit. Old truths have been relearned; untruths have been unlearned. We have always known that heedless self-interest was bad morals; we know now that it is bad economics. Out of the collapse of a prosperity whose builders boasted their practicality has come the conviction that in the long run economic morality pays. We are beginning to wipe out the line that divides the practical from the ideal; and in so doing we are fashioning an instrument of unimagined power for the establishment of a morally better world.

This new understanding undermines the old admiration of worldly success as such. We are beginning to abandon our tolerance of the abuse of power by those who betray for profit the elementary decencies of life.

Franklin Roosevelt's, Second Inaugural Address, January 20, 1937, reprinted in U.S. GOVERNMENT PRINTING OFFICE, INAUGURAL ADDRESSES PRESIDENTS OF THE UNITED STATES 240 (1965); see also D. ZISKIND, CONCERNING HUMAN ASPIRATION, ESSAYS IN COMPARATIVE LABOR LAW 156-58 (1985).

62. See generally P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (1969) (analyzing the general problems of private property concepts as applied to the actual functioning of business, and of the realities of corporate social changes).

63. For example, some types of workplace employee cooperation programs have proved more acceptable to some employers in recent years, where they have resulted in improved quality of production and/or lowered costs. Such programs may also improve the quality of working life for the employees in addition to increasing efficiency. See Analysis: Evaluation of Cooperative Practices Creates Challenges for Union Leaders, 132 Lab. Rel. Rep. (BNA) 9 (Sept. 4, 1989); St. Antoine, supra note 32, at VIII(a).
some constitutional rights. The United States Constitution does not protect property rights as fundamental values, but indeed extends only limited protections to them through the provisions that governmental shall not interfere with them without due process of law, and that there shall be no taking of private property for public use without just compensation. At most, the fundamental property values that have been cast in opposition to employee interests by the courts are fundamental only because the courts say they are. What this has meant in practice is that the ultimate control over prevalent values in the employment relation is given to those who own, or represent owners, of the real or personal property utilized in business. The vast majority of those individuals whose work is essential to the operations of business lack meaningful democratic influence over the values that prevail in the system because they lack the power that has

64. In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), the Supreme Court stated that for an employer to entirely close a business in order to avoid unionization was not an unfair labor practice under section 8(a)(3) of the National Labor Relations Act, even though prompted by anti-union motivation. The Court distinguished a partial closing designed to discourage union organization of employees in other parts of the employer's business empire, which would be an unfair labor practice against the employees of those other related businesses whose union activities would be "chilled," from a total closing, which would deprive all of the employees of the closed plant their jobs permanently, and would not, in the ruling of the Court, be an unfair labor practice. Id. The Court agreed with the Court of Appeals that a total closing would not be an unfair labor practice because the employer has the right to go out of business completely for any reason whatever, even a reason condemned by the Act. Id. However, this decision is well criticized. See, e.g., Summers, Labor Law In The Supreme Court: 1964 Term, 75 YALE L.J. 59, 63 (1965).

Another example of employer property rights taking precedence over union organizational rights is found in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). Here, however, the Court conceded that there would be a modicum of room for balancing this property right against the employees' rights under section 7 of the National Labor Relations Act in the event that the union found access to the employees impossibly difficult by any other means than visits to the employer's property. Id. Moreover, the NLRB has ordered access in a few instances as remedies for aggravated employer unfair labor practices. See A. Cox, D. Box & R. Gorman, supra note 39. However, the cases allowing the unions access under such circumstances are extremely rare in practice.


66. See, e.g., Textile Workers Union, 380 U.S. 263. In Darlington the Court held that not even proof of an employer's anti-union animus could block the employer's right to close his entire business rather than deal with the union, even though this meant the loss of jobs to all of the employees in the plant. Id. The case was remanded to the Board for determination of the issue whether the employer had in fact closed its entire business, or had used the shutdown of the Darlington plant as a means of "chilling unionism" among other employees of the employer in other plants. Id. at 277. Fortunately for the Darlington employees, the Board found on remand that the plant had been closed with the purpose of deterring unionism at other establishments of the employer, and this decision was sustained by the U.S. Court of Appeals for the Fourth Circuit. See Darlington Mfg. Co. v. NLRB, 397 F.2d 760 (4th Cir. 1968), cert. den., 393 U.S. 1023 (1969); Summers, supra note 64 (providing an excellent — if not scathing — analysis of the Supreme Court's opinion).
been conferred by law on the owners of property.\textsuperscript{67}

Even the economic power the employees once had, to walk away from their jobs en masse, thereby shutting down the employer's operations, has been emasculated to the point of disappearance by a series of Supreme Court decisions. Employers now may: (1) hire temporary or permanent replacement for strikers and continue operating their businesses;\textsuperscript{68} (2) offer substantial inducements to strikebreakers, even when this means taking away some seniority-related benefits formerly possessed by the striking employees;\textsuperscript{69} (3) lock out employees to gain economic advantages over the union;\textsuperscript{70} and (4) institute unilateral changes in employment terms and conditions when the terms have been offered to the union in bargaining and impasse has been reached over those terms.\textsuperscript{71} Without this collective economic power, employees are increasingly powerless to insist on workplace democracy.

\textbf{C. Economic Values}

It is tempting to postulate that economic values do not exist in isolation from social and political values of the society. Perhaps it is
possible to conclude that economic values must be made subordinate to social and political needs. But that is not the same as concluding that in drafting any new national labor policy, one can ignore the independent importance of economic values in a global economy as complex and interdependent as ours has become since the Wagner Act was written.  

American working people, at least in major industries, are now in serious competition with overseas workers for jobs to produce products that the American public buys. Another factor in the economic picture has been the failure of major American industries, such as steel, to invest in the modern technology needed to remain competitive with other technologically advanced nations.

The web of problems besetting us economically, including foreign indebtedness, insolvency of financial institutions, bankruptcy of major businesses and farms, a national debt that has no limit in sight (and no sign of ever being repayable), as well as a huge burden of consumer indebtedness, may limit what can be accomplished economically for working people solely through the mechanism of a new, well-defined national labor policy. It may be, as Jane Jacobs has suggested, that the United States is rapidly becoming a third world nation, condemned to an ever lower standard of living with a resultant destruction of social quality (absent some miracle of spontaneous internal revitalization).

Moreover, increasing concentrations of capital in recent decades, especially in the form of conglomerates and multi-national corporations, have contributed substantially to the deteriorating power of labor unions in the United States. See id. Concentrations of capital were already perceived to pose a great threat to workers at the time the Wagner Act was first introduced in 1934. See 78 Cong. Rec. 3443 (Mar. 1, 1934) (statement of Rep. Wagner).

The lack of a highly educated and technologically skilled workforce in the United States contributes to industrial decline. American education has failed to remain abreast of even the most basic current needs of industry. See, e.g., Gerdel, Literacy Crunch Squeezes Firms' Ability to Compete, The Plain Dealer (Cleveland), Oct. 8, 1989, at 2E, col. 2.

This failure may be symptomatic of the economic problems besetting communities that are unable to afford the kind and quality of education needed to train students adequately for today's needs, coupled with the increased difficulty that may be associated with teaching students who have suffered the discouraging and debilitating effects of discriminatory treatment and/or poverty from an early age.


living standard may be less a result of lack of bargaining power than it is of underlying weakness in the total economic structure.\textsuperscript{76} The decline in the standard of living under this view may be more a problem of not enough pie rather than of how the pie has been divided.

One tends to be suspicious of notions that poverty or lowered standards of living are necessary or that they are the inevitable result of high debt or stiff foreign competition. This is a nation rich in both human and natural resources and one that does not suffer from overpopulation. The example of some of the smaller European nations, such as Great Britain and Denmark, would suggest that the general standard of living, access to essential services, and even the length of the work day and vacation allowances, are less dependent on world economic position than on notions of distributive justice.\textsuperscript{77} If we do not have enough pie to satisfy everyone now, perhaps we should make more with the ingredients we unquestionably have on hand, and see that more of it goes to those who need it most.\textsuperscript{78}

In any event, there are broad areas of employment, especially in the retail and service industries, that undoubtedly would benefit from more equitable wage setting and distribution. There is plenty of room for wage improvements at the bottom of existing pay scales.\textsuperscript{79}

\textsuperscript{76} The problems are considered to be primarily political questions of power rather than purely economic, See Atleson, supra, note 72; see also Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 MINN. L. REV. 265 (1978).

\textsuperscript{77} See Friis, Issues in Social Security Policies in Denmark, in SOCIAL SECURITY IN INTERNATIONAL PERSPECTIVE (Jenkins, ed. 1969) [hereinafter SOCIAL SECURITY] (concerning Denmark); see also C. Balfour, supra note 32, at 202-03 (concerning Denmark). In England, government attitudes toward social policy and social welfare undoubtedly have changed during the period in which Margaret Thatcher has been Prime Minister, but the basic system of social benefits, put into place and then refined by a succession of governments, mainly but not entirely those led by the Labour Party, remains. See, e.g., Titmuss, New Guardians of the Poor in Britain, in SOCIAL SECURITY, supra, at 151.

According to news reports, the International Labor Organization recently completed a study indicating that American workers have the shortest vacations, with fewer than nine days after a full year of employment, while those in western Europe have the longest, some based on statutory entitlements, some on collective bargaining agreements, and some on custom. See Want More Vacation Time? Get a Job in Western Europe, Los Angeles Times, July 12, 1989, Part 4, (Business), at 3 (summarizing this report). The report indicates that in West Germany, for example, nearly two-thirds of the work force is given six weeks of paid vacation, even though the legal entitlement is three weeks. Id. Statutes provide for five-week paid leaves in France, Sweden, Belgium, Luxembourg and Spain, and in some of those countries collective bargaining agreements result in longer vacations. Most British employees have at least four weeks paid leave. Id.

\textsuperscript{78} This was unquestionably the attitude of Senator Wagner's at the time the National Labor Relations Act was introduced. See 78 CONG. REC. 3443 (Mar. 1, 1934).

\textsuperscript{79} Retail workers receive the lowest pay in the United States, an average of only
The public will not suffer harm if decent wages mean the end of ninety-nine cent hamburger promotions or free soft drinks in some of the fast food restaurants. There also appears to be room for negotiating improvements for the many thousands of employees who work nearly full-time at "part-time" jobs, or who work full-time for long periods at "temporary" jobs, and who, as a consequence of this arbitrary status, often receive lower rates of pay and are denied the important fringe benefits (e.g., medical insurance and retirement plans) that are given to regular full-time employees.\(^8\) If these employees had meaningful rights under a new national labor policy they would be able to bargain their way to a higher pay scale, benefits and tenure equity comparable to other employees.\(^8\)

\(\$189.51\) per week. *Average Annual Salaries, 112 MONTHLY LAB. REV. 77, table 17 (1989).* On the basis of a 52 week year, that amounts to an annual salary of \$9,854.52. *Id.* This is well below the poverty level for a family of four. The private sector average wage is \$332.43 per week, or \$17,286.36 a year. *Id.* This does not appear to be overly generous, either. The top pay scale among employees is currently received by petroleum and coal workers, who receive \$657.73 per week, or \$34,201.96 a year. *See id.*

Since all of these figures are averages, it means that some employees in all categories are paid more or less than the figures shown. Since the minimum wage is still under \$4.00 an hour, the legal lowest wage would be less than \$160 a week or \$8,320 a year for a 40 hour week, 52 week year. *Id.*

Statistics indicate that, with the exception of mining and manufacturing employees, the average hours worked by employees in the United States is under 40 hours a week. In the retail trade, the average hours worked per week is only 29.1. In the service trade the average hours worked per week is 32.5 which indicates that many employees in these groups are part-time.

For example, in Cleveland, the Regional Transit Authority regularly hires bus drivers on a part-time basis after they have finished a training period. The part-time workers are allowed to work up to 30 hours per week, usually as relief drivers. They are required to pay union dues. They receive a lower hourly rate of pay than full-time drivers, and do not receive certain fringe benefits, such as prepaid health insurance and paid vacations. It often takes longer than a year for a part-time driver to be eligible for a full-time position in this system.

A similar practice is followed in many institutions, including some state universities in Ohio, with respect to housekeeping employees. For example, one person worked for several years as a part-time housekeeping employee, usually working more than 30 hours a week, before finally receiving a full-time position. The part-time position carried no employer-paid fringe benefits, but both the employer and employee did contribute to the state pension fund, which was mandatory under Ohio law.

Therefore, it is a myth to think that such part-time employees only want part-time work. Many of them are simply lining up for full-time jobs when those become available. However, in some systems there is no guarantee that part-time employees will be accepted for full-time jobs on the basis of seniority. Some employers reserve the right to fill available full-time jobs with other employees, including new hires. These practices warrant closer examination by the Department of Labor, and reporting by the Bureau of Labor Statistics.

81. The danger is that part-time and temporary employees might not have sufficient voice in a bargaining unit if the majority of unit employees are full-time, and have the power to trade off the pay and benefits of part-time or temporary employees as a way of keeping their own salaries and benefit levels high. Such selfishness is not unheard of in labor unions. *See Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).* Legislative limits on the exploita-
The economic realities confronting the nation should be considered carefully in drafting a new national labor policy. But a very careful consideration should make it possible for us to distinguish the economic realities from the economic hocus pocus that has led some people to conclude that not much can be done to make our nation a better and fairer place to work and live than it is now.

III. NLRA POLICY AS IT IS NOW: THE ANTI-DISCRIMINATION PROVISIONS OF SECTION 8(a)(3)

Since the Wagner Act became law in 1935, the Act in general and what is now section 8(a)(3) in particular, have been thoroughly analyzed and criticized by numerous scholars. It is not the intention, in this section, to repeat the lengthy and exhaustive analyses of the Act or the cases that have been decided under it. The existing large body of scholarly work, much of which either has been or will be referred to more than once in footnotes in this Article, should be consulted for further analysis of leading cases — as, of course, should the cases themselves.

Section of probationary, part-time and temporary workers might be preferable as a cure for this problem, or simply a provision in the law that such employees shall not be discriminated against in terms of pay rates and benefits by either employers or unions.

See, e.g., Christensen & Svanoe, supra note 4; Cox, supra note 4; see also Getman, Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice, 32 U. CHIC. L. REV. 735 (1965) (hereinafter Getman, Section 8(a)(3)); Lieb, Constructive Discharge Under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern Over Motives, 7 INDUS. REL. L.J. 143 (1985); Oberer, The Scientoer Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails, 52 CORNELL L.Q. 491 (1967); Summers, supra note 64; Note, Proving an 8(a)(3) Violation: The Changing Standard, 114 U. PA. L. REV. 866 (1966).

Section 8(a)(3) of the NLRA provides in part:

(a) It shall be an unfair labor practice for an employer—
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.\(^4\)

In the Wagner Act, the section contained a proviso intended to legitimize the closed shop.\(^5\) This was repealed by the Taft-Hartley Act amendments of 1947,\(^6\) and was replaced with language stating that a collectively bargained agreement for a union shop would not be unlawful under this section, provided certain safeguards were met.\(^7\) But there is no other activity, lawful or unlawful, specified in the statute as being either in or out of the prohibition of discrimination for the purposes stated, nor is “discrimination” itself defined. A chronological examination of the Supreme Court's section 8(a)(3) decisions reveals that, for the most part, the Court has decided what the provision means and how it should be applied to a variety of factual situations in the cases it has accepted for review.\(^8\)

---


87. Labor Management Relations (Taft-Hartley) Act of 1947, § 101, Pub. L. No. 80-101, 61 Stat. 36, 140-41 (codified as amended in 29 U.S.C. § 151-166 (1982)). Under the union shop proviso, a union and an employer may agree that employees must join the union within 30 days of employment in order to retain their jobs. Id. However, "membership" is effectively limited by the second proviso to payment of dues and initiation fee, and employment cannot be denied to the employee who was not given membership on the same terms and conditions as other employees. Id. See generally NLRB v. General Motors Corp., 373 U.S. 734 (1963) (discussing the limitations regarding the union shop provision).
88. See, e.g., NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939). The Court has undertaken to review section 8(a)(3) cases for purposes of determining the sufficiency of the evidence on numerous occasions, especially when the issue of employer motivation was raised. See NLRB v. Waterman Steamship Corp., 309 U.S. 206 (1940).
89. The standard of evidentiary proof required under the National Labor Relations Act, and the power of the appellate courts to review Board decisions for sufficiency of evidence, were significantly changed by the Court's decision in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The Universal Camera Court interpreted and applied the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 1001 (1982), to the National Labor Relations Act. Id. This decision led to heightened scrutiny of the Board's decisions by the Board.
has also occasionally stated that some deference is owed to the expertise of the Board, usually when it agrees with the Board’s decision.\textsuperscript{89} The Supreme Court has not contributed much clarity to the analysis of the Act. However, some patterns have emerged from the Court’s controversial decisions, concerning the meaning and application of the statute as well as the standards and burdens of proof necessary to find a violation of its unfair labor practice provisions.\textsuperscript{90}

The continuing controversy over section 8(a)(3) has spawned much litigation,\textsuperscript{91} and has inspired numerous scholarly articles.

\textsuperscript{89} See, e.g., NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

\textsuperscript{90} What emerges, as the text following this note discloses, is that there are different legal standards for different factual situations. What also emerges in the text is that the Supreme Court increasingly has decided on the meaning of the Act, especially since the Taft-Hartley Act was passed in 1947, instead of leaving that decision-making to the Board. The Court of course does not review more than a tiny fraction of the cases coming from the Board and the Courts of Appeals, and so those bodies also have a tremendous impact on the way the law has developed. The “Reagan” Board has been subject to particularly heavy criticism in recent years for decisions that are perceived to be anti-labor. See, e.g., Craver, Declining Status of the National Labor Relations Act, N.Y.U. Forty-First Annual Nat’l Conf. on Lab. 3-15; see also W. Liebman, “Recent Developments Under the National Labor Relations Act: Changes in Board Law During the Reagan Years,” (April 1989) (paper presented at the 22nd Annual Pacific Coast Labor Law Conference); Report of the Subcommittee on Labor-Management Relations, Committee on Education and Labor, U.S. House of Representatives 98th Cong., 2d Sess., “The Failure of Labor Law — A Betrayal of American Workers” (Comm. Print 1984). Professor Weiler also casts a good deal of blame at American employers and the “core” of the legal structure for the present state of labor law:

Contemporary American labor law more and more resembles an elegant tombstone for a dying institution. While administrators, judges, lawyers, and scholars busy themselves with sophisticated jurisprudential refinements of the legal framework for collective bargaining, the fraction of the work force actually engaged in collective bargaining is steadily declining. A major factor in this decline has been the skyrocketing use of coercive and illegal tactics — discriminatory discharges in particular — by employers determined to prevent unionization of their employees. The core of the legal structure must bear a major share of the blame for providing employers with the opportunity and the incentives to use these tactics, which have had such a chilling effect on worker interest in trade union representation.


\textsuperscript{91} In 1984, there were 13,177 NLRA section 8(a)(3) charges filed with the NLRB, which comprised 53.1 percent of the total cases filed. See 49 NLRB Annual Report (1984); Weiler, supra note 90, at 1776 (providing statistics on years prior to 1984). Professor Weiler makes the following comment about the significance of these figures to employee organizational efforts:

[A] determined anti-union employer has at its disposal a potent weapon with which to demonstrate its power over the lives of its employees: the dismissal of selected union activists, in violation of section 8(a)(3) of the NLRA. Dismissal has the immediate effect of rendering these union supporters unable to vote — a consequence that by itself might tip the balance in a close election — and also excludes the discharged employees from the plant, the setting in which they could have cam-
Many attempts have been made in the law journal articles to formulate neutral, or at least nonpartisan, approaches to application of the statute, such as "balancing" tests, or other distinctions between types of cases based on non-partisan features. On the whole, however, the controversy is a partisan one, with the Supreme Court's critics contending that the Court's decisions under section 8(a)(3) have destroyed the Act's central purpose of encouraging collective bargaining in order to give employees greater power in their relations with employers. Meanwhile, the Court's defenders generally conclude that the Act was never intended to do more than protect employees' organizational rights, and that the Court generally has been correct in its applications of section 8(a)(3).

On its simplest level section 8(a)(3) has two necessary elements; (1) discrimination and (2) to encourage or discourage membership in a labor union. As it has been interpreted, the first requirement does not necessarily require evidence of disparate treatment between adherents to, or advocates of, union activity and non-union employees. Virtually any action an employer may take that adversely affects employees who are engaged in organization or other union-related activities will satisfy the "discrimination" element. It is the second element that has caused the greatest difficulty. Currently, the

---

Id. at 1778 (footnotes omitted).

92. See Christensen & Svanoe, supra note 4; Getman, Section 8(a)(3), supra note 82; see also Proving an 8(a)(3) Violation, supra note 84.

93. Cox, supra note 4.

94. Christensen & Svanoe, supra note 4; Summers, supra note 64. See generally Atle- son, supra note 72; Klare, supra note 76; Weller, supra note 90.

95. Cox, supra note 4; Getman, Section 8(a)(3), supra note 82. The Supreme Court has stated unequivocally that the National Labor Relations Act was never intended to do more than protect employee organizational rights and provide a system of voluntary collective bargaining. See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317 (1965) (stating that [s]ections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."; see also Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954).

96. See Radio Officers' Union, 347 U.S. at 39, 42-3. Christensen & Svanoe contend that there are really three elements, the third being the requirement that the employer's action "must take effect in the particular area of 'hire, tenure of employment or any term or condition of employment.'" See Christensen & Svonoe, supra note 4.

97. In Radio Officers' Union, the employee discriminated against was a union member who was discharged by the employer at the request of his union, for failing to follow the union's desired hiring practices. 347 U.S. 17 (1954).

98. See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945); see Getman, Section 8(a)(3), supra note 82, at 736-38.
Court has interpreted the language "to encourage or discourage" to mean that the Board must usually make a finding of subjective motivation or intent on the part of the employer to discourage or encourage union activity, or "anti-union animus" before a violation will be found.\(^9\) What this means in practice is that, even though the employer's acts have a natural and foreseeable tendency to discourage union membership, or in fact do discourage it, they will not be considered unlawful unless anti-union motivation can be proved by independent evidence. It will not be possible to infer the motive from the deed. Employer subjective motivation thus has become the critical issue, and in the types of cases to which this test is applied, such motivation is very difficult to prove.\(^{10}\)

However, the Court in the past has sustained the Board in finding an unfair labor practice in some cases under section 8(a)(3) without proof of subjective motivation to encourage or discourage membership in any labor organization.\(^{10}\) One decision stated that a


\(^{10}\) An employer can easily refrain from stating or otherwise revealing an unlawful motive, in which case there will be no record of subjective intent. If such intent cannot be inferred from the effects of the employer's behavior on the employees, it must be proven by substantial direct or circumstantial evidence on the record as a whole, and there will be no such evidence if the employer has been careful to state reasons for his conduct other than antagonism to the union. At that point, the person with the burden of proof, which is the General Counsel in NLRB unfair labor practice cases, has the burden of proving that the asserted reason either is false or merely pretextual. See, e.g., N.L.R.B. v. Transportation Management Corp., 462 U.S. 393 (1983). The reason could be held to be pretextual if it is inconsistent with earlier conduct of the employer toward employees in similar circumstances. See, e.g., Transportation Management Corp., 462 U.S. 393. The employer in these circumstances has the best evidence of the reasons for taking the action he did, and it would not seem unfair to put the burden on him to prove that his reasons for so acting were legitimate. In a discriminatory discharge case, such as Transportation Management, even where the General Counsel has managed to carry the burden of proving unlawful motivation, the employer still wins if he can prove that even though his motive for discharging the employee was unlawful, the employee would in any event have been discharged for lawful reasons (that proof failed in the Transportation Management case, however). See A. Cox, D. Bok & R. Gorman, supra note 39, at 227-30.


In NLRB v. Fleetwood Trailer Co., the Court, in an opinion by Justice Fortas, appeared to utilize a variant analysis of the motivation requirement. 389 U.S. 315 (1967). The Fleetwood Trailer Court implied that it was following the analysis set out in Great Dane Trailer. See id. The Court first implicitly suggested that the burden was on the employer under NLRA section 8(a)(3) to present substantial evidence that its actions were motivated by business justifications, and not by anti-union animus. Id. The employer's burden requirement should be compared to the burden requirements that appear to have been imposed on the NLRB General Counsel, who must use independent evidence to prove unlawful employer motivation. Id. Jus-
necessary requirement is that employer actions are "inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other anti-union animus is required" to be found.\textsuperscript{102} The Court has also stated that in some cases the inference of unlawful intent may be "so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose."\textsuperscript{103}

Thus, at least three tests or standards of proof are suggested by the Court as possible under section 8(a)(3): (1) in some cases specific proof of unlawful employer motivation must be present in the record and a finding of such motivation made by the Board, based upon the whole record;\textsuperscript{104} (2) in some cases involving employer ac-

tice Fortas appeared to take this approach based on Justice Warren's opinion in \textit{Great Dane Trailer}. \textit{See id.}

The lack of employer-introduced evidence of lawful motivation caused Justice Fortas to conclude that NLRA section 8(a)(3) had been violated because "no evidence of a proper motivation appeared in the record" and the employer's refusal to reinstate striking employees was destructive of "important employee rights." \textit{Id.} at 380 (quoting \textit{Great Dane Trailers}, 388 U.S. 26 (1967)). The analyses of the majority in both the \textit{Great Dane} and \textit{Fleetwood Trailers} cases appear to be highly vulnerable today in view of the Court's changed composition. It is worth noting that while both cases were decided after \textit{American Ship Building Co.}, they were decided by majorities that no longer exist and that appear to have little following among the present Justices. The other "inherently discriminatory" cases do not discuss the issue of who has the burden of proof of employer motivation.


103. \textit{Id.} at 311-12. Note that this was definitely dictum, and that the Court did not cite any prior authority for the proposition. \textit{See id.} The Court may have felt that this was the gist of the statement in the earlier \textit{Radio Officers' Union} case. \textit{See 347 U.S.} 17, 45 (1954). That statement was apparently dictum but with perhaps some inferential basis in the facts. \textit{Id.} The \textit{Radio Officers' Union} Court stated that "an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement." \textit{Id.}

It may also be more directly supported by the discussion of the \textit{Gaynor} case in \textit{Radio Officers}. \textit{Id.} at 51 (citing NLRB v. \textit{Gaynor News Co.}, 345 U.S. 902 (1953)). In \textit{Gaynor}, it appears that the employer tried to offer evidence of lawful motivation, but the evidence was rejected by the Board and even if the evidence was accepted, the Court concluded that it would not have helped his case. \textit{See id.}

104. This appears to be the test the Supreme Court applied, at least in part, in \textit{American Ship Bldg. Co.} where, after reiterating that section 8(a)(3) "requires an intention to discourage union membership or otherwise discriminate against the union," the Court stated: "[t]here was not the slightest evidence and there was no finding that the employer was actuated by a desire to discourage membership in the union as distinguished from a desire to affect the outcome of the particular negotiations in which it was involved." 380 U.S. at 313. The Court then concluded "that where the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of section 8(a)(3) is shown." \textit{Id.} However, there is a danger in inferring from the Court's decision in this case, which held that the employer did not commit a violation of section 8(a)(3), that in a similar case, the existence of proof of an improper motivation would necessarily lead the Court to approve a decision that a section 8(a)(3) violation had occurred. \textit{Id.} This danger exists because of the balance of the Court's opinion, in which it took the position that only employee organizational activity is
tion "inherently prejudicial to union interests" the proof of motivation may be dispensed with unless there is significant business justification for the employer's actions; and (3) in some other cases, also

protected by the Act, and that the lockout in this case was engaged in for purposes of bringing economic pressure to bear on the union. *Id.; see Meltzer, The Lockout Cases, supra* note 83, at 99 (noting that the Court's distinction is "patently artificial"). This case can, and perhaps should, be read as legitimizing the lockout as an economic weapon the employer is free to use against the union in any economic dispute. If that is true, then anti-union motivation for purposes of section 8(a)(3) analysis appears to be irrelevant in this type of case unless there is also proof that employee organizational rights are also adversely affected by the employer's lockout. It is difficult to see how that could be proven in a situation where the union already represents the employees and organizing is not taking place. The Court in *American Ship Building Co.*, appeared to wall off employer economic activity altogether from the purposes of the unfair labor practice provisions of the Act, and thus appeared to create an irrebuttable presumption of lockout validity in a setting of purely economic disputes. *See* 380 U.S. 300. In any event, one cannot know which analysis of *American Ship Building Co.*, is correct unless and until the Court decides an economic dispute case in which employer anti-union motivation has been proven by substantial evidence on the record as whole.

105. This analysis was suggested, in dictum, by the Supreme Court in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-29 (1963). The outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from this action and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made. *Id.* at 228 (citation omitted).

The Court went on to consider the situation where the employer does put forth a legitimate business justification in a situation where the conduct is discriminatory and does discourage union membership, and stated concerning it:

As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.

*Id.* at 228-29.

The test as so formulated in its entirety may have been applied by the Supreme Court in a later case. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). However, it appears that the Court in dictum added a gloss derived from its decisions in *NLRB v. Brown*, 380 U.S. 278 (1965) and *American Ship Building Co.*, in formulating its analysis that gloss being an intermediate step of determining whether the impact of the discriminatory conduct on the employees is comparatively slight or inherently destructive. *Great Dane Trailers*, 388 U.S. at 34. Only if the impact on the employees is comparatively slight, said the Court, must an antiunion motivation be proved, and then only if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. *Id.* Moreover, the burden was put on the employer to prove the existence of legitimate business objectives "since proof of motivation is most accessible to him." *Id.* (It is little wonder that so many articles have been written on this subject!).

Another case that might be squeezed into this general analytical category is *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).
"inherently" prejudicial, if the inference of unlawful intention is compelling, the Board may be entitled to disbelieve any justification proffered by the employer. It may also be the case, at least in those cases involving economic disputes and requiring specific evidence of employer intent, that the burden now will be on the NLRB General Counsel to prove unlawful motivation, and perhaps even to supply the evidence necessary to sustain a finding of intent.

106. The phrase "inherently" prejudicial is based on the Court's use of the word "inherently" in Radio Officers' Union noting that "[t]his recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct." 347 U.S. at 45; Erie Resistor Corp., 373 U.S. at 228 (stating that "[t]he outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself."); see also Great Dane Trailers, Inc., 388 U.S. 26, 34 (stating that "[f]irst, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.").

107. See supra note 106.

108. In addition to the difficulty of ascertaining the standard of proof appropriate to a given case, there is some difficulty in determining where the burden of proof should rest for different elements of the various standards. The National Labor Relations Act places the general burden of proving a violation of the unfair labor act provisions on the NLRB General Counsel. See 29 U.S.C. § 160(c) (1982). However, that does not necessarily mean that the General Counsel has the burden of proving or disproving everything that may have a bearing on the outcome in the case. See 29 U.S.C. § 160(c) (1982).

For a long while there was special difficulty in resolving the problem of burden of proof in "mixed motive" employee discharge cases. In these cases, there would be evidence of employer anti-union animus, but in addition, the employer would contend that a legitimate business justification for the action was the overriding reason.

Appellate Courts had taken the position that the burden is on the General Counsel to disprove the business justification asserted in those cases. The Board finally received Supreme Court approval for its own approach to this problem, which was to allocate the burden of proof between the General Counsel and the employer. See Wright Line Inc., 251 N.L.R.B., 1083 (1980), aff'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). In Wright Line, the Board placed the initial burden on the General Counsel to establish a prima facie case of discrimination by first proving that the employer showed anti-union animus. See id. The burden then shifted to the employer to overcome evidence of discrimination by establishing a legitimate employer business justification. Id. If the employer failed in that burden, the decision would support the unfair labor practice. Id. If the employer succeeded in establishing a business justification for the action, then the burden would shift back to the General Counsel to either rebut the justification or to show by further evidence that it was pretextual. See also Transportation Management Corp., 462 U.S. 393.

This allocation of the burdens of proof has proved useful in ordinary cases involving discharge or discipline of employees in situations where there is evidence of employer hostility to a labor organization, and the employee is identified as a member or supporter of the union. See, e.g., Transportation Management Corp., 462 U.S. 393; Wright Line Inc., 662 F.2d 899 (1981). However, it remains a test that requires proof of employer anti-union animus, and then allows the employer to overcome the unfair labor charge by evidence of a legitimate business reason for the action taken against the employee. Whether the Supreme Court will apply it in cases involving economic disputes between unions and employers remains to be seen.
These different standards for finding a violation of the Act are problematic because value judgments are involved in making the choice between the standards in different situations and the case's outcome will depend in large part upon the test chosen. What should that value judgment be? Should the balance be tipped toward the employees or the employer? Who should decide that issue? The Supreme Court has stated unequivocally that such policy judgments are for Congress, and not for the National Labor Relations Board.109 However, as Professor Summers has argued, it appears that Congress has never made the policy judgments the Supreme Court finds necessary.110 It seems fair to conclude, as Professor Summers has, that the Supreme Court has itself made these judgments by overturning the Board and deciding on the appropriate test to be applied in certain critical cases.111

Where employer actions have been taken to disadvantage union or employee economic interests, and thus “indirectly” discourage union membership, the Court has come down firmly on the side of the employers.112 This position has resulted from the Court majority view that the sole concern of the Act is to protect the employees’ organizational rights against employer actions.113 In the opinion of the Court, the National Labor Relations Act was never intended to protect or advance the economic interests of employees in opposition

---

110. Summers, supra note 64, at 74.
111. Id. at 72.
112. See, e.g., American Ship Bldg., 380 U.S. 300; NLRB v. Brown, 380 U.S. 278 (1965); see also Summers, supra note 64, at 73.
113. This is the Court's conclusion in American Ship Building Co. where the Court discusses its perception of the policy of the Act and chides the Board for “functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.” 380 U.S. at 315-18 (originally stated in Labor Board v. Insurance Agents Int'l Union, 361 U.S. 477, 497-98 (1960)). The Court stated:
The central purpose of these provisions was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employers. Having protected employee organization in countervailance to the employers' bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their dispute, the Act also contemplated resort to economic weapons should more peaceful methods not avail. Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power. Id. at 317. The Court further complained that in finding the lockout a violation of section 8(a)(3) “the Board has stretched §§ 8(a)(1) and (3) far beyond their functions of protecting the rights of employee organization and collective bargaining.” Id.; see also NLRB v. Insurance Agents' In'l Union, 361 U.S. 477 (1960). It is worth noting that the 1947 and 1959 amendments did place limitations on certain union economic weapons. See, e.g., 29 U.S.C. §§ 151-168 (1982).
to those of their employers.\textsuperscript{114}

In a very recent case under the Railway Labor Act, Justice O'Connor, writing for the majority, spoke of employee participation in an economic strike as a "gamble" on the part of the employees that they would have enough strength to win concessions from the employer.\textsuperscript{115} She concluded that the striking employees assumed the risk of losing their domiciles and schedules, which had been acquired as a result of job seniority, by so gambling.\textsuperscript{116} The opinion suggests that, short of destroying seniority in the bare-bones sense of ranking the employees for purposes of layoff and recall,\textsuperscript{117} employers are at liberty to take away employee benefits achieved through seniority in order to induce strikers to cross the picket line, even if that means breaking the strike by destroying the striking employees' solidarity. The fact that the right to strike is statutorily protected does not mean that the economic rights of the employees have any statutory protection.\textsuperscript{118}


\textsuperscript{116} Id. Senior flight attendants who remained out on strike while TWA proceeded to hire permanent replacements (including strikers it induced to cross the picket line), lost their seniority-related benefits of schedules and domiciles as a result of the employer's granting of preferential choices to the permanent replacements. \textit{Id.} Justice O'Connor's view was that if such benefits were important to the strikers, they were always free to go back to work during the strike. \textit{Id.} There is no discussion in the opinion of the impact the loss of preferred schedules and domiciles would have on the striking employees. \textit{See id.}

Many airline flight attendants today are married and have children. Many have substantial investments in homes. The loss of a preferred domicile could result in the breaking up of families because of different domiciles of husband and wife, and could result in serious disruption of the education of their children. Surely these seniority-related rights should be ranked with layoff and recall seniority as matters of fundamental importance to the employees involved, and their loss as "inherently destructive" of union activity.

\textsuperscript{117} This practice was held to be an unfair labor practice without proof of subjective employer motivation because "inherently destructive" of employee rights under the National Labor Relations Act, section 8(a)(3). \textit{See Erie Resistor v. NLRB, 373 U.S. 221, 227 (1963).} The \textit{Erie Resistor} case was discussed extensively in the Court's majority and dissenting opinion in \textit{Trans World Airlines}, and was distinguished on its facts from that case. \textit{See 109 S. Ct. 1225 (1989)} (Brennan, J., dissenting). It might prove significant to future decisions under the NLRA that the Railway Labor Act has no provision comparable to section 8(a)(3) of the NLRA. \textit{Compare Railway Labor Act, ch. 347, 44 Stat. 577 (1926) with National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982).} It seems difficult to conclude from Justice O'Connor's opinion, however, that she did not intend to give \textit{Erie Resistor} a highly restrictive interpretation in the \textit{Trans World Airlines} decision, thereby at least inviting employers covered by the NLRA to test the waters by taking similar drastic actions in future strike situations. \textit{See 109 S.Ct. 1225 (1989).}

\textsuperscript{118} It is important to stress that the provisions of the Railway Labor Act differ from those of the National Labor Relations Act, as the Court itself noted in the \textit{Trans World Airlines} decision. \textit{See 109 S. Ct. 1225, 1233-4 (discussing these differences).}
Some commentators have argued that in a situation where such a choice between employer and employee economic power must be made, the proper neutral approach would be to balance the harm to employees from the employer's actions against the legitimate needs of the employer to take those actions.\textsuperscript{119} The Supreme Court appears not to have used that balancing analysis. Instead, its approach deals with the cases as being in or out of one of the analytical categories previously discussed.\textsuperscript{120} The Court has kept for itself the final choice as which category is appropriate. At least for the foreseeable future, protection of employee economic interests through employee collective economic action appears not to be within the ambit of the Act, as construed and applied by the Court.

This raises a troubling question: why would employees and unions want to go to the trouble of organizing for collective representation by a union when the effectiveness of their one economic weapon, the strike, is going to be rendered utterly useless in the end? Surely the employees do not need the Act or the huge administrative and judicial apparatus that goes with it to protect their right to join a membership organization just for the sake of joining it. A simple statutory statement of rights of employees to join or support any lawful organization would suffice for that purpose. Nor do employees need the burden of the membership fees and dues charged by unions for the mere privilege of belonging to such an organization. If the only meaningful economic power in collective action is to be whatever the "neutral" labor market may give the employees at any particular time, it does not seem rational for anyone to bother to join or support unions. Perhaps that is one reason that private sector

\textsuperscript{119} See Summers, supra note 64, at 72-74. Summers argues that the Supreme Court itself was balancing economic rights of union and employer in that case. See id. "Despite its disarming formulations, what the Court is balancing is not legal rights but economic weapons." \textit{Id.} at 72 "In American Ship Bldg. Co. the Court is simply asserting that in its judgment the employer should not be denied the strategic advantage of picking the time of battle; . . ." \textit{Id.} Certainly the Board had taken a balancing approach. See American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); see also Summers, supra note 64, at 72-74. As Summers said: "[i]n arguing \textit{American Ship Bldg. Co.} the Board candidly acknowledged that its decision was based on its expert judgment that availability of the lockout "would so substantially tip the scales in the employer's favor as to defeat the Congressional purpose of placing employers on a par with their adversaries at the bargaining table." \textit{Id.} at 73. Summers concludes that the Court merely substitutes its "balancing" for that of the Board. \textit{Id.} He then states: that "[t]he elaborate rationalizations of the Court are calculated to confuse everyone, including the Justices." \textit{Id.}

\textsuperscript{120} It is true that the Court in \textit{American Ship Building Co.} referred to the "balancing" test it had earlier referred to in \textit{Erie Resistor}, as a possible test, but it quickly excluded that as a test applicable to the economic dispute context of \textit{American Ship Building Co.}, 380 U.S. 300, 312 (citing to \textit{Erie Resistor}, 373 U.S. at 229).
union membership in the United States is currently below fifteen percent, which is the lowest level since the passage of the Wagner Act. Furthermore, why should the American people continue to pay for such an apparently meaningless system? Why encourage union membership and the naturally resulting economic strife if it is not going to achieve significantly improved working conditions for the employees with which the employer is not already in accord?

IV. PROPOSALS FOR LEGISLATIVE CHANGES

A. An Overview

The National Labor Relations Act, as amended, interpreted and applied to a wide variety of cases, has not accomplished even the basic goal of securing widespread collective representation of employees and collective bargaining between employers and employees. Many factors might have a bearing on this, including the growing ineffectiveness of unions due to loss of meaningful economic power. Other probable factors are increasingly sophisticated and effective employer resistance to unionization of their businesses, and employee disillusionment with some unions as institutions because of poor management or corruption, or because of dislike of the authoritarian control some unions attempt to exercise over employee actions. Statutory changes have made majority representation less meaningful and have severely limited the unions’ choice of economic weapons. Added to this list is one clear statutory policy, present

121. The most recent available statistics are published in Current Wage Development, U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, Feb. 1989. These figures show that 12.9 percent of all private nonagricultural wage and salary workers were members of unions in 1988 (a decline from 13.4 percent in 1987), while 14.2 percent were represented by unions. Id. at table 2. According to figures supplied by Summers, in 1978 29.7 percent of employees in this category were covered by collective bargaining agreements. Summers, supra note 52, at 15. That suggests that there has been a 13.5 percent drop in employee representation by unions in the private sector in just ten years. A far higher percentage of workers in the government sector (federal and state) were covered by collective agreements: 43.6 percent. Id. A higher percentage — 36.7 percent — of public sector employees were members of unions. Id.

122. See Weiler, supra note 90.


from the time of the original Act, which requires that the employer and the union to bargain over the terms of a possible collective bargaining agreement, but allows them ultimately not to agree on anything.125

Decisions of the Supreme Court limiting union access to employees during organizing campaigns, and approving employers' use of powerful economic weapons, such as the hiring of permanent replacements for striking employees, the lockout, and retaliatory plant closing, have undermined the effectiveness of unions by making employee organization more difficult for unions, and have emasculated the usefulness of strikes as economic weapons.126

However, the Court decisions concerning the economic power relations of the union and the employer, which have to come down on one side or the other in each case, address the dilemma created by the Act. Since the statute provides no policy guidance in deciding those issues, the choice of sides is essentially a political one, which the Court has chosen to exercise, rather than defer to the National Labor Relations Board.127 The Court decisions may have taken the most prudent course available due to the lack of clear statutory policy direction. The decisions have left the power where it was in the beginning, with the employers, subject only to the market power unions may occasionally have as a result of full employment or high demand for certain products.128

The final picture is one of futility in action — at great trouble and expense to all the participants and to the public. It is this ultimate futility that has led many critics to argue with some cogency that the interpretations given to the Act by the Board and the courts have destroyed both its spirit and its purpose.129

organizational and economic action through the provisions of section 8(b) of the National Labor Relations Act. 29 U.S.C. § 158(b) (1982)

125. NLRA section 8(a)(5), read together with NLRA section 8(c), imposes a duty to bargain in good faith over terms and conditions of employment, but not a duty to agree to a collective bargaining agreement. 29 U.S.C. §§ 158(a)(5), 158(c) (1982).


127. Summers, supra note 70, at 87 (stating that "[t]he responsibility for weighing the values and shaping the institutions of collective bargaining comes to rest upon the Court.").

128. This situation is increasingly less likely to develop today because of the growth of foreign competition. As pointed out earlier, the importation of products into the United States currently exceeds exports. See supra text and accompanying note 73.

129. See, e.g., Kirkland Says Many Unions Avoiding NLRB, 132 Lab. Rel. Rep. (BNA) 13 (Sept. 4, 1989) (concerning a meeting of the president of the AFL-CIO with
Perhaps the presence of even an ineffectual law on the books is better than no law at all, at least in some cases. It may, on the one hand, tend to discourage excesses of power and create a more civil atmosphere. On the other hand, the lack of meaningful rights and remedies can and does lead to abuses of power, and ultimately will lead to a dangerous sense of frustration on the part of those who find themselves on the losing side of the equation. In any event, such meaningless laws ultimately make a mockery of the whole idea of justice. They hide real problems behind a facade of official concern and lead us as a nation to ignore the need for change. Therefore, fundamental changes need to be made in America’s labor law policy, and in the means used to carry out a new policy.

First, recognition should be given to employee interests in the work they do. These interests include, but are not limited to, the conditions under which they work, the current and postponed rewards they receive for it, and security in their employment. These interests should be transformed by new legislation into certain legal

reporters).

Kirkland said he prefers “the law of the jungle” over the current system because the law places too many restrictions on what unions can do to assist each other. ‘The law forces us, our unions, to work on products that are manufactured by law-breaking employers, employers that are in violation of the law in fact and in spirit... [It] forbids us to show solidarity and direct union support,’ he declared.

But Kirkland said he would rather see a ‘changed law’ than the law of the jungle. ‘I think there ought to be a fair labor law in this country, and there ought to be a code that is fair to both labor and management, and gives them both decent respect and recognizes both as essential elements of the human community and that collective bargaining has a positive value. . . .’

Id.

The end result is that the legal rules developed by the Board and the courts do not express or implement the premises and purposes of the statute. Our labor law today is not one which encourages the practices and procedures of collective bargaining; it is at best one of declared indifference.

Id. at 17; see also Summers, supra note 52.

130. The assumption behind this statement is that some employers, at least, respect the law and make efforts to abide by both its letter and its spirit.

131. Such frustration was apparent in the recent wild cat strikes in the coal mines of West Virginia.

132. Security of employment includes more than protection against layoff and recall. People put down roots in their communities and are not infinitely mobile. Moreover, people are mortal, and cannot go on indefinitely learning new job skills and starting all over again, especially when the skills involved are complex and require years to perfect. Nor should people have to lose whatever increased benefits they have gained through the accumulation of skills and experience by starting all over again from the bottom of some other ladder. Security of employment can take forms other than a lifetime property interest in a particular job, however. It has a value, and one of the proposals discussed herein, is for legislation that will protect peoples’ monetary interests in their jobs in the event the work is terminated for legitimate reasons. See infra text accompanying notes 151-52.

http://scholarlycommons.law.hofstra.edu/hlelj/vol7/iss1/2
rights, most if not all of which could be protected or effectuated through collectively bargained agreements as an alternative to statutory enforcement. Of necessity, consideration of any such legislation will require confronting issues of employer power, and some currently held views on employer "property rights" as abstract legal propositions.

Second, serious examination should be made of the presently accepted role of unions as active parties in the employment relationship where collective bargaining exists. At least some employer resistance to collective bargaining is traceable to the current necessity of entering into a contract governing employee relations with non-employee third party organizations that demand the loyalty of those employees.

One part of this examination should be devoted to the statutory necessity for a successful union organizational campaign as a prerequisite to collective bargaining. Perhaps the process could be simplified and made less adversarial.

As part of the same examination, the linkage between the representation and membership aspects of union relations with the employees they represent should be questioned. The linkage has already been fractured by the 1947 Amendments to the Act, which limit the aspects of union power an unwilling employee may be required to accept. It may well be that effective employee representation would benefit from a total separation of union membership from the representation process. After all, the central issue in any

133. The legal rights created should establish a floor for any collectively bargained rights, but not a ceiling, much as the Minimum Wage Act establishes a floor for wages. Cf. Fair Labor Standards Act, 29 U.S.C. § 206 (1982). If the rights are further protected by the collective bargaining agreement, some of them, at least, could be protected through the mechanism of a grievance and arbitration procedure as an alternative to the remedies provided by statute.

134. See supra text accompanying notes 47-71; see also Summers, supra note 52, at 17 stating that:

Private claims for the primacy of 'property rights' and 'management prerogatives' have overridden the social claims for equality of bargaining power, providing industrial democracy, and guaranteeing individual justice. Employers, acting as self-appointed surrogates of individual rights, have misappropriated those rights for their own benefit to defeat collective bargaining and deprive employees of individual rights.


136. See Weiler, supra, note 52.

137. See Abraham, supra note 126.

labor policy will ultimately be the employees' relations with their employers. Why should union membership per se, and all that membership in a fraternal organization entails, be at all relevant to the question of whether employees use the services of a professional representative to bargain collectively with their employers?

The modern utility of the fraternal labor association as a principal contracting party in the collective bargaining relationship needs to be thoroughly examined.139 There may be more effective and less costly ways of encouraging collective bargaining and of serving the needs of employees in the collectively bargained employment relationship than the system we have become accustomed to.140 In any re-examination of policy, the needs of all employees for effective representation in negotiations and other relations with their employers should be paramount to any concern for maintaining unions as they are today simply because they have existed for a long time, and political power structures have been built on them.

Third, the wisdom and/or necessity of continuing a policy of economic warfare between employers and employees should be questioned. There are better ways to resolve disputes, less costly to both employers and employees, and less destructive to the employer-employee relationship, than to resort to strikes and lockouts.141

B. Specific Proposals for a New Legislative Program

1. The legal rights of employees should be spelled out as part of the policy statement of new legislation, and should include the following:

139. Historically, traditional unions have not been an unmixed blessing to employees. They have frequently had exclusionary membership policies, and until 1964, with the passage of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (1982), were under no duty to refrain from discriminating in membership on grounds of race, sex, religion or national origin. See Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). There are large sections of the working population that existing unions have failed to organize, which tends to offset the social value of gains they have achieved for the employees in areas where they have successfully organized. See Summers, Closing Address, 11 N.Y.U. REV. OF L. & SOC. CHANGE 187 (1982-83).

140. The “system,” of course, has changed over time, partly as a result of the elimination of the closed shop in 1947, and partly because of the amendment to section 8(a)(3) allowing only the “union” or “agency” shop to be included in a collective bargaining agreement, which has been interpreted as meaning only the payment by an employee of reasonable dues and initiation fees, and not full membership in a union. See supra note 24. The text is referring to our traditional concepts of unions as principals in the collective bargaining relationship with employers, rather than as agents of the employers, and as such embodying somehow the collective power of the employees. See O. KAHN-FREUND, LABOUR AND THE LAW 70-72, § 165, 211-222 (1972).

141. The proposal is for a procedure culminating, in the absence of an agreement at an earlier point, in interest arbitration. See infra note 179 and accompanying text.
a. All employees in the United States should be given the right to protection against arbitrary or unfair dismissal from work.¹⁴² This will require long-overdue abolition of the employment-at-will doctrine.¹⁴³ Such a right can be (and usually is today) adequately protected by collectively bargained agreements that require just cause for dismissal or discipline of employees, and provide for a privately structured grievance-arbitration procedure.¹⁴⁴

For those employees who do not vote for collective bargaining, statutory protections and procedures will be needed. These procedures might be administered by the National Labor Relations Board regional offices, which already have substantial background in certain types of unfair dismissals.¹⁴⁵ Perhaps administrative law judges could hear these cases in the first instance, or even less formal tribunals could be created for the purpose of hearing these cases expeditiously. The concept of unfair dismissal should be broadened by legislation to include any discharge resulting from discrimination on

¹⁴². Many states have already modified the employment-at-will doctrine and have provided certain protections for employees against unfair dismissal either through case law developments in tort and contract, or (in a few cases) by legislation. The National Commissioners on Uniform State Laws recently proposed a tentative model state statute, the Employment Termination Act, which would provide for arbitration of dismissal disputes instead of court litigation. See "Pros and Cons of Wrongful-Discharge Legislation, National Labor Policy, Are Weighed by ABA Panelists," 131 Lab. Rel. Rep. (BNA) 554 (Aug. 28, 1989); St. Antoine, Are Employees Acquiring a Property Interest In Their Jobs?—Some Implications of Recent Developments in Unjust Dismissal, Plant Closings, and Employee Ownership, at 7-8, Twenty-Second Annual Pacific Coast Labor Law Conference, Seattle, Washington (1989) (unpublished). Professor St. Antoine reported that “more than a dozen” jurisdictions are considering legislation to give employees protection against dismissal without just cause. Id. at 7. See generally, Blades, Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404 (1967); M. Rothstein, A. Knapp & L. Liebman, supra note 39, at 738-858. Professor Summer urged adoption of an unfair dismissal law several years ago. Summers, supra note 52, at 31-33.

The proposal here is for a national law protecting against unfair dismissal, which state laws might supplement in those instances of employment the federal legislation cannot constitutionally reach (if there are any). The right to fair treatment in employment should be considered one of the fundamental rights of persons living in the United States.

¹⁴³. See Bierman & Youngblood, supra note 36.

¹⁴⁴. Grievance-arbitration procedures, differing in many particulars, are commonly included in collective bargaining agreements. Out of 500 major collective bargaining agreements in the private sector surveyed by the Industrial Relations Center of Cleveland State University, 385 contained provisions for both grievance procedures and arbitration as the final stage of grievance resolution. INDUSTRIAL RELATIONS CENTER, CLEVELAND STATE UNIVERSITY, CHARACTERISTICS OF MAJOR PRIVATE SECTOR COLLECTIVE BARGAINING AGREEMENTS AS OF JANUARY 1, 1988, table 8.1 (1989). Another 114 contained grievance procedures alone, and 1 contained an arbitration provision alone. See id.

¹⁴⁵. The reference is to charges made by, or on behalf of, individual employees to the National Labor Relations Board for dismissals in violation of either NLRA sections 8(a)(1) or (3).
grounds of race, sex, religion, age, nationality, or sexual preference. In these cases employees should not have the burden of proving unlawful employer motive, but instead the burden should be on the employer to prove just cause. In other cases of unfair dismissal, the burden should be on the employer to prove, by a preponderance of all of the evidence, that just cause existed for a dismissal.

Remedies should include back pay and reinstatement awards, and should be expanded to provide for incidental and consequential damages and, in cases of outrageous unfairness, for punitive damages. Permissible employer defenses should be enumerated in the legislation in such a way as to encourage regularity of employment practices and clear communication of work rules to employees. All credibility questions should be left to the trier of fact, and should not be subject to judicial review, as should any questions concerning the relative weight to be given to evidence. In a situation where employees have rejected representation and collective bargaining, it would seem fair that employees should bear the burden of paying for their own legal representation in such proceedings, but provisions should be made for recovery of attorney's fees by a successful plaintiff.

Serious consideration should be given to limiting judicial review except for substantial constitutional questions. Perhaps a special appellate tribunal could be established for run of the mill cases, limited to review of alleged errors of law. Great Britain's experience with its Unfair Dismissal Act might provide insights into useful procedures and remedial approaches.

In those instances where employees choose collective bargaining, the grievance and arbitration procedure should include the same range of rights and remedies as the unfair dismissal statute. In cases of race, sex, religion or national original discrimination, access to

---

146. The reason for this allocation of burden of proof to the employer is that the employer has the records, and the resources to produce them, whereas the employee who has been discharged is in a disadvantageous position with respect to securing evidence of employer motive. Indeed, it might be prudent to include in such legislation some form of official investigatory assistance to employees who allege unjust discharge, to help them to acquire the facts they need to defend against the allegations the employer may make in justification of the dismissal.

147. Back pay and orders of reinstatement are commonly ordered by the National Labor Relations Board as remedies for violations of sections 8(a)(1) and (3) that have resulted in employee discharge.

148. Back pay awards, especially if legal fees must be deducted from them, are not adequate to compensate the unfairly dismissed employee for the losses incurred. These losses might include the loss of property resulting from the inability to find replacement work, the costs of job seeking, and the like. The suggestion of punitive damages is intended to provide a really meaningful deterrent to arbitrary or malicious treatment of employees by employers.

procedures and remedies under Title VII of the 1964 Civil Rights Act\textsuperscript{150} should be an available alternative to collective bargaining procedures and remedies.

b. Protection against the financial ravages of permanent layoffs because of lack of work or cessation of work done by the employees should be provided. The need for such protection increases the longer an employee works for a particular employer or, for reasons of age, becomes less able to find comparable employment elsewhere. To the extent employees contribute directly, through payroll deductions, to a layoff protection fund, their contributions should be considered vested and go to them at retirement with accrued interest, if they are not used sooner. Alternate plans, requiring contributions to a centrally administered fund by employers and the government, might be considered preferable. However, the risk of loss of employment for economic reasons should be shared in at least some circumstances by both employers and employees and not borne entirely by the government. It will be difficult to differentiate the circumstances leading to permanent layoffs, but that will need to be done in order to establish a sound piece of legislation.

In recent years there have been instances where decisions were made to shut down industries because it was more profitable to invest in other sectors than to take the necessary steps to make the closed industries competitive and profitable.\textsuperscript{151} Further, some industries have relocated or subcontracted to save labor costs.\textsuperscript{152} In circumstances like that, it would seem fair that more of the cost of layoffs should be borne by the employer than either the employees or the government.

Regardless of the particulars of the legislation, its policy should state clearly that using the labor of others to make a profit is a privilege, not a right, and that this privilege imposes a duty on the em-


\textsuperscript{151} See Atleson, supra note 72.

\textsuperscript{152} Under NLRA section 8(a)(5), there is a duty to bargain about the decision to close or subcontract where the decision is made solely to reduce labor costs, but there is only a duty to bargain about the effects of the decision if the decision is based on other business reasons. See First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). However, even in those infrequent instances where the duty to bargain about the decision is imposed, there is no duty for the employer to agree with the union’s objections to the employer’s decision to make the change. See id.
ployers to behave in a socially and financially responsible manner toward those employees, their dependents, and their communities. Whatever the legislative scheme chosen, its main purpose should be to prevent at least some of the sudden catastrophic losses employees (and in many cases entire communities) have suffered as a result of losing long-term employment from plant shutdowns or relocations.

c. All employees in businesses with ten or more employees should have a nonwaivable right to vote every three years on: (1) whether or not they would like to have representation to engage in collective bargaining with their employers and (2) if so, what organization should be the representative working on their behalf. Collective bargaining does require that some person or persons represent the group; the employer obviously cannot be expected to bargain with a town meeting. The legislation should insist on professionally qualified, independent representation, rather than employee committees, in order to avoid any problems of employer domination or control, and to provide at least a minimal assurance of competence on the part of the representative.

Three years is an entirely arbitrary period. On average, it seemed about the right time in order to avoid constant workplace interruptions, keep costs down, allow a reasonable period for a collective bargaining agreement to be in place, and yet still allow employees reasonably frequent opportunities to consider again the question of whether to be represented, and if so, by what organization. It is possible that a shorter period of time, say one year, should be stipulated in those situations where the employees have never been represented, and choose at the first election not to collectively bargain. The policy of encouraging collective bargaining relationships to develop, might be better served by a shorter period in those circumstances. In the private sector, it appears that collectively bargained agreements have an average duration of 25 months to 3 years. See INDUSTRIAL RELATIONS CENTER, CLEVELAND State UNIVERSITY, CHARACTERISTICS OF MAJOR PRIVATE SECTOR COLLECTIVE BARGAINING AGREEMENTS AS OF JANUARY 1, 1988, table 1.4 (1989). Where a decision is made to enter into a collective bargaining relationship, sufficient time must be allowed for the agreement to be negotiated, and also for the employees to fully evaluate their elected representative. Under present law, there is a flexible three-year contract bar rule, to which there are numerous exceptions. See A. COX, D. BOK & R. GORMAN supra note 39, at 272-76. For an example of an exception, see American Seating Co., 106 N.L.R.B. 250 (1953).

The degree to which the employees must identify with the group represented is an interesting question. See Abraham, supra note 126, at 1284-85, stating that:

Those who choose to act with others, be it in furtherance of a shared goal or identity or only to advance the likelihood of obtaining their private wishes, must seek more than exchange. They must assess the situation, organize and inform themselves, formulate a collective goal, and then act strategically, employing selective incentives as well as collective discipline to obtain that goal.

Employer domination or control over unions is prohibited by NLRA section 8(a)(2). 29 U.S.C. § 158(a)(2) (1982). The practice of establishing company-dominated unions was one of the principal evils at which the Wagner Act was aimed, as is clear from the legislative history.
The employees' periodic right to vote would carry with it the duty of all employees to be bound by the decision of the majority of employees in the bargaining unit for the next three years. Of course individuals can disagree with decisions taken by a majority in a democratic society. However, this does not mean, and should not mean in new legislation, that dissidents can sabotage the interests of the majority.

In small companies, elections could be conducted by impartial third parties or by businesses that rent voting machines and provide vote-counting services. In the case of large employers, the NLRB regional offices could continue to provide those services. A ballot might be limited to a "yes" or "no" vote on the question of collective bargaining, or it might also include a preferential ballot for a representative (assuming more than one representative is available).

No union or other potential representative would have to seek authorization cards from employees to appear on a ballot, but would only have to request inclusion. The employer could be given a choice of either providing potential representatives access to the premises to meet and/or distribute literature to employees during non-working times in non-working areas, or of providing such organizations a complete list of names and addresses of current employees sixty days before a scheduled election in order to give them time to contact all the employees. Notice of scheduled elections could also be published in newspapers along with other legal notices, at least sixty days in advance.

No potential representative could condition representation on employee membership in its organization. All employees in the election unit would have the same rights of access to the representative, and to sit in on any scheduled discussions of bargaining issues or negotiations in progress. On all issues requiring a vote, all employees would be entitled to vote, and the majority decision would be binding on all.

Potential representatives would be expected to describe fully the representation services they would offer to employees before the elec-

---

156. The sole basis of such a requirement would be the democratic principal that all are bound by a decision taken by the majority. This principal has been undermined by the decision of the Supreme Court in Pattern Makers' League v. NLRB, 473 U.S. 95 (1985).

157. Such a business exists in Cleveland, Ohio. In places that do not provide commercial voting machines or voting booth rentals, perhaps the local election board could be persuaded to make its equipment available, as long as there is no conflict with general elections, otherwise, there would have to be some provision in the legislation for the NLRB or other federal agency to provide the equipment.

158. See Weiler, supra note 52.
tion, and the monthly fees that would be assessed to all employees for those services. If selected, a representative would have to consult with the employees to establish collective bargaining priorities, and would have to submit the contents of tentative agreements to all of the employees for majority approval before entering into an agreement on behalf of the employees. The representative would be solely an agent of the unit of employees, and would not be a party to the contract with the employer. The representative would be a fiduciary, and could have no conflicts of interest in its dealings with a particular group of employees.

Of course representatives should offer services other than professional advice on bargaining strategy and the actual negotiation of contracts. These probably should include qualified financial analysis of the employer's financial condition and competitive economic position, representation of employees at grievance and arbitration procedures, representation of the employees in dealing with the employer on any contract changes during the three year period, and the like.\textsuperscript{169} The role of representatives would not differ greatly from the expert functions now performed by unions in collective bargaining relations.\textsuperscript{160} The relationship between unions and employees would be simplified and clarified, and yet the relationship between employees and employer would not be distorted by the presence of a non-employee third party.

Labor unions perform other functions that might be difficult under this scheme, such as political lobbying.\textsuperscript{161} There is no reason for unions to discontinue their political operations, however. All that would be required is a separation of the representation business from union membership.

\textsuperscript{159} In view of the high cost grievance arbitration, one item that should be considered in connection with the legislation is the provision of group legal services insurance.

\textsuperscript{160} The only thing that would change is the relation between the union and the employees, and the relation between the employees and the employer. The development of new collective bargaining representatives that would occur as a result of such legislation could, however, create significant competition for existing unions. One level of that competition would be the nature, amount, and quality of services provided to employee groups.

\textsuperscript{161} Unions, especially at the national level, have been and still are, actively engaged in the ongoing process of recommending, supporting or opposing new legislation or legislative reforms. Unions also employ expert staffs for this purpose. Union dues of members and non-member represented employees pay for those services now. Under this scheme, political activities would be separated from the representation of employees, unless the employees voted specifically to authorize such activities in their name and on their behalf. Those activities include the presentation of petitions or resolutions to Congress or the state legislatures, among others. The point is that the employees which are represented pay for that representation, and should be allowed to retain fairly direct and tight control over the use of their representation funds.
If unions wanted to offer membership in separately funded organizations for political lobbying support, or for a host of other functions a membership organization might want to perform, such as the provision of life, accident, and disability insurance, health clubs, travel tours, newsletters and so on, there should be no objection to that. In fact, the availability of a range of adjunct services might make an organization more attractive as collective bargaining representative to the majority of employees. Models for such an approach to the provision of extra services to members exist. For example, the American Bar Association, American Association of University Professors and American Association of Retired Persons, are but a few of these models. This proposal would by no means ring the death knell for American labor unions. Indeed, if they put some energy into the process, they could end up representing millions of additional employees.

Professor Atleson raises more substantial questions concerning representational issues that should also be addressed by legislation. As he points out, there are serious disparities in bargaining relationships today because unions are not permitted to engage in joint bargaining, even with very large, conglomerate or multinational corporation employers. Bargaining is limited to employees in a particular bargaining unit. New legislation should make joint bargaining on issues of common concern lawful in the case of such large employers, where there might be several units of employees for election purposes; it should also make possible joint bargaining across corporate lines in the case of conglomerates, and across international lines in the case of multinational corporations. Representatives and employees should also be able to communicate freely with others in their own and related industries. A possible way to make this easier, both for employees and their employers, is to require that in any business, counting a conglomerate or multinational company as a single business for this purpose, all election dates and all contract dates will occur on the same day of the same year.

A right to vote every three years on the questions of collective

162. All of these organizations provide various sorts of insurance plans (through commercial companies) to their members. AARP has its own travel club. The ABA offers discounts on rental cars through Hertz. The AAUP offers a lower than average interest rate credit card through a bank. The list could go on and on and all of these extra services are paid for separately by the members who want them.

163. Atleson, supra note 72.


165. See Atleson, supra note 72, at 845-852.
bargaining and representation will give employees a chance to reconsider current arrangements. It will make needed changes in representation easier than they now are, and it will give those who voted against collective bargaining a chance to change their minds if their decisions proved unwise.

The role of employers in this voting process should be defined. Once the employees have been given a statutory right to vote every three years, it is difficult to see how the employer has any legitimate need to be involved in the decisions the employees make. If the relationship between employer and employees is a close one and if individual bargaining has gone on successfully in the past, it is unlikely that the employees will suddenly decide to bargain collectively. In large establishments, however, not much individual bargaining goes on between employers and the bulk of their employees. In a non-union plant, the employees are paid what the employer is willing to pay them. Here there are strong reasons for not allowing the employer to participate in any way in a representation election. Since the new law would give all employees a statutory right to representation, and a statutory right to vote on the question of representation and collective bargaining every three years, employers would have no good reason for trying to influence the outcome. Any at-

---

166. See generally id. (discussing the impact of the employer’s control of communication and permissible range of political discourse).

167. There are certain exceptions to this, and the university faculty model might be one such exception. In some universities, budgeting is decentralized to a certain extent, to allow deans or department chairs the power to allocate the amount of money they are allotted for salaries as they see fit. In such a case, individuals might attempt to bargain about their salaries with the person in authority. Even there, however, the person with the decision-making authority must be concerned about the impact of decisions on other employees. In a large factory situation, where a hundred or more employees might perform essentially similar work, attempting to bargain individually with all those employees must seem like a senseless exercise. There are easier ways to reward productivity, for example, with incentive plans or by the institution of piece-work rates.

168. In a sense this is also true in a union plant, because the employer is under no obligation to agree to anything the employer does not want.

169. This is not to say they might not have selfish reasons for wanting the employees not to be represented or to engage in collective bargaining with the employees. However, if the policy of the legislation is made crystal clear that the right to bargain collectively is a right the employees possess under the statute, and the exercise of that right is solely the concern of the employees, then any employer interference designed to influence the outcome of that decision making would be inappropriate.

However, this does not reflect the law as it has been developed under the NLRA, which has allowed substantial employer influence over employees in the name of free speech, and under the protection of section 8(c) of the Act. In short, the new law should make it clear that if employees want to bargain collectively with the employer for any reason, the employer must simply agree to collectively bargain with their representative, without attempting to influence the employees either to vote against collective bargaining, or in their choice of representative.
tempt to interfere should be regarded as an attempt to defeat collective representation for reasons apart from the employees' interests in acting collectively. Employers will have ample opportunity to state their positions on the substantive issues affecting employment during the collective bargaining process itself.

New legislation should make clear, as the NLRA failed to do, that any employer interference or influence at the voting stage is a violation of the Act. Such an approach would eliminate from our future jurisprudence the greatest number by far of employer unfair labor practices that come before the Board today.

The question of appropriate employee units remains. Some of the current rules, such as exclusion of plant guards from a general employee unit, a separate vote for professional employees to determine whether they want to be included in a larger employee unit, and exclusion of managerial and supervisory employees from a unit, might helpfully be continued. Perhaps simpler rules could be worked out for the rest of the employee unit issues, beside those under the current Act, to eliminate the necessity for some of the individualized determinations that must be made by the Board now.

Recognizing the legitimacy of joint bargaining among units of a single employer or conglomerate or multinational corporation would reduce the stakes involved in fighting over unit determinations. First, employers and employees should be able to agree on unit determinations, as at present. Then there could be a general rule that in companies with fewer than one hundred employees there could not be more than one unit without the employer's consent. In larger compa-

See generally Weiler, supra note 52.
170. 29 U.S.C. §§ 158(a)(1), 158(c) (1982). Employer interference, restraint or coercion of employees is an unfair labor practice under the current Act. 29 U.S.C. § 158(a)(1) (1982). However, if an employer limits his actions to communications, written or oral, and does not make threats of reprisals or force, or promise of benefits, such communications are shielded by section 8(c) of the Act from being unfair labor practices or evidence of unfair labor practices. 29 U.S.C. § 158(c) (1982). This proposal would extend protection far beyond the present limits of NLRA section 8(a)(1). See 29 U.S.C. § 158(a)(1) (1982).
171. The largest number of cases filed with the NLRB, 53.1 percent, involved charges of violation of section 8(a)(3) in fiscal year 1984. See 49 NLRB ANN. REP. 93 (1984) table 2. Numerous charges of independent violations of section 8(a)(1), 15.4 percent, were also filed. Section 8(a)(1) charges were actually filed in 100 percent of the cases, but the lower figure represents those that charged actual violations of the section. Id. Both of these sections are heavily implicated in organizational activities. See generally Weiler, supra note 52.
panies the National Labor Relations Board regional offices might con-
tinue to make unit determinations as they do now, without judicial
review.176 Companies with existing collective bargaining relations
could be left with their present unit structure, unless the employer or
employees requested that a new determination be made. If the em-
ployees in an existing unit structure opposed the change on grounds
that enlargement or splitting up might result in defeating collective
bargaining, then the existing unit structure should remain
untouched.

The reason for favoring the employees' choice in this matter is
simple: the two aims of this part of the new legislation should be
first, to encourage collective bargaining as much as possible in order
to empower employees in their economic and political relations with
their employers. This was the primary aim of the Wagner Act in
1935, although the economic power aspect of the legislation appears
to have been lost and forgotten since.177 The second aim should be to
reduce industrial conflict, and to take the sting out of it when it does
occur. This legislation, taken in its totality, would do that by encour-
aging private, internal dispute resolution mechanisms through collec-
tive bargaining whenever possible, without taking the ultimate power
of choice to bargain collectively away from the majority of
employees.

d. Strikes and lockouts should be abolished. This is the last nec-
essary step of any new legislation. The attempt to have the govern-
ment establish ground rules effectively and fairly governing the con-

176. Under the present law, bargaining unit determinations made by the Board are only
reviewable by the various Courts of Appeals and only if one of the parties refuses to bargain
and is charged with an unfair labor practice under section 8(a)(5). See NLRB v. Chicago
Health & Tennis Clubs, Inc., 567 F.2d 331 (7th Cir. 1977), cert. denied, 437 U.S. 904 (1978).
The reason for limiting or eliminating judicial review of such decisions altogether is to prevent
delays in the bargaining process. Perhaps it would be preferable to set out more rules for
bargaining unit determinations in new legislation rather than leaving the matter entirely to the
Board's discretion.

177. Section 1 of the National Labor Relations Act as finally adopted and signed into
law, entitled "Findings and Policy," stated in part:

It is hereby declared to be the policy of the United States to eliminate the
causes of certain substantial obstructions to the free flow of commerce and to mitig-
ate and eliminate these obstructions when they have occurred by encouraging the
practice and procedure of collective bargaining and by protecting the exercise by
workers of full freedom of association, self-organization, and designation of repre-
sentatives of their own choosing, for the purpose of negotiating the terms and condi-
tions of their employment or other mutual aid or protection.

S. 1958, 74th Cong., 1st Sess., 49 Stat. 449, (Final Print 1935) reprinted in 2 NLRB LEGIS-
LATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 3270 (1985) (emphasis
added).
duct of economic disputes that cannot be resolved through voluntary collective bargaining has failed. Either one party or the other is going to win in that kind of economic warfare, and the evolution of the case law has now assured that, except in a rare case, the employer determined not to settle voluntarily is destined to be the winner. Alternative methods of economic dispute resolution, starting with mandatory mediation at the first sign of pending impasse, should be legislated. If mandatory mediation fails, then mandatory interest arbitration conducted by a neutral, but well-informed third party, with legislative power to decide any remaining issues in the failed collective bargaining negotiations, could step in. In this legislation, both the employer and the employees would “gamble” on the outcome of their failure to reach agreement on the terms of a collective bargaining contract, not just the employees.

Mandatory interest arbitration would provide both employees and employers with the greatest possible incentive to compromise in order to reach a voluntary agreement, because neither side would be able to predict in advance how an interest arbitrator might decide the outstanding issues. Guidelines should be developed for interest arbitrators to make certain that they will give sufficient consideration to the employer’s circumstances, the economic position of the

178. Mandatory mediation before final impasse could facilitate agreement by allowing a neutral party to help the collective bargaining representatives see possible areas of compromise. A possible further intermediary step might be advisory “fact finding,” in which the neutral recommends to the parties a possible basis for settlement of their differences. A variety of mechanisms are in use both in the United States and in other nations to help the parties settle economic disputes. See The Role of Neutrals in the Resolution of Interest Disputes, An Eight Nation Study by the National Academy of Arbitrators’ Overseas Correspondents, 10 COMP. LAB. L.J. 271 (Spring 1989) (providing a helpful review of some procedures); see also O. Kahn-Freund, supra note 140, at 111-23. See generally F. Elkouri & E. Elkouri, How Arbitration Works 3-4 (4th Ed. 1985).

employees relative to other employees in the company, the industry and the region, and to the reasonableness of the positions taken by each party on the remaining issues. The interest arbitrator should not be bound to accept the position of one side or the other, but should have the power to compromise the outstanding issues, as long as the result reached is feasible and appears to the arbitrator to be the fairest result possible in all the circumstances. It might be possible to specify that where there is a range of disagreement between the parties, say as to salaries, the arbitrator's decision would have to fall somewhere within the range, neither lower than the bottom nor higher than the top. This might lead the parties initially to exaggerate their demands, but there would be an obvious risk to both sides in doing that. The decision of an interest arbitrator should not be reviewable, in the interest of allowing the parties to end their controversies as soon as possible, as well as to keep costs to a minimum.  

However, the decision of an interest arbitrator could be limited to a period of one year, instead of the three year duration of a voluntarily reached collective bargaining agreement, thus giving the parties another opportunity to negotiate a more agreeable settlement at the end of that time. If they continued to disagree, the interest arbitrator's decision could be allowed to stand for the remainder of the three year period. Any decision made by an arbitrator should be retroactive to the date scheduled for completion of negotiations and the signing of a new contract.

Certain terms should be required in every collective bargaining agreement, and should be implied by law if they are not expressly included. Chief among these is an impartial grievance-arbitration procedure for dispute resolution that should be broadened in scope to take the place of a statutory unfair dismissal law (except in cases...

---

180. Statutory standards and procedures to guide interest arbitrators in their fact finding and decision-making would have to be adopted for the system to work fairly, and in the event those procedures were not followed or the standards were not utilized by the interest arbitrator, limited judicial review should be available in the interest of protecting the parties rights to procedural due process. However, judicial disagreement with an interest arbitrator's substantive award should not be grounds for judicial review.

181. Grievance arbitration is arbitration of rights disputes under an existing collective bargaining agreement. See supra note 144. It is commonly provided for in collective bargaining agreements in the United States, but is not universal. See Industrial Relations Center, Cleveland State University, Characteristics of Major Private Sector Collective Bargaining Agreements as of January 1, 1988, table 8.1 (1989). One reason for mandating this provision is to reduce the costs of dispute resolution to the public. Another is to expedite dispute resolution to the extent possible. The state of and costs of private grievance arbitration today should be thoroughly investigated prior to legislation to see whether the system currently in place can be streamlined and made less expensive to the disputants.
involving race, sex, religion, age or national origin discrimination). Another term that should be implied is one protecting the employees’ freedom to associate with others both on and off the job as long as the association is lawful. Another is a provision prohibiting strikes by employees or employer lockouts of employees. Another is a clause granting all members of the unit the right to participate in and vote on all issues relating to representation, and imposing on all members an obligation to contribute an equal share of the cost of representation.

The bargaining relationship, to accomplish its purposes for both employers and employees, cannot be allowed to degenerate into an adversarial relationship. A successful employment relationship is one based on cooperation, not competition, and certainly not warfare. A national labor law based on respect for the rights and interests of all participants in the employment relationship, including those who perform the necessary work, will be far more successful in the long run than the one we have now, which fails to deal either realistically or fairly with the economic interests of employees. This proposal points more accurately toward industrial peace and economic well being than the National Labor Relations Act does because it advocates: establishing planned funds for cushioning employees against the financial shock of displacement or early termination of employment; granting all employees the legal right to vote on issues of representation and restricting the employer’s power to resist or sabotage that right; providing a method for resolving economic disputes with-

182. This provision would give employees a choice of using either existing statutory remedies or resorting to arbitration, either as a final alternative, or as a nonbinding alternative.

183. This is a major change from the present law. Although a union may be legally required to represent all the members of the bargaining unit, it does not have to seek their approval before taking action. On the other hand, some unions permit their members to vote on proposed contracts prior to agreement on their terms. With respect to contributing to the costs of representation, this is possible today if a union can persuade an employer to agree to a union shop clause as contemplated by the proviso to section 8(a)(3). Then all the employees in the unit must “join” the union (in the minimal sense of paying reasonable membership fees and dues to the union). The union may also succeed in persuading the employer to deduct union dues payments from the employees wages, which provides some guarantee to the union that it will receive the money promptly and without hassle. Both of these provisions at present are subject to the agreement of the employer. A statute which seriously intends to foster collective bargaining among employees must recognize that the employees who benefit from it (whether or not they voted for it) are responsible for bearing a fair share of its costs, just as they must pay their fair share of taxes to the various governments, whether they like it or not, in order to support their public institutions. Since employees will have frequent opportunities to reconsider their choice of bargaining representative, the mandatory payments should not become a basis for political oppression. The system of frequent elections should foster competition in the provision of representation services, in terms of quality, scope and costs.
out industrial warfare; and recognizing employee rights to be free of arbitrary and unjust action affecting their employment status.

e. Congress should create a permanent legislative oversight commission to monitor the application of national labor legislation, and to report periodically on developments that do or may require legislative changes. Such a commission could help to keep Congress abreast of major problems in application of the legislation or misunderstandings of its underlying policies. A commission might help Congress draft legislative changes that need to be made because of developing technology or shifts in patterns of employment. Members of the commission should be well-informed of employer and employee interests, but should be non-partisan in their outlook. It would not serve any useful purpose for Congress if such a commission became a platform for special interest groups.

V. CONCLUSION

The proposals offered here for new legislation are based on a frank conclusion that the National Labor Relations Act is not serving its original purpose of enlarging the power of employees to deal with their employers and hence improve their living conditions. There will be some disagreement with the conclusion, and many more disagreements about the proposals. Hopefully, the debate will no longer be principally confined to the pages of law journals, but will draw needed attention from the legislators on whom responsibility for this country's currently disheveled and unsatisfactory labor policies rests.