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Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again

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I. INTRODUCTION

The structure of the legal framework governing collective bargaining tends to fragment the labor movement and to focus labor's use of collective resources on economic gains within specific bargaining units.[1] This fragmentation undermines the sense of shared political objectives among workers and contributes to the declining importance of unions as a political force.[2] This Article is concerned

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1. *See generally* Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1989 WIS. L. REV. (forthcoming) (draft on file with the University of Miami Law Review; citations will refer to page numbers and notes in draft); Stone, *The Postwar Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1983).

2. *See* Rogers, *supra* note 1. In his article, Professor Rogers demonstrates how the organizational structure of collective bargaining dooms union solidarity. He analyzes the institutional framework in terms of the ways in which unions act rationally within that framework and use their collective resources in order to organize at the local level:

> Bluntly put, in the American context unions are largely reducible to union locals, union locals to specific bargaining agreements, and specific agreements to the

with recent legal developments that further encourage fragmentation by localizing, within bargaining units, the processing of disputes over statutory rights of union workers under the National Labor Relations Act ("NLRA" or "Act").[3]

This Article analyzes both the process of disputing and the relationship between that process and the substantive outcomes of workplace disputes. The substantive outcomes of disputes matter because of the potential impact of any outcome on the relative wealth and bargaining power of labor and management,[4] which will affect the res-

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interests and capacities of workers in narrowly defined units. This is an organizational structure that does not encourage solidarity even across sites, much less between workers in particular sites and the unorganized.

Id. at 125; *see also* Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989) (arguing that the statutory interpretation of employee Section 7 rights to engage in workplace protests tends to undermine solidarity across bargaining units).

I do not disagree with Professor Roger's institutional account of the way that the Labor Management Relations Act has kept the cost of union organizing high and encouraged fragmentation of organized workers. Rogers, *supra* note 1, at 119-48. Indeed, the focus of unions on gains within specific bargaining units largely explains why dispute processing is becoming more localized, as this Article describes. Nevertheless, I believe it is important to continue to seek institutional structures that will permit workers to have a significant voice in working conditions, while attempting to supersede the fragmented structure of collective bargaining on a unit-by-unit basis. My reasons for focusing on the substantive and procedural characteristics of workplace disputes are twofold. First, it highlights the way in which the state conditions the bargaining power of labor within the fragmented structures of bargaining through a system of allocation of statutory and contract entitlements. *See infra* notes 191-393 and accompanying text. Second, dispute processing provides the institutional setting for ongoing conflicts over power and hierarchy in the workplace. *See infra* notes 26-34 and accompanying text. A shared discourse among workers about the way that power is exercised in the workplace is fundamental to broader-based political action aimed at altering the institutional structures that lead to workers' organizational weakness. For the inadequacy of the current statutory structure to both become more visible and serve as a focal point for political action, unions need to resist accepting arbitration as a forum for adjudicating statutory rights. As Professor Rogers himself recognizes, history never stops. This Article addresses the inadequacy of arbitration as a forum to adjudicate statutory rights.

3. The original National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. IV 1986)), was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, tit. I, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-200 (1982 & Supp. IV 1986)) (amending and incorporating 29 U.S.C. §§ 151-169 and adding 29 U.S.C. §§ 141-144, 171-200). The National Labor Relations Act was further amended in 1959 by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act. Pub. L. No. 86-257, 73 Stat. 542 (1959). Hereinafter, "Act" or "NLRA" refers to the National Labor Relations Act, as amended; "LMRA" refers to the Labor Management Relations Act, 1947, as amended.

The federal courts were given subject matter jurisdiction over the enforcement of collective bargaining agreements by LMRA § 301(a), 29 U.S.C. § 185(a). *See also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (By enacting Section 301, Congress authorized federal courts to fashion a body of federal law to govern the enforcement of collective agreements.).

4. *See infra* notes 325-93 and accompanying text.

olution of future disputes. The process of disputing is important in three different ways. First, delays in the process of disputing in either a public forum or in arbitration, combined with the substantive right of management to act pending resolution of a dispute, can effectively undermine the enforcement of a statutory right or contract entitlement.[5] When the remedy is delayed, it may provide an empty victory by the time the dispute is resolved. Second, the structural characteristics and context of the forum selected to adjudicate the dispute tend to influence the arguments accepted as legitimate justifications for an adjudicator's decision.[6] Thus, the selection of a forum may influence the substantive outcome of a dispute.[7] Third, the visibility of a forum will determine, in part, the relationship between the ongoing process of disputing and the public discourse over the statutory rights of workers.[8] When disputes are localized within specific bargaining units, rather than being adjudicated in visible public forums, the discourse over workers' rights also focuses on tensions within specific work settings.[9] The dialogue over shared concerns among workers in general is weakened, and the potential contribution of the disputing process to transformations in the values and perspectives applied to resolve disputes is inhibited.[10] Thus, bifurcating and particularizing the discourse over workers' shared concerns tends to undermine the potential for broader based political action reflecting common goals.[11]

The central claim of this Article is that the resolution of workplace disputes among union employees is becoming more localized to particular bargaining units, and thus more particularistic. This is evidenced by the growing reliance on private arbitration, rather than the National Labor Relations Board ("NLRB" or "Board") and the federal courts, as the primary forum in which to resolve disputes over employee statutory rights under the NLRA once a union has obtained a collective bargaining agreement.[12] This transferral of adjudication

5. *See infra* notes 295-307 and accompanying text.

6. *See* Sarat, *The "New Formalism" in Disputing and Dispute Processing*, 21 LAW & SOC'Y REV. 695, 708-11 (1988).

7. *See, e.g., infra* notes 367-93 and accompanying text.

8. *See infra* note 34 and accompanying text.

9. *See infra* notes 503-35 and accompanying text.

10. *See infra* notes 29-34 and accompanying text.

11. *See* Rogers, *supra* note 1; Stone, *supra* note 1.

12. *See infra* notes 144-90 & 394-502 and accompanying text. A similar trend exists under the Railway Labor Act, ch. 247, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982 & Supp. IV 1986)) (RLA). Recent court decisions have narrowed the category of major disputes, which are resolved through bargaining in which the parties are obligated to maintain the status quo prior to impasse, an obligation that is enforced by federal courts under Section 6 of the RLA. Correspondingly, the courts expanded the category of minor disputes, which are resolved by adjustment boards and which are not governed by a statutory obligation

of statutory rights to private arbitrators is problematic for two related reasons. First, arbitrators are an integral part of the system of private ordering and thus are not in a position to adjudicate fundamental challenges to the statutory framework governing bargaining.[13] Second, arbitrators tend to explain their decisions in terms of the parties' collective bargaining agreement, expectations, and ongoing working relationship, and not in terms of underlying statutory policies.[14] Thus, disputes over gaps in collective agreements often are resolved by reference to management rights clauses that are interpreted in a manner consistent with the values of efficiency and maintenance of productivity, rather than by reference to statutes that are protective of employees' rights.[15] Therefore, the linkage between the ongoing process of disputing in the workplace and public discourse over workers' statutory rights is less visible.

There is substantial overlap in the subject matter jurisdiction of the three alternative forums that adjudicate or resolve disputes that arise in a unionized workplace: the National Labor Relations Board, the federal courts, and private arbitrators.[16] Each forum's core subject matter jurisdiction can be easily distinguished, and thus each forum's jurisdictional role in the labor dispute resolution process is relatively well defined. Nonetheless, an aggrieved party still enjoys considerable freedom to characterize the statutory or contract right being asserted in a way that permits considerable forum shopping. This potential for parties to forum shop has led to a complex body of doctrine that governs the allocation of disputes among the forums in a manner that is consistent with a general theory of collective bargaining.[17]

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to maintain the status quo. *See* Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2477, 2489 (1989) (When an employer asserts a contract right to take unilateral action to alter a working condition, the dispute is minor if "the action is arguably justified by the implied terms of its collective-bargaining agreement."); Air Line Pilots Ass'n Int'l v. Eastern Air Lines, 863 F.2d 891, 859-900 (D.C. Cir. 1988) (The district court was without jurisdiction to enter a preliminary Section 6 status quo injunction for a dispute arising after the expiration of an agreement; a court must look to the parties' expectations and relationship under the expired agreement when classifying the dispute, and where the dispute is over the definition of previously vested rights, the dispute is minor and hence within the adjustment board's jurisdiction.); Comment, *Merging the RLA and the NLRA for Eastern Air Lines: Can It Fly?*, 44 U. MIAMI L. REV. 539 (1989); *see also* Lynch, *Statutory Rights and Arbitral Values: Some Conclusions*, 44 U. MIAMI L. REV. 617, 619-25 (1989).

13. *See infra* notes 503-35 and accompanying text.

14. *See infra* notes 507-15 and accompanying text.

15. *See infra* notes 511-33 and accompanying text.

16. *See infra* notes 38-142 and accompanying text.

17. For a systematic description of this general theory, derived from the doctrine establishing the legal framework that governs parties' relationships in the formation and administration of collective bargaining agreements, see Feller, *A General Theory of the*

This general theory of collective bargaining views labor arbitration as the centerpiece of a democratic workplace in which workers and employers jointly agree on a set of rules, the collective bargaining agreement, which governs the conduct of both management representatives and employees in the workplace.[18] Private arbitration is

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Collective Bargaining Agreement, 61 CALIF. L. REV. 663 (1973). For a critical treatment of the assumptions about hierarchy and power in the workplace which inform the doctrinal model of labor relations, see J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-41*, 62 MINN. L. REV. 265 (1978); Stone, *supra* note 1. For a response to Professors Klare and Stone's critical treatment of the labor doctrine, as well as their replies, see Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984); Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985); Stone, *Re-Envisioning Labor Law: A Response to Professor Finkin*, 45 MD. L. REV. 978 (1986).

18. *See* LMRA § 201, 29 U.S.C. § 171; LMRA § 301, 29 U.S.C. § 185. In Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the United States Supreme Court stated that Section 301 was a mandate for the federal courts to develop a substantive body of federal law to govern the enforcement of collective bargaining agreements. *Id.* at 456. The Court made arbitration the centerpiece of the system of private government in collective agreements in three cases decided in 1960, known collectively as the *Steelworkers Trilogy*. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (An arbitrator's award should be enforced as long as the award draws its essence from the collective agreement.); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (When the scope of an agreement to arbitrate is ambiguous, courts should resolve doubts in favor of coverage and order the parties to arbitrate.); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (Courts should enforce agreements to arbitrate irrespective of the merits of the grievance as long as the dispute is within the scope of the arbitration clause.).

In *Warrior & Gulf Navigation Co.*, the Court, relying on Dean Shulman's Holmes Lecture, *see* Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955), and an article by Professor Archibald Cox, *see* Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959), described collective bargaining as follows:

> A collective bargaining agreement is an effort to erect a system of industrial self-government . . . . But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.

Warrior & Gulf Navigation Co., 363 U.S. at 580.

For an early vision of the Taft-Hartley Act's objective of creating a "government of an industry or plant, under which [labor and management] work out together through grievance procedure and arbitration the day-to-day problems of administration," see Cox, *Some Aspects of the Labor Management Relations Act, 1947 (Pt. 1)*, 61 HARV. L. REV. 1, 1 (1947). *See also* Feller, *supra* note 17; Shulman, *supra*.

In addition to giving federal courts the jurisdiction to enforce collective bargaining agreements, the Taft-Hartley Act also substantially altered the balance of power between unions and employers in conflicts over organizing drives, and it placed restrictions on union tactics aimed at neutral or secondary employers. *See* NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4). Thus, the costs of organizing increased, causing tensions for unions deciding whether to use their resources to improve the economic conditions of workers in sectors of the economy which already had high density union organization, or whether to use resources provided by union employees to organize workers in less organized sectors. *See* Rogers, *supra* note 1, at 126-33.

the primary vehicle for resolving conflicts over the interpretation and application of these rules in the context of specific disputes. The theory posits the NLRB's primary functions in terms of protecting the organizational rights of workers and reinforcing the system of private ordering through collective bargaining once employees have selected a bargaining representative.[19] This theory tends to minimize the Board's role as a forum for resolving specific labor-management workplace disputes once the union obtains a collective agreement. Similarly, the federal courts' powers of adjudication and enforcement are used primarily to encourage the parties to turn to arbitration to resolve their conflicts, rather than to encourage the parties to use economic and concerted pressure to achieve their respective goals.[20] Thus, federal court doctrine projects a contractarian image of rights in the workplace that minimizes the impact of Board and court decisions on the relative bargaining power of the parties.

Central to this policy that encourages the parties to rely on arbitration, rather than concerted pressure, to resolve disputes is the assumption that the union will contract away or waive its statutory right to strike in exchange for a broad arbitration clause.[21] This general acceptance of a union's capacity to waive employee NLRA rights leads inevitably to shared jurisdiction between the NLRB and private arbitrators over the adjudication of statutory rights.[22] Thus, for example, the wording of a collective bargaining agreement becomes a focal point for determining whether a union has waived an employee's protection under Section 7 to engage in different forms of protest in solidarity with other workers.[23] Moreover, whether a dispute over the waiver is to be adjudicated by the Board or by an arbitrator is decided, in turn, by reference to the Board's deferral doctrine.[24] Con-

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The new union unfair labor practice restrictions also reflected a set of underlying statutory values that were in tension with the policies embodied in the original language of Section 7 and invited reinterpretation of the scope of employee statutory rights. *See generally* J. ATLESON, *supra* note 17; Fischl, *supra* note 2; Klare, *supra* note 17.

19. *See infra* notes 394-502 and accompanying text (describing how the deferral and waiver doctrines displace statutory disputes from the NLRB to private arbitrators once a bargaining representative has signed a collective agreement). For a thoughtful argument in favor of the Board focusing its statutory enforcement powers primarily on protecting workers engaged in union organizing, see Weiler, *Promises to Keep: Securing Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

20. For contrasting views on the way that federal common law encourages the peaceful resolution of workplace disputes rather than the use of economic and concerted pressure, compare Feller, *supra* note 17 with Stone, *supra* note 1.

21. *See infra* notes 50-54 and accompanying text.

22. *See infra* notes 55-100 and accompanying text.

23. *See infra* notes 445-502 and accompanying text.

24. For a description and analysis of the Board's deferral doctrine, see *infra* notes 394-444 and accompanying text.

sequently, the deferral and waiver doctrines interact to increase reliance on arbitration to resolve workplace disputes over statutory rights.[25]

To the extent that these doctrines force more disputes into arbitration, there are significant implications for the cohesion of the labor movement in general. The context of the setting in which parties dispute over their respective statutory and contract entitlements shapes the way in which a dispute is framed and whether the arguments advanced are treated as legitimate.[26] In the public forum of the NLRB, it is expected that disputes will be framed in terms of the underlying statutory values that reflect a societal view of both the appropriate balance of power between labor and management and the protection of employee rights to engage in collective action.[27] In arbitration, however, the structure of the system of collective bargaining is treated as a given; the discourse instead focuses on the parties' working relationship and on their respective expectations as defined by the collective bargaining agreement and past practices. Fundamental values regarding justice in the workplace are an element of the way disputes are framed in arbitration, but it is a concept of justice that is bounded by workers' expectations in a specific bargaining unit. The connection of the dispute to the situation of workers in general is less visible.[28]

The visibility and level of the forum in which disputes are adjudicated matters because of differences in the way in which arguments about disputes are framed before the Board and courts, as compared with the way in which they are framed before private arbitrators. The discourse that is accepted as legitimate for resolving disputes is linked to the ongoing development of an "ideology" of the workplace. The term ideology, as it is used here, refers to the "webs of values, perspectives, and evaluative criteria" that construct the social relations of the workplace.[29] Disputes between management and labor are not

25. *See infra* notes 394-502 and accompanying text.

26. *See* Sarat, *supra* note 6, at 708-11.

27. *See infra* notes 325-93 and accompanying text.

28. *See infra* notes 521-23 and accompanying text.

29. *See* Trubek & Esser, *"Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box?*, 14 LAW & SOC. INQUIRY 3, 18 (1989). In contrasting an instrumentalist approach to research on disputing with an interpretist vision of ideology, the authors comment:

> For an interpretist, the values, the knowledge, and evaluative criteria embodied in the subjectivity of actors are not individually held units of meaning but rather are the threads or traces of a collectively held fabric of social relations. Further, in the interpretivist perspective the individual does not appropriate this fabric through the conscious selection of values or learning of existing knowledge [instrumentalism]. Rather, in some sense the fabric "appropriates" the

simply static events that need to be resolved so that productivity will not be interrupted.[30] They are also quarrels over the substance of the ideology that may result in a transformation over time of the values and perspectives embodied in the ideology.[31] This relationship has been succinctly described by Professors Trubek and Esser:

> The handling of a dispute is thus a dialectical process that transforms not only the dispute itself but the legal system and the community as well. Dispute processing not only changes the form and content of the social relationship in question, but also may alter law and legal consciousness. "Process" relates social change to legal change. "Process" (or "practice") sits *between* law and society, providing a site where legal meanings can "flow through" and become part of community and vice versa.[32]

This dialectical vision of the process of disputing contributes to an understanding of the consequences of using private arbitration to resolve conflicts over statutory rights when they overlap with issues of contract interpretation. The point is not that the union movement is more likely to obtain better results through the adjudication of statutory rights in more visible public forums. Indeed, recent experience suggests that management is much more successful than labor at obtaining Board and court decisions that embody a management ideology of the workplace.[33] What this Article questions is the conse-

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> individual so that without self-conscious reflection the actor comes to desire the ends, use the perspectives, and apply the rationality that makes up the social fabric.

Id. The web of values in the workplace, which "appropriates" workers and employers, enables them to respond to a variety of workplace conflicts within certain constraints that are defined by that web of values. At the same time, their response to new situations will alter the "ideology" of the workplace in ways that encourage new responses in the future. *See id.* (citing Merry, *Everyday Understanding of the Law in Working-Class America*, 13 AM. ETHNOLOGIST 253 (1986)).

30. *See id.* at 22. Dispute resolution does not merely involve individuals who act rationally in the selection of the most efficient forum for resolving their conflict. It also involves "transformation." *See* Mather & Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775, 776-77 (1980-81). The authors argue:

> Transformations occur because participants in the disputing process have different interests in and perspectives on the dispute; participants assert these interests and perspectives in the very process of defining and shaping the object of the dispute . . . . By *transformation of a dispute* we mean a change in its form or content as a result of the interaction and involvement of other participants in the dispute process . . . . [T]he transformation of a dispute involves a process of *rephrasing*--that is, some kind of reformulation into a public discourse.

Id.

31. *See* Trubek & Esser, *supra* note 29, at 23.

32. *Id.*

33. For the negative reactions of labor leaders to doctrinal trends in Board and court decisions interpreting the NLRA, see *infra* note 534.

quence for the labor movement in general of the displacement of more disputes from public forums to private arbitration, regardless of whether unions are obtaining favorable rulings before the Board and the courts. Public discourse about fundamental rights contributes to the definition of shared community.[34] When that discourse becomes more localized within particular bargaining units and the processing of disputes is decentralized, a sense of shared concerns among workers is inevitably weakened.

In order to support the claim that a more expansive use of labor arbitration inhibits discourse our statutory rights, it is important to illustrate how the institutional setting of arbitration shapes and limits the nature of arbitral reasoning. Prior to a comparative analysis of the reasoning employed in public forums and private arbitration, however, the reader needs a picture of the forums' overlapping subject matter jurisdictions and the doctrines that are employed to allocate disputes among the forums. Section II describes the relationship among the Board, the federal courts, and private arbitration, and it illustrates the potential for aggrieved parties to take their claim to more than one forum. The purpose of this Section is to give the reader a "road map" for understanding the forums' shared jurisdiction.

Section III describes two of the doctrines used to allocate claims among the three forums. In the first instance, it is important to distinguish between the principles of federal common law under Section 301 of the Labor Management Relations Act (LMRA), which govern the respective roles of courts and arbitrators in the enforcement of collective bargaining agreements, and the doctrines used to allocate disputes between the NLRB and arbitrators. Section III only deals with the former. The two key doctrines are: (a) the interrelationship between the presumption of arbitrability and no-strike clauses; and (b) the limited scope of judicial review of arbitration awards. The principles embodied in the two doctrines limit the courts' role primarily to determining the arbitrability of disputes, issuing injunctions to enforce no-strike clauses, and enforcing arbitration awards as long as the awards derive their essence from collective agreements.[35]

Deferral and waiver, the two doctrines governing the relationship

34. *See, e.g.*, Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984) (arguing that the discourse over communal notions of property rights contributed to efforts by unemployed steel workers to seek creative solutions to purchase steel mills and keep them from closing); *see also* Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798 (1987); Perry, *Taking Neither "Rights-talk" nor the "Critique of Rights" Too Seriously*, 62 TEX. L. REV. 1405 (1984).

35. *See infra* notes 144-90 and accompanying text.

between the NLRB and arbitrators, are the subject of Section V. In order to illustrate the significance of deferral and waiver, however, Section IV first addresses why the forum for resolving disputes over statutory rights matters. In Section IV, entitlement theory is used to provide a conceptual framework for examining the way that the interpretation of statutory rights shapes collective bargaining by partially determining the bundle of state protected entitlements that each party holds at the outset of bargaining. Entitlement theory is used because it helps to underscore the role of the state in creating, allocating, and protecting the parties' expectations.[36]

Section V then examines the relationship between the Board's standards for the deferral of unfair labor practice charges to arbitration on the one hand, and the acceptance of a union's power to waive employee Section 7 rights on the other. The analysis illustrates how the two doctrines interact to increase the use of arbitration for the resolution of disputes involving issues of statutory policy. This analysis of the deferral doctrine examines: (a) the Board's standards for deciding whether to proceed with an unfair labor practice charge, both prior to and subsequent to an arbitration award; (b) the consequences of limited judicial control over the administration of these standards in regional offices; and (c) the critical reaction of some federal courts to the Board's deferral standards. Section V then describes the way that waiver doctrine shifts the focus of disputes over statutory rights from a balancing of interests reflecting statutory policies to an inquiry into the parties' expectations under the collective bargaining

36. The use of entitlement theory as an analytical tool is not meant, however, to suggest that the concept should become central to the labor movement's public discourse over claims to rights established by the NLRA. Rights discourse embodies the communication of a demand that the state recognize a fundamental expectancy based on shared communal values. In addition, rights discourse may contribute to the formation of community. *See* Appleby, *supra* note 33; Lynd, *supra* note 33; Perry, *supra* note 33. For a critique of the communitarian vision of rights and an argument that a focus on rights is both disempowering and alienating, see T. CAMPBELL, THE LEFT AND RIGHTS (1983); Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988); Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

In the workplace, management has been much more successful than labor at using the rhetoric of rights to shield core entrepreneurial decisionmaking from collective bargaining. *See, e.g.*, Pittsburgh & L.E. R.R. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2584, 2596 (1989) (A decision of a railroad employer to sell its assets with the consequent reduction in available jobs to zero is not a change in the status quo subject to an obligation to bargain under Section 156 of the Railway Labor Act.); First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (An employer has no duty to bargain under NLRA § 8(a)(5) over a partial closing of a business.); Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*) (Unless there is an explicit clause to the contrary in a collective agreement, an employer is free to transfer bargaining unit work during the term of an agreement after bargaining to impasse.) Nevertheless, the claims of the labor movement for state recognition of shared values in the workplace are appropriately embodied in a demand for the recognition of statutory rights.

agreement based on contract language, bargaining history, and past practice.

Section VI describes why grievance arbitration is an inappropriate forum in which to resolve disputes over statutory policy due to the structural characteristics of arbitration and arbitrators' predominant concern with the ongoing relationship between a specific employer and union. The principles that arbitrators apply to resolve disputes are compared with the justifications used by the Board and the courts to explain their decisions. The student comments published in this issue provide more detailed illustrations of the reasoning of arbitrators as compared to the Board and the courts in the context of specific types of recurring disputes. The extent to which the claims of this Article are, or are not, supported by the findings of the student comments is discussed in my concluding essay.[37]

Finally, Section VII summarizes this Article's central themes and conclusions. It is argued that disputes that involve an overlap between unfair labor practice charges and contract entitlements often present the adjudicator with the need to allocate an unsettled statutory entitlement. The way the disputes are resolved matters because the allocation of the entitlement may influence the relative bargaining power between management and labor. Arbitration is an inappropriate forum for resolving these conflicts because what is accepted as legitimate discourse to justify an arbitral award is bounded by the collective bargaining agreement and the parties' expectations, rather than by statutory policies aimed at balancing the relative power of labor and management. In arbitration, the structure of the legal framework is treated as a given rather than as the focal point for engaging in an ongoing process of disputing about the structure itself. In addition, arbitration awards are less visible than Board or court decisions. They are primarily concerned with the disputes in a specific bargaining unit. Thus, the contribution of the disputing process to the ongoing formation of an "ideology" of the workplace is localized in the particular bargaining unit. Therefore, the conclusion argues that the NLRB should adopt an alternative standard for deferral, one which is more protective of the NLRB's jurisdiction to resolve conflicts over fundamental questions of statutory policy.

II. SHARED JURISDICTION OVER STATUTORY AND CONTRACT DISPUTES

In enacting the NLRA, Congress chose to create an administra-

37. For concluding observations on the implications of the student comments, see Lynch, *supra* note 12.

tive board staffed by labor relations experts who were to be appointed by the President and confirmed by Congress.[38] The Board was charged with the responsibility of adjudicating unfair labor practice charges,[39] with all final orders subject to judicial review by the United States Courts of Appeals before enforcement under a court's contempt power.[40] Thus, the statutory structure contemplated the initial formulation of statutory policy by an administrative board responsive to changing political currents within the executive branch and Congress.[41] At the same time, the federal courts were to provide an independent source of continuity in the development of labor policy through judicial review of final Board orders.[42]

There are now two additional avenues by which the federal courts shape labor policies governing collective bargaining. First, under Section 301 of the LMRA, the courts have jurisdiction to enforce collective bargaining agreements through actions filed in the federal district courts.[43] As a part of this power to enforce collective agreements, they also review arbitration awards as a precursor to deciding if an award should be enforced by a court order.[44] Second, the federal courts share jurisdiction with the Board over claims by individual employees that their union has failed to represent them fairly either in bargaining or in the processing of grievances under a collective agreement.[45]

In all three avenues of this involvement with the formulation of

38. NLRA § 3, 29 U.S.C. § 153.

39. NLRA § 10(a), 29 U.S.C. § 160(a).

40. NLRA § 10(e)-(f), 29 U.S.C. § 160(e)-(f).

41. *See* NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 499 (1960) ("[W]here Congress has in the statute given the Board a question to answer, the courts will give respect to that answer. . . ."); NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957) ("The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."). *But see* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.").

42. NLRA § 10(f), 29 U.S.C. § 160(f).

43. LMRA § 301(a), 29 U.S.C. § 185(a); NLRA § 10(e), 29 U.S.C. § 160(e). State courts may also hear actions to enforce collective bargaining agreements, but they must apply federal law, and the actions may be removed to federal court. *See* Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968); Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1967).

44. LMRA § 301(a), 29 U.S.C. § 185(a); *see* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

45. *See* Vaca v. Sipes, 386 U.S. 171, 183 (1962) (The NLRB's assumption of jurisdiction over duty of fair representation complaints against bargaining agents did not "oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative."); Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962) (A bargaining

labor policy, the federal courts have been careful to project a contractarian image of labor policy. Court doctrine points to the role of both the Board and the courts as neutral adjudicators who encourage the parties to define workplace rights through collective bargaining and as avenues through which the parties enforce their bargain.[46] Their actual decisions, however, establish initial statutory entitlements, fill in gaps in agreements, and balance bargaining power by regulating forms of concerted pressure.[47] Thus, both the Board and the courts play prominent roles in the formulation of labor policy in ways that impact on the substantive terms of collective bargaining agreements.

Although theoretically neutral contract interpreters, private arbitrators also play a role in shaping and implementing statutory policy. The source of a labor arbitrator's jurisdiction over disputes is the parties' collective bargaining agreement.[48] These agreements normally include an arbitration clause that defines the scope of the arbitrator's power to hear disputes arising under the agreement and that delineates the remedies that the arbitrator may include in an award. This consensual image of labor arbitration is, however, only a partial explanation for the expansive role of labor arbitration. To understand fully the role of labor arbitration, it is necessary to examine the doctrine shaping the interlocking relationship among the Board, the federal courts, and arbitrators.

Through their jurisdiction to enforce collective bargaining agreements, the federal courts have developed a substantial body of federal common law making labor arbitration the centerpiece of a democratic workplace in which workers and employers jointly agree on a set of rules governing the conduct of management representatives and

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agent's breach of the duty of fair representation violates Sections 7 and 8(b)(1)(A) of the NLRA), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

46. *See infra* notes 148-59 and accompanying text.

47. *See infra* notes 325-93 and accompanying text.

48. For a description of the early rise to "prominence and respectability" of arbitration and labor arbitrators, and their development as "a distinct professional group who successfully advocated their role in the collective bargaining process," see Stone, *supra* note 1, at 1523-25. *See also* Shulman, *supra* note 18, at 1007-09. Shulman explains the importance of understanding the arbitrator's proper role:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather a part of a system of self-government created by and confined to the parties . . . .

Id. at 1016, *quoted in* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

employees.[49] For example, if a union has waived its statutory right to strike during the term of an agreement, federal courts will presume that disputes arising under the agreement are subject to arbitration.[50] Similarly, if a dispute is subject to arbitration, federal common law will imply a union obligation not to strike.[51] Federal courts assume a coterminous relationship between the breadth of a grievance arbitration clause and a union's pledge not to strike.[52] Finally, the autonomy of arbitrators in the interpretation of agreements is also protected by the limited nature of judicial review of arbitration awards.[53] Consequently, federal courts ordinarily enforce arbitration awards as long as the arbitrator's opinion draws its essence from the agreement.[54]

Implicit in this model of labor relations, with arbitration as the central means by which unions control employer discretion on a dispute-by-dispute basis, is the assumption that the union may waive employees' statutory rights.[55] Section 7 of the NLRA guarantees to

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49. *See supra* note 18.

50. Justice Douglas first asserted that arbitration was the quid pro quo for a union's agreement not to strike in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957). He subsequently used an absolute no-strike clause to support the presumption of arbitrability in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960). In a later case, the Court found that a strike over a dispute that had been consigned to arbitration violated the collective bargaining agreement, even in the absence of an express no-strike clause. Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-06 (1962); *see also* Gateway Coal Co. v. UMW, 414 U.S. 368, 380-84 (1974). The binding relationship between arbitration and the no-strike clause was accorded the equitable enforcement power of the courts in 1970, when the Supreme Court held that the Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1982 & Supp. IV 1986)), does not prevent the federal courts from enjoining a strike over an arbitral dispute. Boys Mkts., Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970). The Court provided the final touches to the concept of the coterminous relationship between grievance arbitration and the no-strike clause in 1976 when it held that a *Boys Markets* injunction could only issue to enforce a no-strike clause if the work stoppage was over an arbitral dispute. Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

51. *See* Gateway Coal Co. v. UMW, 464 U.S. 368 (1974); Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

52. *See* cases cited *supra* note 50.

53. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598-99 (1960).

54. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364 (1987); *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

55. The coterminous relationships between arbitration, the peaceful means of resolving workplace disputes, and the no-strike clause assumes that a bargaining agent can waive an individual employee's Section 7 entitlement to be protected when engaged in concerted activity. *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956) ("On the premise of fair representation, collective bargaining contracts frequently have included certain waivers of the employees' right to strike . . . . *Provided the selection of the bargaining representative remains free*, such waivers contribute to the normal flow of commerce and the maintenance of regular production schedules.").

employees the right to engage in concerted activity for mutual aid and protection, which includes the right to strike.[56] Although an individual employee may not contract with his employer to waive that employee's Section 7 right to engage in concerted activity,[57] once employees have banded together into a union, their bargaining agent may waive this right in a collective bargaining agreement encompassing all the employees within the bargaining unit.[58]

This "waiver" doctrine inevitably leads to shared jurisdiction between the Board and arbitrators in the adjudication of potential Section 7 violations. Consequently, the interpretation of the collective bargaining agreement becomes the central issue in determining both the extent of the protection provided by the agreement and whether the agreement waived the protection that the employees would otherwise enjoy under Section 7. Two similar cases, *NLRB v. City Disposal Systems*[59] and *American Freight System v. NLRB*,[60] provide useful examples of this overlap.

In each of these cases, an employee refused to drive a truck that he thought was unsafe and, as a result, was discharged by the employer for refusing to follow the order to drive.[61] Illustration 1 sets forth the employee's options at this point: Most employees would immediately file a grievance claiming that the discharge was not for just cause, arguing that there was a contractual right to refuse to drive an unsafe truck.[62] Alternatively, or simultaneously, the employee might file an unfair labor practice charge with a regional office of the Board, alleging that he had been disciplined for engaging in protected concerted activity.[63] Should the employee attempt to go directly to court under Section 301 in order to enforce his claimed contractual right[64] to refuse to drive an unsafe truck, however, the court would dismiss the complaint and require the employee to first exhaust his remedies under the collective bargaining agreement.[65]

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56. NLRA § 7, 29 U.S.C. § 157.

57. NLRA § 9(a), 29 U.S.C. § 159(a). Individual contracts entered into prior to the employees' selection of an exclusive bargaining agent cannot be used by the employer to "defeat or delay procedures prescribed by the National Labor Relations Act looking to collective bargaining." J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944).

58. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

59. 465 U.S. 822 (1984).

60. 722 F.2d 828 (D.C. Cir. 1983).

61. *City Disposal Sys.*, 465 U.S. at 826-27; *American Freight Sys.*, 722 F.2d at 830.

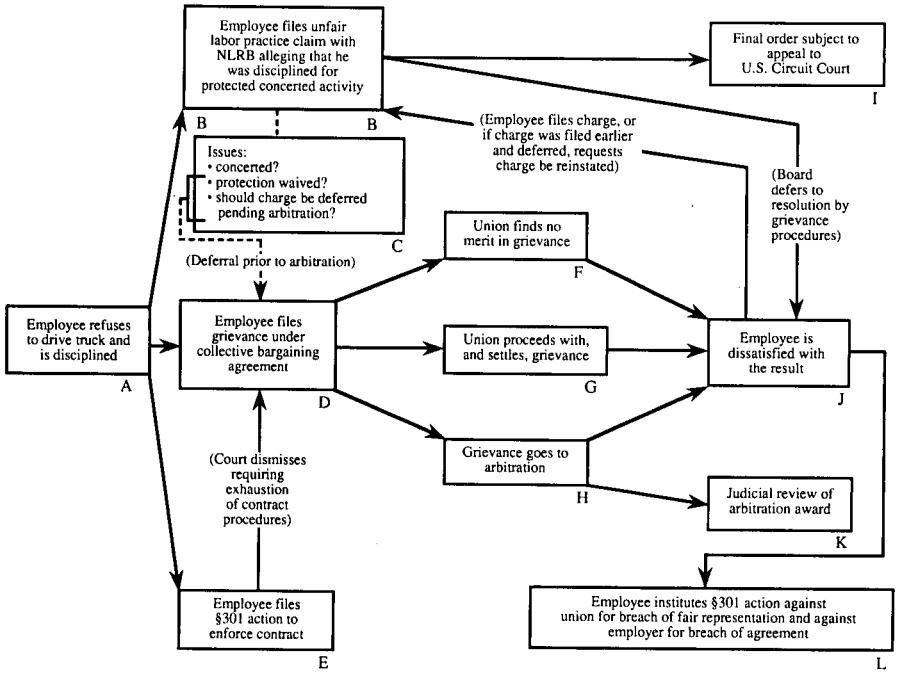
62. Illustration 1, Box D; *see City Disposal Sys.*, 465 U.S. at 827; *American Freight Sys.*, 722 F.2d at 830.

63. Illustration 1, Box B; *see City Disposal Sys.*, 465 U.S. at 827-28; *American Freight Sys.*, 722 F.2d at 830.

64. Illustration 1, Box E.

65. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

Illustration 1



If the grievance is resolved in the employee's favor prior to arbitration and if the employee is content with the result, that would end the matter. If the grievance is arbitrated and the employee wins, the employer's only alternative is to seek to set aside the award in a court, but the court would normally treat the award as final and hence binding.[66] The situation becomes more complex, however, if the grievance is resolved against the employee.

Illustration 1 depicts three different ways in which a decision adverse to the grievant may be made. First, the union could decide that the grievance lacks merit and thus decline to grieve; this was the case in *City Disposal Systems*.[67] Second, the union might initiate grievance procedures and either settle the grievance because it decides that the employer was justified or because the grievance is not of sufficient merit to justify the expenditure of union resources to arbitrate. Alternatively, the union may agree to a compromise remedy, such as the employee's reinstatement without back pay.[68] If the union either settles the grievance or declines to grieve, the employee—if he is dissatisfied with the union's decision—may elect to pursue an alternative remedy by initiating a complaint in another forum.[69] Third, the grievance could go to arbitration and be denied by the arbitrator.[70] In *American Freight System*, for example, the grievance was denied after a hearing by a bipartite grievance committee which the court treated as equivalent to arbitration.[71] At this point, the employee in Illustration 1 must seek redress in a public forum to challenge the resolution of the dispute that occurred through private ordering.[72]

The employee has two options in public forums if the grievance ends short of arbitration, and an additional third option if it is denied by the arbitrator: (1) He can file an unfair labor practice charge if one is not already pending;[73] (2) he can file a Section 301 action alleging that the union breached its duty of fair representation[74] and that the

66. *See* United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 370-71 (1987); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

67. *City Disposal Sys.*, 465 U.S. at 827; Illustration 1, Box F.

68. Illustration 1, Box G; *see, e.g.*, Hotel Holiday Inn de Isla Verde v. NLRB, 723 F.2d 169 (5th Cir. 1983); Roadway Express, Inc. v. NLRB, 647 F.2d 415 (4th Cir. 1981).

69. *See infra* notes 73-75 and accompanying text; Illustration 1, Boxes B and L.

70. Illustration 1, Box H.

71. American Freight Sys. v. NLRB, 722 F.2d 822, 832-33 (D.C. Cir. 1983).

72. *See* Illustration 1, Boxes J-B, H-K, and J-L.

73. NLRA § 10(a), 29 U.S.C. § 160(a); Illustration 1, Boxes J-B.

74. *See* Bowen v. United States Postal Serv., 459 U.S. 212 (1983); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171 (1967); Illustration 1, Boxes J-L. Alternatively, the employee can file an unfair labor practice charge against the union for breach of the duty of fair representation, either in addition to or instead of a charge against the employer for interference with Section 7 rights. *See Vaca*, 386 U.S. at 176-83. On the facts of

employer breached the collective bargaining agreement;[75] or (3) if the grievance has been denied by the arbitrator, he can additionally seek (through an action filed by the union) to have the award set aside by a federal district court.[76] Thus, the nature of the cause of action is distinct in each forum, even though the action arises from the same underlying set of facts.

The discharged truck driver may also pursue the unfair labor practice charge before the Board either without first filing a grievance or after he has exhausted his available contract grievance procedures, as long as the six month statute of limitations for such charges has not run.[77] The unfair labor practice charge poses three issues for the Board: (1) whether the driver was discharged for engaging in protected concerted activity;[78] (2) whether the collective bargaining agreement waived the employee's statutory protection by establishing a contractual standard for the protection of employees who refuse to drive a truck that is less protective of bargaining unit employees than is Section 7 or whether the standard is equivalent to the statutory protection;[79] and (3) whether the Board should defer the charge to arbitration.[80]

If the employee goes to the Board first or pursues a grievance and unfair labor practice charge simultaneously, either the General Counsel or the Board, if formal proceedings against the employer have reached the point of a hearing before an Administrative Law Judge (ALJ), will apply the standards for deferral prior to arbitration.[81] Because the same underlying facts of the driver's discharge are the source of both the grievance and the unfair labor practice charge, the

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the discharged driver example, however, the employee will be more likely to file a Section 301 action to avoid Board confusion over the relationship between the employer's interference with Section 7 rights and the union's duty of fair representation. *See infra* notes 473-91 and accompanying text.

75. *Cf. Vaca*, 386 U.S. at 186-87 (In order to proceed with a breach of contract action against an employer under Section 301, the employee must show that the bargaining agent breached its duty of fair representation.).

76. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

77. An unfair labor practice complaint may not issue if the alleged violation occurred more than six months prior to the filing of the charge. NLRA § 10(b), 29 U.S.C. § 160(b). The Supreme Court has adopted Section 10(b) as the statute of limitations for Section 301 actions against both the employer and the union when the employee is alleging a breach of the duty of fair representation. Del Costello v. International Bhd. of Teamsters, 462 U.S. 151 (1983).

78. *See* NLRB v. City Disposal Sys., 465 U.S. 822, 828 (1984).

79. *See id.* at 835-37.

80. *See* American Freight Sys. v. NLRB, 722 F.2d 828, 831 (D.C. Cir. 1983).

81. *See* United Technologies Corp., 268 N.L.R.B. 557, 560 (1984) (The Board defers if the parties' agreement provides for arbitration, the dispute is arbitrable, and the employer is willing to arbitrate.).

unfair labor practice proceedings will normally be stayed pending arbitration, as long as the employer is willing both to arbitrate and to be bound by the arbitral award.[82]

If the employee is unhappy with the arbitrator's award and requests reinstatement of the unfair labor practice charge subsequent to the award, the issue posed will be the same as it would have been had the employee exhausted the contract grievance procedures before filing the charge. Under current Board standards, as long as the grievance proceedings are "fair and regular"[83] and the arbitrator's award is not "palpably" inconsistent with the policies and purposes of the Act,[84] the charge will be dismissed.

Following the arbitrator's award in the case of the discharged driver, the employer can also make a narrower collateral estoppel argument for deferral based on the similarity of the issues posed in both forums.[85] The employer will claim that the arbitrator's decision regarding the level of protection that the collective bargaining agreement provides the employee is essentially addressing the same issue that the Board would face in deciding whether the agreement waived the employee's statutory protection. Therefore, the employer will argue that the Board should respect the parties' agreement to have the arbitrator interpret the contract.[86]

In response to either a broad deferral standard based on the same underlying facts or a more narrow collateral estoppel defense, the driver will argue that his access to the Board should not be waived on the basis of the overlap of his contract and statutory rights because the protection that Section 7 provides an employee who refuses to drive an unsafe truck reflects statutory policies that are independent of the collective bargaining agreement.[87] The employee will claim that he is entitled to a de novo hearing on the facts and the law because the Board is charged with the responsibility to enforce statutory rights.[88] In practice, the Board tends to favor the employer's

82. *See id.* For a more detailed treatment of deferral standards, see *infra* notes 394-444 and accompanying text.

83. *See* Olin Corp., 268 N.L.R.B. 573, 574 (1984) (The Board defers subsequent to an arbitral award if the contractual issue is parallel to the unfair labor practice issue, the arbitrator is presented with the relevant facts, and the award is not palpably wrong.).

84. *See id.*

85. *See, e.g.*, Darr v. NLRB, 801 F.2d 1404, 1408 (D.C. Cir. 1986) (suggesting that the Board may have relied on estoppel as one of four possible theories to justify deferral). For a discussion of the *Darr* court's questioning of the theories that the Board had relied on in deciding to defer, see *infra* notes 432-44 and accompanying text.

86. *See, e.g.*, *Darr*, 801 F.2d at 1408.

87. *See id.* at 1407.

88. *See id.*

position, but some federal courts have reversed the Board based on reasoning that is more sympathetic to the employee's argument.[89]

When a grievance is decided short of arbitration, such as when the union decides either not to grieve or to settle the grievance, the Board's position on deferral is not as clear, but it appears to be moving toward treating a union settlement the same as an arbitration award.[90] The fact pattern of *NLRB v. City Disposal Systems* posed the most difficult case for deferral to grievance proceedings because the union refused at the outset to grieve on the employee's behalf.[91] In *City Disposal Systems*, the charged party did not plead deferral as an affirmative defense; instead, the employer argued for dismissal based on the driver's failure to exhaust internal union procedures that permitted him to challenge the union's refusal to grieve.[92] The ALJ dismissed the exhaustion argument with a reference to the statutory language that states that the Board's powers are not "affected by any other means of adjustment."[93] Thus, the central issue of the case became whether the refusal to drive by a sole truck driver, without any aid or support by fellow employees, constituted protected concerted activity.[94] Consequently, the Supreme Court majority opinion in *City Disposal Systems* focused only on the meaning of "concerted" under Section 7.[95] The union's refusal to grieve is mentioned, but it played no apparent part in the majority's reasoning.[96]

The dissent, in contrast, focused primarily on the need to contain this type of dispute within contract grievance procedures and suggested that the Board, even assuming that the refusal was protected, should have deferred to the union's initial decision to decline to grieve.[97] The general theory of collective bargaining is more consistent with the dissent in the sense that, under the theory, the Board

89. *See infra* notes 403-44 and accompanying text.

90. *Compare* Alpha Beta Co., 273 N.L.R.B. 1546, 1547 (1985), *enforced sub nom.* Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987) (adopting the same tests for deferral to grievance settlements as those applied in deferral to arbitration awards, finding the settlements to be "fair and equitable," and instead focusing on the union's waiver of employees' statutory claims) *with* Spann Bldg. Maintenance Co., 289 N.L.R.B. No. 118, 130 L.R.R.M. (BNA) 1013 (1988) (refusing to defer to union acquiescence in a remedy unilaterally instituted by the employer). *See* Comment, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U. MIAMI L. REV. 341 (1989).

91. NLRB v. City Disposal Sys., 465 U.S. 822, 839-41 (1984).

92. City Disposal Sys., 256 N.L.R.B. 451, 453 (1981), *enforcement denied*, 683 F.2d 1005 (6th Cir. 1982), *rev'd and remanded*, 465 U.S. 822 (1984).

93. *Id.* (quoting Section 10(a) of the NLRA).

94. *Id.* at 451 n.2.

95. 465 U.S. at 841.

96. *Id.* at 827.

97. *Id.* at 844 n.4 (O'Connor, J., dissenting).

should defer to a union's decision as long as no conflict between the union and the employee raises a question of whether the union's decision was made either in bad faith or arbitrarily.[98] Thus, the dissent's approach implicitly suggests that fair representation protections should be incorporated into the deferral doctrine[99] and that, if the union has not breached its duty by declining to grieve, the employee has no statutory right to a Board hearing.[100]

This description of the relationships among the forums is primarily aimed at emphasizing the critical roles that waiver and deferral play in making arbitration the central forum for resolving claims involving both statutory and contract rights. The substance of the deferral and waiver doctrines and their implications for the protection and development of statutory rights are addressed in more detail in subsequent sections.[101]

The second type of overlap between the Board's jurisdiction and the jurisdiction of arbitrators involves mid-term modifications to collective bargaining agreements. Illustration 2 draws on recent developments in the drug testing area to demonstrate the nature of the shared jurisdiction in this type of dispute:

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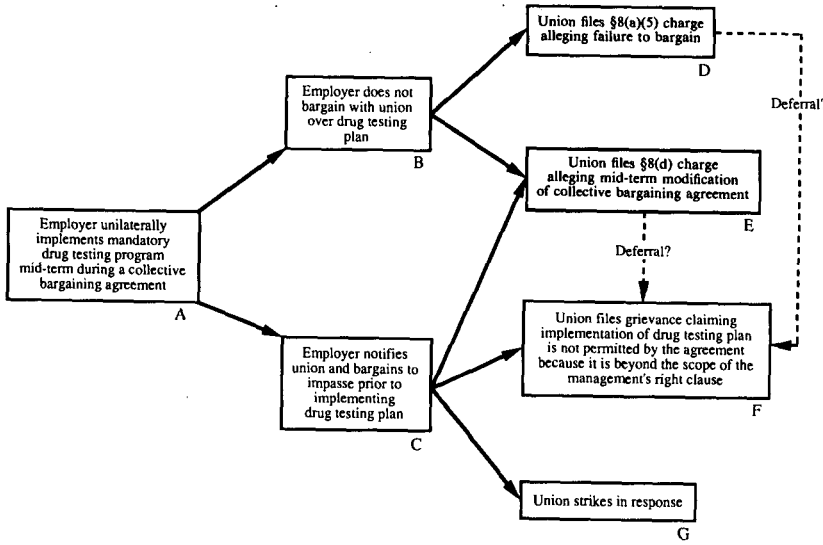
98. *See* Vaca v. Sipes, 386 U.S. 171, 191-93 (1967).

99. In order for a grievance settlement by a union to be regarded as "fair and equitable" for purposes of deferral when the grievant objects to the settlement and continues to pursue a Board remedy, the Board would need to rely on a waiver theory. In making concessions that provide a basis for settlement, a union essentially waives employees' statutory rights. *See* Alpha Beta Co., 273 N.L.R.B. 1546, 1547 (1985). Collective control over individual rights is only valid if the decision is not arbitrary or in bad faith. *See* Vaca v. Sipes, 386 U.S. 171 (1967). Thus, a collective's waiver of an individual's statutory remedy would be valid only if the union's decision did not breach its duty of fair representation.

100. *See infra* notes 482-91 and accompanying text (analyzing the relationship between the NLRB's standard for deferral to a settlement objected to by the affected employee and the duty of fair representation). *Compare* Comment, *supra* note 90, at 368-69 *with* Lynch, *supra* note 12, at 625-28 (arriving at differing conclusions on deferral to such settlements).

101. *See infra* notes 394-502 and accompanying text.

Illustration 2



In implementing the testing program, an employer may first bargain to impasse with the union,[102] or it may simply implement the testing plan.[103] If the employer implements the plan without bargaining, the union may file both Section 8(a)(5)[104] and Section 8(d)[105] charges. On the other hand, if the employer either had first bargained to impasse or offered to bargain but the union declined on the grounds that the employer could not implement the plan during the agreement's term without violating the agreement, then the principal charge would be based on the employer's obligation to maintain the terms of the agreement under Section 8(d).[106]

In either circumstance, the union can file a grievance alleging that the drug testing plan violates the collective bargaining agreement.[107] The union may simultaneously attempt to block implementation of the plan pending arbitration by seeking a status quo injunction under Section 301.[108] The primary issue for the arbitrator to decide in this instance is whether the employer has the authority under the management rights clause to implement a drug testing plan.[109] This clause will be interpreted in the light of other terms of the agreement that relate to drugs,[110] such as the possession or use of

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102. Illustration 2, Box C. For a definition of a bargaining impasse and the pertinent Board and court decisions, see *infra* note 228.

103. Illustration 2, Box B.

104. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5).

105. NLRA § 8(d), 29 U.S.C. § 158(d).

106. *See, e.g.*, Milwaukee Spring Div. of Ill. Coil Spring Co., 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985) (company could unilaterally transfer bargaining unit work to non-unionized plant after bargaining to impasse with union). For an analysis of the implications of the Board and court decisions in this case on future mid-term modification disputes under Section 8(d), see *infra* notes 249-87 and accompanying text.

107. *See, e.g.*, Laidlaw Transit, 89 Lab. Arb. (BNA) 1001 (1987) (Allen, Arb.) (union opposed employer-imposed drug testing program by filing both a grievance under the collective bargaining agreement and an unfair labor practice charge with the NLRB). For a thorough discussion of arbitration awards in grievances filed over unilaterally implemented drug testing programs, see Comment, *Employee Drug Testing: Federal Courts Are Redefining Individual Rights of Privacy, Will Labor Arbitrators Follow Suit?* 44 U. MIAMI L. REV. 489 (1989).

108. The federal courts are in disagreement over whether it is appropriate to issue an injunction to maintain the status quo until an arbitrator can rule on the validity of a union's challenge to a drug testing program. *Compare* United Steelworkers v. USX Corp., 130 L.R.R.M. (BNA) 3089 (E.D. Pa. 1989) (enjoining a plan that involved substantial privacy invasion—including a strip search and observed urination) *with* IBEW Local 1900 v. PEPCO, 634 F. Supp. 642 (D.D.C. 1986) (requiring a union seeking an injunction to show that employees have particular current needs, beyond temporary loss of employment, that could not be addressed fully by a subsequent arbitration award).

109. *See* Comment, *supra* note 107, at 516-20.

110. *See id.* at 519 (describing Gem City Chem., Inc., 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.) (The company argued that unilateral implementation of its drug testing

drugs in the workplace. In most cases, arbitrators reduce the question to whether the plan is a reasonable means, under the circumstances, for implementing policies such as job safety and the maintenance of productivity.[111] The arbitrator balances employees' privacy interests against the employer's need to manage the workplace, and he makes an initial assignment of entitlements regarding drug testing which will provide a basis for future bargaining.[112]

Should the union elect to strike in lieu of arbitration, it is likely that the employer will be able to obtain a *Boys Markets* injunction[113] to end the work stoppage pending arbitration, as long as the employer is willing to submit the dispute to an arbitrator.[114] If the employer then claims that the dispute is beyond the reach of the arbitration clause because drug testing is not contained in the agreement per se, then the union can file a Section 301 action to force arbitration.[115] Under the presumption of arbitrability that applies to collective bargaining agreement disputes, the court would normally order the parties to arbitrate.[116]

Consequently, the substantive issue of the employer's discretion to implement drug testing unilaterally during the term of an agreement will be decided by the NLRB or by an arbitrator. If the union prefers arbitration, the union can simply file a grievance and the arbitrator will decide the issue.[117] Should the union prefer the Board, however, the employer may be free to choose between leaving the dispute before the Board or forcing arbitration by waiving contract limits on the filing of a grievance and requesting deferral.[118] Thus, the strategic behavior of the parties in forum shopping is likely to reflect the way in which the two different forums will approach the overlap between the statutory duties to bargain and to maintain the terms of

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program was justified by a clause authorizing annual safety physicals or, alternatively, by the prohibitions against illegal drugs and intoxication on the job.)).

111. *See id.* at 520-23.

112. *See id.* at 518-20 (describing arbitration awards' analysis of the reasonableness of employer-implemented drug testing programs under management rights clauses).

113. *See* Boys Mkts., Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970) (A federal court may issue an injunction to stop a union work stoppage over an arbitral issue when the work stoppage is in breach of a no-strike clause.).

114. *Id.* at 254 (quoting Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)).

115. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

116. *Id.*

117. There is no procedural avenue which an employer can use to force a union to file an unfair labor practice charge rather than a grievance.

118. *See* United Technologies Corp., 268 N.L.R.B. 557, 560 (1984). For a more detailed description of the standards that govern pre-arbitration deferral, see *infra* notes 394-444 and accompanying text.

the agreement and the contractual waiver of the statutory bargaining entitlement.[119]

The NLRB's recent decision in *Johnson-Bateman Co.*[120] provides a partial picture of the way in which the Board will deal with a Section 8(a)(5) charge. In *Johnson-Bateman,* the company unilaterally implemented a policy of testing employees who needed medical treatment for on-the-job injuries.[121] The employer gave the union neither notice of the new policy nor an opportunity to bargain prior to implementing the drug and alcohol testing.[122] The union then filed Section 8(a)(5) and Section 8(a)(1) charges.[123] The union had not previously filed a grievance over the drug testing policy, and the employer was unwilling to waive contract requirements regarding the timely filing of grievances.[124] Given the parties' positions, the Board did not have the option of deferring the dispute to grievance arbitration.[125]

The employer's primary defense to the Section 8(a)(5) charge was that the union had waived its statutory right to bargain over drug testing both by agreeing to a "zipper clause" and to a broad "management rights clause" and by acquiescing in the past to unilaterally implemented company rules.[126] The Board evaluated the parties' agreement and past practices by relying on the rule of interpretation that states: "It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable."[127] Under this standard, an employer will lose on a Section 8(a)(5) charge before the Board unless he can show "the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter."[128] Therefore, because the employer was unable to produce evidence of bargaining history to show that drug and alcohol testing was discussed in relation to the management rights clause, the Board ruled in favor of the union.[129] Moreover, the Board also rejected as evidence of a waiver an earlier arbitrator's award that had interpreted

119. *See infra* notes 445-502 and accompanying text.
120. 295 N.L.R.B. No. 26, 131 L.R.R.M. (BNA) 1393 (1989).
121. 131 L.R.R.M. (BNA) at 1395.
122. *Id.*
123. *Id.*
124. *Id.* at 1395 n.6.
125. *Id.*
126. *Id.* at 1398. For an example of a "zipper clause," see *infra* note 241.
127. 131 L.R.R.M. (BNA) at 1398, 1401 (citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983)).
128. *Id.* at 1398, 1400 (citing Rockwell Int'l Corp., 260 N.L.R.B. 1346, 1347 (1982)).
129. *Id.* at 1402.

the management rights clause as giving the employer the "right to make rules to manage the plant, provided the rules do not violate the collective bargaining agreement."[130]

Had the employer sought deferral, the outcome could well have been the opposite. In arbitration, the rule of interpretation that determines the employer's power under the management rights clause normally focuses on whether a drug testing policy is a reasonable company rule given the surrounding circumstances and the legitimate concern over safety in the workplace.[131] Before deciding whether the employer could implement the drug testing plan without union consent, an arbitrator might refer to the policies of Section 8(a)(5) that compel bargaining.[132] The predominant tendency, however, would be for the arbitrator to turn directly to the question of whether the plan was a reasonable means to implement policies involving job safety.[133] In *Johnson-Bateman*, the employer would have had an excellent chance of winning in arbitration, given that the drug testing was triggered by a specific event (an employee injury) and that there was a prior arbitration award broadly interpreting the management rights clause.[134] If an arbitrator had upheld the company's power to implement the testing program under the contract, the Board would likely have declined to reactivate the Section 8(a)(5) charge in response to the union's argument that the arbitrator failed to follow the Board's rule of interpretation for finding a waiver of a statutory right.[135] This

130. *Id.* at 1400-01.

131. For an example of arbitral awards focusing on the reasonableness of drug testing, see Comment, *supra* note 107, at 525-28.

132. *See, e.g.*, Laidlaw Transit, 89 Lab. Arb. (BNA) 1001 (1987) (Allen, Arb.) (employer had a statutory obligation to bargain to impasse before implementing drug testing). An equivalent issue may also emerge under the collective bargaining agreement if a union obtains a clause obligating an employer to give the union notice and the opportunity to discuss proposed changes in work rules prior to implementation. *See, e.g.*, Gem City Chem., Inc., 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.) (union objected to drug testing program on the grounds that all safety matters under the collective agreement were made the subject of bargaining by the collective agreement). Finally, notice and an opportunity to be heard before a change in work rules can be implemented is regarded as one factor in evaluating whether an employer's actions were "reasonable" under the management rights clause. *See, e.g.*, Donaldson Mining Co., 91 Lab. Arb. (BNA) 471 (1988) (Zobrok, Arb.) (failure to give union notice of a plan prior to its implementation was unreasonable).

133. *See* Comment, *supra* note 107, at 520-23.

134. For a description of arbitral awards upholding drug testing that was implemented as a result of employee on-the-job injuries, see *id.* at 526.

135. *See, e.g.*, Dennison Nat'l Co., 296 N.L.R.B. No. 22, 132 L.R.R.M. (BNA) 1076 (1989). The Board deferred a Section 8(a)(5) charge to an arbitrator's decision where the arbitrator did not address the issue of the union's waiver of its bargaining entitlement because the waiver issue was a statutory question for the NLRB. 32 L.R.R.M. (BNA) at 1076. The arbitrator ruled that the management rights clause reserved to the employer the right to unilaterally eliminate job classifications. *Id.* Even though the arbitrator's award was not

is so because, under the general theory of collective bargaining, it is the province of the arbitrator to interpret the contract. Once an arbitrator has ruled that the company has the power to act under the collective bargaining agreement, the statutory issues under Section 8(a)(5) fade into the background.

As a result, the significance of the Board's decision in *Johnson-Bateman* may be limited to the holding that alcohol and drug testing of current employees is a mandatory subject of bargaining.[136] Moreover, future disputes over the implementation of drug testing during the term of an agreement are likely to be deferred. Because the central issue posed by the employer as a defense to the charge was the claim of "waiver" under two clauses of the agreement, the meaning of these types of clauses, rather than the policies underlying Section 8(a)(5), can be made the focal point for similar disputes in the future. Under current Board standards, the interpretation of the contract is within the province of an arbitrator if the employer will agree to arbitrate. In summary, whenever an employer can frame a statutory dispute as a "waiver" issue, the meaning of the agreement—rather than the NLRA—becomes the central issue, and arbitration becomes the most likely forum for resolving the conflict.[137] The implications of this trend for the protection of statutory rights is treated more fully in Sections V and VI.

If an employer avoids the Section 8(a)(5) issue by bargaining to impasse before implementing drug testing during the term of an agreement, arbitration is still the most likely forum to resolve any Section 8(d) charge.[138] The waiver of the duty to bargain is no longer an issue. Instead, the question is whether the employer failed to maintain the terms of the contract in accordance with the statutory

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necessarily consistent with Board precedent on the waiver of a duty to bargain, deferral was appropriate unless the General Counsel could show that the arbitrator's award was not susceptible to an interpretation consistent with the NLRA. *Id.* at 1077. For an empirical analysis of the impact of Olin Corp., 268 N.L.R.B. 573 (1984), on post-arbitration deferrals, see Greenfield, *The NLRB's Deferral to Arbitration Before and After* Olin*: An Empirical Analysis*, 42 INDUS. & LAB. REL. REV. 34, 42-46 (1988). The study found that in two regional offices, the rate of post-arbitration refusals to defer went from 18.9% to 3.8% of the cases involving a deferral issue. *Id.* at 44. The study noted that following *Olin*, regional offices were more inclined to find the statutory issue implicitly resolved by the arbitrator and, therefore, to defer. *Id.* at 45.

136. Johnson-Bateman Co., 295 N.L.R.B. No. 26, 131 L.R.R.M. (BNA) 1393 (1989).

137. *See Olin*, 268 N.L.R.B. at 575.

138. The area in which deferral prior to arbitration has received its greatest acceptance is mid-term modification charges filed under Subsections 8(a)(5) and 8(d). *See* Schatzki, *NLRB Resolution of Contract Disputes Under § 8(a)(5)*, 50 TEX. L. REV. 225 (1972); Sharpe, *NLRB Deferral to Grievance Arbitration: A General Theory*, 48 OHIO ST. L.J. 595, 608-09 (1987).

obligation of Section 8(d).[139] Although Board and court doctrine over mid-term modifications is confused, it is clear that the interpretation of the collective bargaining agreement, particularly the management rights clause, will be the central issue.[140] Therefore, the employer can normally obtain deferral if the company prefers that the dispute go to an arbitrator. Regardless of whether the Board or an arbitrator resolves the question of implied entitlements when the contract is essentially silent on the issue, the neutral adjudicator is placed in the position of filling in gaps in the parties' agreement by looking to statutory policy or the common law of the industry.[141] The decision will give one party the equivalent of a property entitlement granting control over a working condition that either can be retained by that party in the future or bargained away.

Thus, a complete understanding of the impact of the deferral and waiver doctrines requires an examination of the framework of statutory entitlements that governs collective bargaining and an examination of the way in which the Board and the courts draw on the policies underlying that framework either to fill gaps in agreements or to justify the deferral of disputes to an arbitrator. Section IV explores these entitlements and analyzes the way in which the framework and the rules of interpretation employed by the Board and the courts impact on the relative bargaining power of management and labor. Before that, however, Section III describes the doctrines governing the relationship between courts and arbitrators in actions to enforce collective bargaining agreements under Section 301.[142]

III. THE CENTRALITY OF GRIEVANCE ARBITRATION IN LABOR LAW DOCTRINE

The legal framework that shapes the structure of collective bargaining is composed of federal common law under Section 301, which permits private suits to enforce collective agreements,[143] and decisions by the NLRB and the federal courts that interpret the NLRA in the context of unfair labor practice proceedings. Both sources of precedent complement each other and reinforce the centrality of grievance arbitration. It is beyond the scope of this Article to summarize this doctrine completely, but a brief review of the most critical concepts is

139. NLRA § 8(d), 29 U.S.C. § 158(d).

140. For a discussion of current Board and court doctrine on mid-term modifications, see *infra* notes 252-87 and accompanying text.

141. *See infra* notes 249-307 and accompanying text.

142. LMRA § 301, 29 U.S.C. § 185.

143. *Id.*

important to an understanding of the way in which both of these bodies of law influence the reasoning of arbitrators.

The key concepts in federal common law are: (1) the relationship between the presumption of arbitrability and the waiver of the union's right to strike,[144] and (2) the limited judicial review of arbitration decisions.[145] The NLRB doctrine of deferral of unfair labor practice charges to grievance arbitration complements limited judicial review of arbitral awards.[146] In addition, the waiver doctrine permits arbitrators to determine when private ordering takes precedence over the policies underlying statutory protections.[147] The federal common law doctrines are described briefly below, and deferral and waiver are the subject of Section V.

A. *The Presumption of Arbitrability and No-Strike Clauses*

Both NLRA doctrine and federal common law governing the administration of collective bargaining agreements incorporate status and contractarian images of the relationship between parties.[148] The status image is embodied in the presumption that there is a quid pro quo between a broad grievance arbitration clause and a no-strike clause. If a contract includes either clause, then a corresponding clause of similar scope will be presumed to be a part of the parties' agreement;[149] only explicit language to the contrary will result in the

144. The arbitration clause is treated as the quid pro quo for the no-strike clause. *See* cases cited *supra* note 50.

145. *See* United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364 (1987); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

146. *Compare infra* notes 158-90 and accompanying text *with infra* notes 387-435 and accompanying text.

147. *See infra* notes 445-502 and accompanying text.

148. The term "status" is used here to refer to the relationship between the parties that results from the law imposing fixed obligations on a union and employer once the union is certified and the parties enter into a collective bargaining agreement. Their "status" is in part defined by obligations under both the NLRA and federal common law. These imposed obligations are in contrast to the "contractarian" ideology which posits that the parties are totally free to define, by mutual agreement, their reciprocal obligations and rights. For a general discussion of the ways in which "status" assumptions about the appropriate relationship between employers and employees permeate legal doctrine governing labor relations, see J. ATLESON, *supra* note 17, at 84-96. *See also* Klare, *supra* note 17; Stone, *supra* note 1.

149. *See* Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974) (labeling the relationship between the no-strike clause and the arbitration clause the "coterminous application" doctrine); Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) (arbitration clause in a collective bargaining agreement creates an implied prohibition of strikes over matters subject to the arbitration clause); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960) ("When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes,

two clauses not being read as coterminous.[150] Moreover, even if the parties agree on a clause that preserves union discretion to strike over an issue that could be arbitrated, the clause will be read as narrowly as possible so as to preserve industrial peace while the parties arbitrate.[151]

The contractarian image emphasizes the parties' freedom to define their relationship through the collective bargaining agreement without government intervention in the formulation of the specific terms of the agreement.[152] It is a basic principle of the NLRA duty to bargain that neither party can be forced to agree to any terms of an agreement through governmental intervention in the bargaining.[153] Federal labor policy encourages arbitration, but the parties are free to agree on their own methods of administering their collective agreement.[154]

These two doctrinal images co-exist in tension with each other. Although a union cannot be compelled to agree to a no-strike clause, it is presumed that the union has voluntarily agreed to such a clause if a broad arbitration clause is contained in the agreement.[155] Similarly, an employer cannot be compelled to agree to a broad arbitration clause, but if he wants a broad no-strike clause, then the arbitration clause will be presumed.[156] As a result, almost all collective bargain-

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or if not, it is protected from interference by strikes."). For an overview of the origins of the coterminous application doctrine, see generally Ryder Truck Lines v. Teamsters Freight Local Union 480, 727 F.2d 594 (6th Cir.), *cert. denied*, 469 U.S. 825 (1984); United States Steel Corp. v. NLRB, 711 F.2d 772 (7th Cir. 1983).

150. *See* Local 787, Int'l Union of Elec., Radio & Mach. Workers v. Collins Radio Co., 317 F.2d 214 (5th Cir. 1963) (grievance not arbitrable where there was explicit exclusionary language).

151. *See Gateway Coal*, 414 U.S. at 382.

152. *See* NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 487 (1960) (noting that "it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements"); NLRB v. American Ins. Co., 343 U.S. 395, 404 (1952) ("[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."). In H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), the Court commented on the limited remedial powers of the Board:

> While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Id. at 108 (footnote omitted).

153. *See* cases cited *supra* note 152.

154. LMRA § 203(d), 29 U.S.C. § 173(d) (private adjustment of grievances by "a method agreed upon by the parties" is desirable).

155. *See Gateway Coal*, 414 U.S. at 382.

156. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960).

ing agreements include both clauses, and the image of private ordering by contract is protected.[157]

B. *The Scope of Judicial Review of Arbitral Awards*

Federal common law also preserves the autonomy of labor arbitration from legal control through judicial review. As long as the arbitrator bases his decision on an interpretation of the collective bargaining agreement, a court is constrained to let the arbitrator's decision stand, even if the court feels that the arbitrator's contract interpretation or findings of fact are erroneous.[158] The rationale is that the parties contracted for the settlement of their disputes by an arbitrator of their choice, and if they are dissatisfied with the decision, they are free to select a different arbitrator in the future. Thus, the parties can contract around any single arbitrator's decision that they do not like, but federal common law discourages the parties from using the courts to set aside an arbitrator's award.[159]

The general deference of the federal courts to arbitral awards has recently been somewhat weakened in spite of a United States Supreme Court opinion reaffirming the limited scope of judicial review.[160] The primary source for the changing scope of review is the public policy

157. *See infra* note 372 (regarding the percentage of collective bargaining agreements with no-strike clauses). Although 94% of the agreements in a Bureau of National Affairs sample included a no-strike pledge, grievance arbitration clauses were found in 100% of the sampled agreements. *See* BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 12 (10th ed. 1983).

158. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 371 (1987) ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (An arbitration award should be enforced so long as it "draws its essence from the collective bargaining agreement.").

159. *See generally* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, 75 MICH. L. REV. 1137 (1977).

160. *See, e.g.*, S.D. Warren Co. v. United Paperworkers Int'l Union, 846 F.2d 827, 828 (1st Cir.) (*Warren II*) (On remand after *Misco*, the First Circuit affirmed its holding that the arbitrator exceeded her authority in setting aside the discharge because the agreement gave the company the "sole right" to discharge for particular violations, including possessing drugs on company property.), *cert. denied*, 109 S. Ct. 555 (1988); Iowa Elec. Light & Power Co. v. Local Union 204, IBEW, 834 F.2d 1424, 1427 n.2 (8th Cir. 1987) (distinguishing *Misco* on the grounds that federally mandated regulations for nuclear power plants required vacating, on public policy grounds, the award reinstating an employee discharged for opening a safety door so as to take a shortcut to lunch); Georgia Power Co. v. IBEW, Local 84, 707 F. Supp. 531, 539 (N.D. Ga. 1989) (Relying on a public policy denouncing the operation of potentially hazardous equipment by employees under the influence of drugs, the Court refused to enforce an arbitrator's award reinstating an employee who was discharged for violating the company's anti-drug policy.); Delta Air Lines v. Airline Pilots Ass'n, 686 F. Supp. 1573, 1580 (N.D. Ga. 1987) (setting aside an adjustment board's reinstatement of a pilot discharged for flying a passenger plane while intoxicated), *aff'd*, 861 F.2d 665, 674 (11th Cir. 1988).

exception to judicial deference to arbitration.[161] In *United Paperworkers International Union v. Misco, Inc.*,[162] the Supreme Court described the limited scope of this exception as follows:

> "[A] court may not enforce a collective-bargaining agreement that is contrary to public policy" . . . . We cautioned, however, that a court's refusal to enforce an arbitrator's interpretation of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."[163]

Exactly what this means is unclear. In *Misco*, the Supreme Court relied on two grounds as it reversed the Fifth Circuit's decision to set aside an arbitrator's award that reinstated an employee discharged for possession of drugs on company property.[164] First, the Court concluded that the Fifth Circuit had substituted its judgment of the facts for that of the arbitrator.[165] Second, the Court noted that the Fifth Circuit did not point to any well defined public policy that would prohibit an employer from continuing to employ a worker who was caught with marijuana in a car on company property.[166] In spite of the *Misco* decision, which narrowly construed the public policy exception to judicial enforcement of arbitral awards, federal courts are continuing to set aside arbitral awards on public policy grounds.[167] For example, the Eleventh Circuit recently affirmed a district court's refusal to enforce an award reinstating a pilot who had flown a commercial airliner while under the influence of alcohol.[168] The adjustment board had found that the pilot in question had been treated differently than other similarly situated pilots, and it ordered reinstatement, without back pay, because the airline had failed to

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161. *See Misco*, 108 S. Ct. at 373; W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983). *See generally* Douglas, *Protecting the Parties' Bargain After* Misco*: Court Review of Labor Arbitration Awards*, 64 IND. L.J. 1 (1988); Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3 (1988); Meltzer, *After the Labor Arbitration Award: The Public Policy Defense*, 10 INDUS. REL. L.J. 241 (1988); Comment, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving* Grace *in the Search for a Well-Defined Public Policy Exception*, 42 U. MIAMI L. REV. 767 (1988).

162. 108 S. Ct. 364 (1987).

163. *Id.* at 373 (quoting *Grace*, 461 U.S. at 766).

164. *Id.* at 374.

165. *Id.*

166. *Id.*

167. *See supra* note 160.

168. Delta Air Lines v. Airline Pilots Ass'n, 686 F. Supp. 1573 (N.D. Ga. 1987), *aff'd*, 861 F.2d 665 (11th Cir. 1988).

administer its alcohol rehabilitation program uniformly and fairly.[169] The Eleventh Circuit upheld the district court's refusal to enforce the award, citing federal regulations and state statutes that obligated the airline to prevent a plane from being piloted by someone under the influence of alcohol.[170] The court concluded that this public policy embodied in the federal regulations and state statutes removed from the jurisdiction of the adjustment board any power to reinstate the pilot, even if other employees were treated differently.[171]

The opening created by the public policy exception has also led some courts to look more closely at the interpretation of collective bargaining agreements by arbitrators.[172] A recent decision of the First Circuit illustrates this tendency. In *Georgia-Pacific Corp. v. Local 27, United Paperworkers International Union*,[173] an arbitrator reinstated an employee who had informed his employer that he could not report for work due to an injury.[174] The employee had said that his arm hurt and, therefore, that he could not work; the employee, however, then traveled 150 miles to play eighteen holes of golf.[175] The collective agreement provided for progressive discipline, but a specific disciplinary clause provided for immediate discharge for dishonesty.[176] The union argued that the clause providing for immediate discharge was an exception to normal progressive discipline, but that this exception did not remove the arbitrator's authority to determine whether the degree of dishonesty engaged in by the employee constituted just cause for the discharge.[177] The arbitrator agreed with the union's argument and found mitigating circumstances in the employee's excellent prior work record during his twenty-five years with the company.[178] The arbitrator therefore reinstated the

169. *Delta Air Lines*, 861 F.2d at 668.

170. *Id.* at 672-74.

171. *Id.* at 674.

172. *See, e.g.*, S.D. Warren Co. v. United Paperworkers Int'l Union, 846 F.2d 827 (1st Cir.) (*Warren II*), *cert. denied*, 109 S. Ct. 555 (1988); S.D. Warren Co. v. United Paperworkers Int'l Union, 845 F.2d 3 (1st Cir.) (*Warren I*), *cert. denied*, 109 S. Ct. 555 (1988). In *Warren I* and *II*, the First Circuit disagreed with the arbitrators' interpretations of a clause governing the employer's right to discharge and found that the employer had the "sole right" to discharge for particular rule violations, rejecting the arbitrators' rulings that the contract was ambiguous and that the employer therefore had to show "proper cause" for discharge. *See Warren II*, 846 F.2d at 828; *Warren I*, 845 F.2d at 8; *see also* Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union, 864 F.2d 940 (1st Cir. 1988).

173. 864 F.2d 940 (1st Cir. 1988).

174. *Id.* at 941.

175. *Id.*

176. *Id.*

177. *Id.* at 944.

178. *Id.*

employee, but without back pay.[179]

The First Circuit disagreed with the arbitrator's interpretation of the agreement and reversed.[180] The court concluded that the contract provided "two independent justifications for dismissal: (1) just cause, and (2) a list of offenses, including dishonesty, for which immediate discharge is appropriate."[181] The court found the language of the contract to be unambiguous so that "once dishonesty is established, no further showing is required."[182] The opinion constitutes a straight forward disagreement with the arbitrator's interpretation of the collective bargaining agreement, despite the Supreme Court's caution that the parties had contracted for the arbitrator to interpret the agreement and that the arbitrator's interpretation should be respected.[183]

The growing number of cases in which federal courts have refused to enforce arbitration awards presents a challenge to the traditional model of labor relations that is embodied in federal common law.[184] Implicit in these decisions is an assumption that arbitrators should be more sensitive to bodies of legal doctrine and public policy external to the parties' collective bargaining agreement, including court precedent governing contract interpretation.[185] It remains an open question whether this trend will influence arbitrators to conform their opinions to statutory precedent interpreting the NLRA when they face either questions of statutory waiver or of implied contractual limits on management discretion.[186]

In spite of the public policy exception, most courts still apply a very limited scope of review to arbitration awards.[187] In addition, most arbitrators prefer to justify awards by reference to the parties'

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179. *Id.*

180. *Id.* at 946.

181. *Id.* at 944-45.

182. *Id.* at 945.

183. *See* United Paperworkers Int'l Union v. Misco, 108 S. Ct. 364, 370 (1987).

184. *See generally* Feller, *The Coming End of Arbitration's Golden Age*, 29 NAT'L ACAD. ARB. PROC. 97 (1976).

185. *See, e.g.*, Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union, 864 F.2d 940 (1st Cir. 1988); S.D. Warren Co. v. United Paperworkers Int'l Union, 846 F.2d 827 (1st Cir. 1988) (*Warren II*).

186. *See* Comment, *Arbitration and Selective Discipline of Union Officials After* Metropolitan Edison, 44 U. MIAMI. L. REV. 443 (1989) [hereinafter Comment, *Selective Discipline of Union Officials*]; *see also* Comment, *Arbitral Treatment of Subcontracting After* Milwaukee Spring II: *Much Ado About Nothing?*, 44 U. MIAMI L. REV. 371 (1989) [hereinafter Comment, *Arbitral Treatment of Subcontracting*].

187. *See, e.g.*, Florida Power Corp. v. IBEW, Local Union 433, 847 F.2d 680 (11th Cir. 1988) (sustaining award that reinstated employee arrested for drug possession and drunk driving); United States Postal Serv. v. National Ass'n of Letter Carriers, 810 F.2d 1239 (D.C. Cir. 1987) (sustaining award that reinstated letter carrier who failed to deliver thousands of

agreement, and to interpret the agreement so as to avoid any conflict with external law.[188] Consequently, arbitrators integrate court decisions into their awards by combining the values underlying public policy with traditional arbitral values in order to interpret the meaning of the parties' agreement.[189] They still reason, however, as if their award is bounded primarily by the collective bargaining agreement.[190]

IV. STATUTORY AND CONTRACT ENTITLEMENTS IN THE WORKPLACE

Common law doctrine, symbolized by the discharge at will doctrine, assumed that the appropriate hierarchy in the workplace was for the employer to control the terms and conditions of employment unless the employer agreed, by contract, to limit the exercise of its managerial discretion.[191] A substantial body of federal and state legislation now operates to limit this discretion in such areas as discrimi-

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pieces of mail); Northwest Airlines v. Airline Pilots Ass'n, Int'l, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1751 (1988) (sustaining award that reinstated alcoholic pilot).

188. The way that arbitrators should deal with a conflict between "external law" and the parties' agreement has been a source of competing views since the debate was begun by two distinguished arbitrator-scholars. *See* Howlett, *The Arbitrators, the NLRB, and the Courts*, 20 NAT'L ACAD. ARB. PROC. 67 (1967) (Law is an overriding element of every collective bargaining agreement and should be considered by the arbitrators whenever applicable.); Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 34 U. CHI. L. REV. 545 (1967) (Arbitrators should follow the contract and ignore the law.). For a middle position, that the law is relevant only when it forbids something that the contract permits, as opposed to permitting something that the contract forbids, see Mittenthal, *The Role of Law in Arbitration*, 21 NAT'L ACAD. ARB. PROC. 42 (1968); Sovern, *When Should Arbitrators Follow Federal Law?*, 23 NAT'L ACAD. ARB. PROC. 29 (1970).

189. *See* J. GETMAN & B. POGREBIN, LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE 198-99 (1988).

190. *See id.*; *see also infra* notes 298-332 and accompanying text.

191. For a history of the "at will" doctrine, see Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976). Even limits agreed to in written contracts were often unenforceable. In contrast to the case with commercial contracts, the duration of the employment had to be fixed in the agreement and could not be implied from circumstances surrounding the agreement. *Id.* at 128-29 (reviewing thirty New York decisions between 1895 and 1915 in which the duration of an employment contract was central to the courts' decisions). When a contract of employment did contain an express duration clause, it still might be held unenforceable for lack of mutuality of obligation. In the absence of a promise that an employee would not leave his employer, the employer was not bound by a promise to retain the employee in accordance with the express duration clause. *See* Pitcher v. United Oil & Gas Syndicate, 174 La. 66, 139 So. 760 (1932). For an excellent treatment of the ideological premises underlying the doctrine, and its elevation to constitutional status by the Supreme Court in Coppage v. Kansas, 236 U.S. 1 (1915), see Casebeer, *Teaching an Old Dog Old Tricks:* Coppage v. Kansas *and At-Will Employment Revisited*, 6 CARDOZO L. REV. 765 (1985). For a review of the recent doctrinal developments limiting the scope of the "at will" doctrine, see Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

nation,[192] minimum wage and hour standards,[193] health and safety,[194] social security,[195] and welfare benefits.[196] When working conditions meet or exceed these statutory minimums, however, labor law doctrine limits the government's involvement in the substantive terms of collective bargaining agreements.[197]

Through their interpretation of the NLRA, the Board and the courts shape the framework for collective bargaining by setting limits on the parties' use of coercive power, by defining the scope of bargaining, and by allocating statutory obligations and spheres of protected rights which shape the parties' expectations.[198] The decisions of the Board and the courts influence the parties' relative power and help determine the outcome of bargaining.[199] One way to focus on this relationship between statutory interpretation and the relative power of the parties is to treat the NLRA as establishing a set of statutory entitlements.[200]

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192. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(a), 81 Stat. 602, 603 (codified as amended at 29 U.S.C. § 623(a) (1982)) (private right of action for age discrimination); Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2a (1982)) (creating a private cause of action for victims of race and sex discrimination in employment).

193. Fair Labor Standards Act of 1938, ch. 376, §§ 6-7, 52 Stat. 1060, 1062-1064 (codified as amended at 29 U.S.C. §§ 206-207 (1982)) (minimum wage and maximum hour provisions).

194. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, §§ 5(a)(1), 6(a), 84 Stat. 1590, 1593 (codified as amended at 29 U.S.C. §§ 654(a)(1), 655(a) (1982)) (obligating employers to furnish employees with "employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm" and requiring the Secretary of Labor to promulgate national consensus standards for employee health and safety).

195. Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-1397 (1982)).

196. *See, e.g.*, Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at scattered provisions of 15 U.S.C., 22 U.S.C., 26 U.S.C., 29 U.S.C., and 45 U.S.C.).

197. H.K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970) ("The object of [the Wagner] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions."); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952) (It is "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.").

198. For a classification of statutory protections and obligations in terms of the nature of the entitlements they create, see *infra* notes 217-324 and accompanying text.

199. *See infra* notes 325-93 and accompanying text.

200. For a view of the law as assigning entitlements protected by rules that provide for different types of remedies that depend on the nature of the entitlement, see Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For an application of this framework to authoritative

Some NLRA entitlements are inalienable in the sense that they cannot be bargained away.[201] Most, however, may be exchanged through bargaining.[202] When these entitlements are appropriated without the consent of the entitlement holder—that is, not bargained for or not exchanged—the remedy available to the holder varies depending on whether the entitlement is protected by a "property rule" or by a "liability rule."[203] When an entitlement that is protected by a property rule is taken without consent, the holder can obtain equitable relief in the form of an injunction to prevent the taking.[204] In contrast, an entitlement that is protected by a liability rule may be appropriated without consent, and the only remedy that is available is an award of damages assessed by a court or other neutral adjudicatory body.[205]

Most statutory protections that unions can waive through collective bargaining are treated by the Board as being subject to property rules. The Board is formally limited to providing make-whole remedies, primarily reinstatement with back pay, but it cannot award damages.[206] The Board's orders are only enforceable by the equitable powers of the courts.[207]

Entitlements allocated through collective bargaining are normally also protected by property rules. Arbitrators issue orders to cease and desist from contract breaches, orders that are enforceable by the equitable powers of the courts.[208] In some situations such as

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interpretations of the NLRA, see Wachter & Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349 (1988).

201. As used here, "inalienability" means that the statute has been interpreted so as to prevent this entitlement from being transferred. Any clause transferring this entitlement would be unenforceable and could be removed from an agreement by an NLRB order that is enforceable by a court. *See infra* notes 308-14 and accompanying text; *see also* Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

202. *See* Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983). *See generally* Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23 (1985); Harper, *Union Waiver of Employee Rights Under the NLRA: Part I*, 4 INDUS. REL. L.J. 335 (1981).

203. *See* Calabresi & Melamed, *supra* note 200, at 1092.

204. *See id.; see also* Wachter & Cohen, *supra* note 200, at 1370-71.

205. *See* Calabresi & Melamed, *supra* note 200, at 1092; Wachter & Cohen, *supra* note 200, at 1368-69.

206. Section 10(c) sets forth the Board's powers to remedy unfair labor practices by taking "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]." NLRA § 10(c), 29 U.S.C. § 160(c). *See generally* D. MCDOWELL & K. HUHN, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES (1976).

207. Section 10(e) provides a mechanism for enforcement of Board orders when the Board petitions the appropriate United States Court of Appeals. NLRA § 10(e), 29 U.S.C. § 160(e).

208. The parties may petition either a state court or a federal district court to enforce the award of an arbitrator. LMRA § 301, 29 U.S.C. § 185. If the action is initially filed in a state

work rules, however, it is more convenient for the parties to simply provide for liability rule protection in the form of damages should an employer breach a clause that protects bargaining unit work.[209]

Labor doctrine also incorporates two types of entitlements that

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court, however, the defendant may remove to a federal district court under federal question jurisdiction. *See* Avco Corp. v. Aero Lodge, No. 735, 390 U.S. 557 (1968).

209. There are two situations in which a union might seek to use a liquidated damage clause rather than a clause that simply prohibits unit work from being assigned to non-unit employees. The first is a situation in which an employer would be able to contract away control over the work in question so that union activity aimed at forcing the employer to return the work to the bargaining unit could be classified as secondary under the "right to control" doctrine. *See* NLRB v. Enterprise Ass'n of Pipefitters, Local Union No. 638, 429 U.S. 507 (1977). Union concerted activity is secondary when it is directed not only at the party with whom the union has a labor dispute, but also at a third party which the union seeks to compel into discontinuing business with the employer, the party with whom the union has the dispute. For the most celebrated definition of a secondary boycott, see IBEW, Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950) (Hand, J.), *aff'd*, 341 U.S. 694 (1951). Union concerted activity to enforce a contract clause aimed at protecting bargaining unit work from being transferred to other employees is secondary if the union's employer has contracted away the right to control the assignment of the work to another employer. *Pipefitters*, 429 U.S. at 521-23. It is an open question whether enforcement of a work preservation clause in an agreement to obtain compensation may also be classified as coercive within the meaning of Section 8(b)(4)(B), and therefore secondary. The work preservation clause is primary, and thus valid, if the union and the employer entered into it while the employer controlled the work. *Id.* at 525-26; *see* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967). The problem is whether, because of the logic of *Pipefitters*, enforcement of the clause becomes coercive after control is contracted to a second employer. Generally, the Board has not classified arbitration that is not accompanied by a work stoppage as coercive within the meaning of Section 8(b)(4)(B). *See* Sheet Metal Workers, Local 2 (Doubarn Sheet Metal, Inc.), 9 NLRB Advice Mem. Rep. (LRP) ¶ 19,117 (July 15, 1982); *see also* California Dump Truck Owners Ass'n, 227 N.L.R.B. 269, 274 (1976); Carrier Air Conditioning Co., 222 N.L.R.B. 727, 730 (1976), *modified sub nom.* Sheet Metal Workers' Int'l Ass'n, Local 28 v. Carrier Air Conditioning Co., 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977); Hughes Mkts., Inc., 218 N.L.R.B. 680, 683 (1975).

Similar issues arise when the employer does not contract away control over the work, but instead assigns the work to another bargaining unit, and the union in the bargaining unit that lost the work threatens to engage in concerted pressure if the work is not assigned to that union's members. The employer may request the Board to resolve the jurisdictional dispute over the work under Section 10(k). NLRA § 10(k), 29 U.S.C. § 160(k). A question can again emerge as to whether the first union can seek damages in arbitration for the transfer of the work in violation of the union's collective bargaining agreement. Current Board decisions hold that a union grievance seeking arbitration prior to a Section 10(k) Board hearing to determine which group of employees should be assigned the disputed work is not coercive within the meaning of Section 8(b)(4)(D). *See* Sheet Metal Workers' Int'l Ass'n, Local Union No. 49 v. Los Alamos Constructors, Inc., 206 N.L.R.B. 473 (1973). If the grieving union does not win the Section 10(k) hearing, there is a greater chance that arbitration will be treated as a Section 8(b)(4)(D) violation and enjoined by the NLRB. *See* Local 32, ILWU (Weyerhaeuser Co.), 271 N.L.R.B. 759 (1984), *enforced sub nom.* Local 32, ILWU v. Pacific Maritime Ass'n, 773 F.2d 1012 (9th Cir. 1985). Asking for compensation for the loss of work, rather than for the work itself, puts the union in a better position to argue that they are simply enforcing their collective agreement, not challenging the Board's ruling in the Section 10(k) hearing. *See* Associated Gen. Contractors v. International Union of Operating Eng'rs, Local 701, 529 F.2d 1395 (9th Cir.), *cert. denied*, 429 U.S. 822 (1976); Iron Workers Local 55 (Lathrop Co.), 292

are not found in other bodies of law.[210] First, Section 8(a)(5) grants bargaining representatives an entitlement, protected by a "bargaining rule," that seeks to give employees a collective voice in setting the terms and conditions of employment.[211] Second, the Board and the courts have inferred from the structure of the NLRA an individual, inalienable employee entitlement to "fair representation."[212] Employees within the bargaining unit are entitled to fair representation by the union both in the judgment calls that the union makes while bargaining,[213] and in the processing of grievances under the collective agreement.[214] The following is a brief description of how the framework that labor law doctrine establishes to regulate private collective bargaining can be conceptualized in terms of these five categories of entitlements.[215] The contours of the bargaining rules are described first

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N.L.R.B. No. 7, 130 L.R.R.M. (BNA) 1239 (1989); Carpenters Local 33 (Blount Bros.), 289 N.L.R.B. No. 167, 129 L.R.R.M. (BNA) 1311 (1988).

210. The conceptual treatment of employer obligations under Section 8(a)(5) as a limited "bargaining entitlement" was first developed in an excellent article by Professors Michael Wachter and George Cohen that applied theories on internal labor markets to collective bargaining over work preservation clauses. Wachter & Cohen, *supra* note 200, at 1371-72.

211. *See* R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? (1984) (arguing that the principal contribution of unions in the workplace is to provide employees with a voice in the rules that govern work, thereby enhancing worker satisfaction and productivity); Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353 (1984) (comparing the collective goods model of labor relations with the price theory and relational contract models).

212. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967) (Board's jurisdiction to enforce the duty of fair representation as an unfair labor practice under the NLRA not preemptive of court jurisdiction to enforce the same obligation under Section 301); Syres v. Oil Workers Int'l Union, Local 23, 350 U.S. 892 (1955) (duty to represent fairly all bargaining unit members under the NLRA); Wallace Corp. v. NLRB, 323 U.S. 248 (1944) (duty of bargaining agent to represent all employees, not merely its own members, fairly); Steele v. Louisville & N. R.R., 323 U.S. 192 (1944) (The RLA imposes on statutory bargaining representatives a "duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963) (finding bargaining representative's failure to represent fairly all bargaining unit employees to be a violation of Subsections 8(b)(1)(A) and 8(b)(2)).

213. *See* Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). *See generally* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973); Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980); Freed, Polsby & Spitzer, *A Reply to Hyde, Can Judges Identify Fair Bargaining Procedures?*, 57 S. CAL. L. REV. 425 (1984); Freed, Polsby & Spitzer, *Unions, Fairness and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461 (1983); Hyde, *Can Judges Identify Fair Bargaining Procedures?: A Comment on Freed, Polsby & Spitzer, Unions, Fairness, and the Conundrums of Collective Choice*, 57 S. CAL. L. REV. 415 (1984); Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 ILL. L.F. 35.

214. *See* Vaca v. Sipes, 386 U.S. 171 (1967). *See generally* Feller, *supra* note 17; Finkin, *supra* note 213; Leffler, *supra* note 213.

215. The five types of entitlements referred to are property entitlements, liability entitlements, inalienable entitlements, bargaining entitlements, and the entitlement to fair

and are then followed by a description of the property, liability, and inalienable entitlements embodied in the NLRA. The individual employee's inalienable entitlement to fair representation is discussed last. The conceptual framework is then used to assess the impact that the assignment of the statutory entitlements has on the relative bargaining power of the parties.[216] The relationship between statutory bargaining obligations and the formation of a collective agreement creating property and liability contract entitlements is treated first.

A. *Bargaining Rules*

Bargaining rules guarantee employees a voice in determining "wages, hours, and other terms and conditions of employment."[217] The two central concerns of bargaining rules are the scope of the subjects about which parties must bargain and the obligations that flow from the duty to bargain in good faith over those subjects both during the initial period of contract formation and during the administration of the agreement. The rules that the Board applies to define the scope of bargaining are described first, followed by an assessment of the implications of these rules for the strategic behavior of the parties engaged in bargaining.

Case law divides the subjects of bargaining into three categories: (1) mandatory, (2) permissive, and (3) illegal.[218] The third category is another way of stating that the entitlement in question cannot be transferred. If a clause transferring such an entitlement were included in a collective bargaining agreement, it would be a violation of the statute and hence unenforceable.[219] Therefore, the critical distinction is between mandatory and permissive subjects. If an issue is a mandatory subject, the parties must bargain over it in good faith,[220]

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representation. Bargaining entitlements can be viewed as a type of property entitlement, unique to labor law, that is protected by an equitable remedy only. The fair representation entitlement can also be regarded as a type of inalienable entitlement owned by individual employees.

216. The framework set forth here draws heavily on excellent articles by Professor Douglas Leslie, *see* Leslie, *Multiemployer Bargaining Rules*, 75 VA. L. REV. 241 (1989), Professor Stewart Schwab, *see* Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245 (1987), and Professors Michael Wachter and George Cohen, *see* Wachter & Cohen, *supra* note 200.

217. Section 8(d) defines the subjects about which the parties have a duty to bargain. NLRA § 8(d), 29 U.S.C. § 158(d). Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5).

218. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

219. *See infra* notes 308-14 and accompanying text.

220. Ford Motor Co. v. NLRB, 441 U.S. 488 (1979); Fibreboard Paper Prods. Corp. v.

exchange information about the cost of their proposals,[221] and the employer may not take unilateral action on the subject until the parties have reached an impasse in bargaining.[222] On the other hand, a permissive subject can be placed on the bargaining table for discussion, but the opposing party is not obligated to bargain over the issue.[223]

In order to protect the autonomy of employer decisionmaking in responding to product market changes and in developing efficient production methods, the Supreme Court has held that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."[224] The NLRB has interpreted this language to mean that the decision as to whether a subject is mandatory or permissive should be determined by asking "whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives."[225]

NLRB, 379 U.S. 203 (1964); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

221. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). *See generally* Bartosic & Hartley, *The Employer's Duty to Supply Information to the Union—A Study of the Interplay of Administrative and Judicial Rationalization,* 58 CORNELL L. REV. 23 (1972); Shedlin, *Regulation of Disclosure of Economic and Financial Data and the Impact on the American System of Labor-Management Relations,* 41 OHIO ST. L.J. 441 (1980).

222. NLRB v. Katz, 369 U.S. 736 (1962). *See generally* Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes,* 44 TEX. L. REV. 470 (1966); Stewart & Engeman, *Impasse, Collective Bargaining and Action,* 39 U. CIN. L. REV. 233 (1970).

223. *Borg-Warner Corp.*, 356 U.S. at 349.

224. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679 (1981). For a thoughtful criticism of this case, see Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance: *The Scope of Mandatory Bargaining,* 68 VA. L. REV. 1447 (1982). For an economist's perspective on the Court's reasoning, see Alchian, *Decision Sharing and Expropriable Specific Quasi-Rents: A Theory of* First National Maintenance Corporation v. NLRB, 1 SUP. CT. ECON. REV. 235 (1982).

225. Otis Elevator Co., 269 N.L.R.B. 891, 892 (1984) (plurality opinion) (*Otis Elevator II*), *rev'g* 255 N.L.R.B. 235 (1981) (*Otis Elevator I*). By making the test for the duty to bargain depend on whether the decision turns upon labor costs or upon other factors related to the direction of the business, the plurality protects management prerogatives. The plurality held that the employer had no duty to bargain over a decision to transfer research operations because the decision was motivated by factors other than labor costs: outdated technology at the old plant and the consolidation and streamlining of operations at the new facility. *Id.* Member Dennis concurred, but he applied a two-pronged test. *Id.* at 897 (Dennis, Member, concurring). Relying on *First National Maintenance,* he concluded that an issue is mandatory if the General Counsel can demonstrate: (a) that the union has control over a factor that is a significant consideration in the decision of the employer and (b) that "the benefit for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of business." *Id.* (quoting *First Nat'l Maintenance,* 452 U.S. at 679). Member Zimmerman concluded that an issue was mandatory if only the first part of the test applied by

The test is constructed so as to keep unencumbered management's discretion to respond to the product market unless the change that management contemplates relates primarily to the cost of labor and does not involve a basic change in the production process.[226] It should be emphasized, however, that the *effects* on employees in the bargaining unit of a permissive decision impacting on job security are still a mandatory subject, even though the decision itself is not.[227]

The true significance of the mandatory-permissive distinction on the outcome of bargaining is difficult to assess. The obligation to bargain only means that the employer must bargain to impasse before implementing a proposed change.[228] When the parties are bargaining

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Member Dennis was satisfied; that the decision was "amenable to resolution through collective bargaining." *Id.* at 901 (Zimmerman, Member, concurring).

In subsequent opinions, the NLRB has failed to choose among the three alternative tests. Instead, the Board has generally found that all three of the tests are satisfied or none of the three are satisfied. *See, e.g.*, FMC Corp., 290 N.L.R.B. No. 62, 131 L.R.R.M. (BNA) 1130 (1989); Connecticut Color, Inc., 288 N.L.R.B. No. 81, 128 L.R.R.M. (BNA) 1211 (1988) (view of Chairman Stephens and Member Bobson); Dubuque Packing Co., 287 N.L.R.B. No. 52, 130 L.R.R.M. (BNA) 1151 (1987) *remanded*, United Food & Commercial Workers Int'l v. NLRB, 880 F.2d 1422 (D.C. Cir. 1989) (remanding for a reasoned justification of the test that the NLRB is applying to determine if an issue is a mandatory subject of bargaining and for an explanation of how that test applies to the facts of the case). The remand of the District of Columbia Circuit in *United Food & Commercial Workers* is explicitly aimed at forcing the Board to articulate the test that "is in fact guiding agency behavior rather than merely serving as a cover for arbitrary and capricious decisionmaking." 880 F.2d at 1439.

226. *Otis Elevator II*, 269 N.L.R.B. at 893-94; *see also First Nat'l Maintenance*, 452 U.S. at 686; Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

227. *First Nat'l Maintenance*, 452 U.S. at 681. *See generally* Kohler, *Distinctions Without Differences: Effects Bargaining in Light of* First National Maintenance, 5 INDUS. REL. L.J. 402 (1983).

228. Impasse is normally defined as that point at which future negotiations would be fruitless. The "parties, despite the best of faith, are simply deadlocked." NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1963). In Taft Broadcasting Co., 163 N.L.R.B. 475 (1967), the Board defined the factors it applies in deciding when an impasse exists:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Id. at 478. Following impasse, the employer may only institute benefits that are consistent with the employer's prior offers. *See* Atlas Metal Parts Co. v. NLRB, 660 F.2d 304 (7th Cir. 1981); Bradley Washfountain Co., 89 N.L.R.B. 1662 (1950), *enforcement denied*, 192 F.2d 144 (7th Cir. 1951).

The extent to which these rules constrain employer behavior during bargaining is open to question. The vague nature of the test for impasse is likely to constrain employers from implementing changes that reduce benefits when the parties are engaged in concession bargaining. Should the NLRB rule that there was not an impasse, the employer could be ordered to reimburse employees in an amount equivalent to the reduction. *See, e.g.*, Cauthorne Trucking, 265 N.L.R.B. 721 (1981), *enforcement granted in part and denied in part*, 691 F.2d 1023 (D.C. Cir.

over the initial terms of a collective agreement, the distinction between a mandatory and a permissive subject may only be of symbolic importance. At the initial bargaining stage, both mandatory and permissive subjects may be placed on the table.[229] The importance of both types of demands may be communicated although the party that is proposing a clause on a permissive subject avoids formally insisting on its inclusion in the agreement. Only if the parties reach agreement on all mandatory subjects will the constraints on the use of concerted pressure to obtain a clause on a permissive issue inhibit the strategy of either a union or an employer. Because agreements over mandatory subjects are partially under the parties' control, however, an important permissive subject is not likely to be isolated on the bargaining table. When a strike or lockout occurs and a mix of mandatory and permissive subjects is involved, the parties will understand and apply the tradeoffs among all the issues on the table in order to arrive at a final agreement. In short, classifying a subject as permissive does not mean that a union will be unable to obtain a clause restricting employer discretion to act unilaterally on that subject during the term of the agreement.[230]

Once an employer's discretion is constrained by specific language in an agreement, the union can seek enforcement through grievance arbitration. At that point, the critical issue is whether the assumptions about the importance of protecting the employer's entrepreneurial discretion to respond to market forces, which underlie the mandatory-permissive distinction, will influence arbitrators to

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1982). A situation in which there was a prior increase in benefits, however, works very differently. Should the employer be found to have implemented the increase prior to impasse, the Board could order the employer to cease and desist, but there is no monetary risk beyond the cost of litigation. *See, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962). In any case, it is likely that the parties will have settled on a new agreement prior to the Board adjudication of the impasse issue, and the unfair labor practice charge will normally be dropped as a part of the final settlement on the new agreement. The unilateral increase that is less than the union has demanded is only significant if the union strikes in response to obtain its demands and if the union can characterize the strike as being an unfair labor practice strike in response to a Section 8(a)(5) violation, instead of simply an economic strike for better terms. Then, should the employer replace the strikers and should the union fail to win a favorable settlement of the strike, the replacements would be classified as temporary, and the strikers reinstated with back pay from the time that they offered to return to work. To avoid this obligation, the employer must show that the strike would have occurred even without the employer committing the unfair labor practice. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 236 F.2d 898 (6th Cir. 1956), *aff'd and modified on other grounds*, 356 U.S. 342, *applied by Board after remand*, 121 N.L.R.B. 1492 (1958). Consequently, a remedy for unilateral employer increases primarily comes into play as additional job security for employees who are willing to strike to obtain demands in excess of the increases.

229. *See Borg-Warner*, 356 U.S. at 349.

230. *See* J. GETMAN & B. POGREBIN, *supra* note 189, at 123.

construe narrowly the clause in the agreement.[231] It is important to note that the union's only remedy to enforce a clause that governs a permissive subject is grievance arbitration. The breach of a clause governing a permissive subject is not a violation of the employer's duty to maintain the terms of the agreement under Section 8(d).[232] Because the obey and grieve doctrine permits employers to act pending arbitration,[233] the enforcement of some clauses regarding permissive issues can prove to be illusory. No meaningful remedy may be available once circumstances have changed as a result of an employer's unilateral actions prior to the arbitrator's decision.[234]

A union may attempt to preserve the integrity of arbitration on the issue in question by seeking an injunction to maintain the status quo pending arbitration, but because federal courts are hesitant to become involved in or to influence contract interpretation, there is disagreement over the propriety of issuing status quo injunctions.[235]

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231. *See* Comment, *Successorship Doctrine, the Courts and Arbitrators: Common Sense or Dollars and Cents?*, 44 U. MIAMI L. REV. 403 (1989). For a thoughtful treatment of the core values that inform the mandatory-permissive distinction, see J. ATLESON, *supra* note 17, at 111-35.

232. Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 188 (1971).

233. *See infra* notes 303-07 & 527-53 and accompanying text.

234. *See, e.g.*, Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974). In *Howard Johnson*, the Supreme Court held that the purchase of a business with a clause in the collective bargaining agreement that binds successors to adopt the existing collective agreement does not bind a purchaser who had notice of the clause prior to completing the purchase. *Id.* at 262-63. The Court suggested that the union's remedy for the breach of the successor clause was to enjoin the sale pending arbitration of the seller's obligation under the clause. *Id.* at 258 n.3; *see also* Local Lodge 1266, IAM v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981). A court may deny the injunction, however, on the grounds that the Court's interpretation of the Norris-LaGuardia Act in *Buffalo Forge* does not permit a court to usurp the arbitrator's role by interpreting the successor clause. *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 410-11 (1976); Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, 529 F.2d 1073 (9th Cir. 1976), *vacated*, 429 U.S. 807, *on remand*, 550 F.2d 1237 (9th Cir.) (reversing, in light of *Buffalo Forge*, former decision sustaining a preliminary injunction pending arbitration), *cert. denied*, 434 U.S. 837 (1977). The union may also fail to learn about the proposed sale in time to seek an injunction because the decision to sell will not be a mandatory subject of bargaining; only the effects on employee job security will be the mandatory subject of bargaining. *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). *See generally* Kohler, *supra* note 227. To the extent that a union's primary concern in seeking a successor clause was to obtain job security for its members, an arbitrator will not be able to provide any meaningful remedy for the breach once the sale is complete. *See Panoramic*, 668 F.2d at 286; Lever Bros. v. International Chem. Workers Union, Local 217, 554 F.2d 115, 120, 122 (4th Cir. 1976); *see also* Comment, *supra* note 231, at 420-22.

235. *See* Columbia Local, Am. Postal Workers Union v. Bolger, 621 F.2d 615 (4th Cir. 1980) (refusing to enjoin merger of work shifts within the same facility); Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, 550 F.2d 1237 (9th Cir.) (reversing district court injunction of changes in work cycles pending arbitration), *cert. denied*, 434 U.S. 837 (1977). *But see* Local Lodge No. 1266, IAM v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981); United Steelworkers v. Fort Pitt Steel Casting, 598 F.2d 1273 (3d Cir. 1979) (requiring employer to

If a court refuses to issue the injunction, then the union's only option will be to seek damages from an arbitrator.[236] Consequently, many contract clauses on permissive subjects operate more as liability rules than as property rules.

The major practical difference between mandatory and permissive subjects emerges once an agreement is in place. An employer is totally free to act unilaterally on a permissive subject if he is not constrained by specific contract language.[237] The statutory treatment of mandatory subjects during the term of an agreement creates the potential for shared jurisdiction between the Board and arbitrators as indicated earlier in the discussion of Illustration 2.[238] If there is a clause on point, a breach of that clause may be the subject of both an unfair labor practice charge under Section 8(d) and grievance arbitration.[239] As long as an employer is willing to arbitrate, however, an

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pay hospitalization and insurance premiums during strike despite dispute over employer's obligations); Lever Bros. v. International Chem. Workers Union, Local 217, 554 F.2d 115 (4th Cir. 1976) (enjoining plant relocation). Even if a court accepts the *Lever Brothers* position that injunctions should issue if arbitration will otherwise be a "hollow formality," *Lever Bros.*, 554 F.2d at 123, the standards remain difficult to meet unless the employer's actions will result in an "irretrievable loss of workers' primary employment." IOCW of Quincy, Inc. v. Procter & Gamble Mfg. Co., No. Civ. A 88-2048MC (D. Mass. Oct. 3, 1988) (WESTLAW, Allfeds) (1988 WL 105625) (refusing to enjoin employer changes in work shifts, safety, and employee dress pending arbitration), *aff'd*, 864 F.2d 927 (1st Cir. 1988). In order to obtain an injunction, the union must show that the dispute is arbitrable, that arbitration will otherwise be a "hollow formality" or irremediable injury, and that success on the merits is likely. *See Procter & Gamble*, 864 F.2d at 930. The category of irremediable injury has been regarded as equivalent to the irretrievable loss of jobs. *Bolger*, 621 F.2d at 618 (injunction vacated where work shift eliminated but job security remained, despite threats to seniority, time off, vacation, and convenience factors); *Procter & Gamble*, 864 F.2d at 931-32. *See generally* Cantor, Buffalo Forge *and Injunctions Against Employer Breaches of Collective Bargaining Agreements*, 1980 WIS. L. REV. 247.

236. *See* Comment, *supra* note 231, at 422-28. *Compare* Martin Podany Assocs., Inc., 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.) (awarding damages for breach of successor clause based on back wages, pension contributions, and health and welfare funds) *with* Wyatt Mfg. Co., 82 Lab. Arb. (BNA) 153 (1983) (Goodman, Arb.) (denying remedy because successor clause did not include specific language obligating seller for buyer's failure to adopt the collective bargaining agreement).

237. *See* Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

238. *See supra* notes 102-41 and accompanying text.

239. *See* Milwaukee Spring Div. of Ill. Coil Spring Co., 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985). The facts of *Milwaukee Spring I* and *II* aptly illustrate a union's options. In order to obtain relief from comparatively higher labor costs under a collective bargaining agreement with the union, the company proposed relocating assembly operations to its non-unionized plant. *Id.* at 207. The parties bargained over the transfer, but when the union rejected making wage concessions, the company announced that it had decided to transfer the work anyway. *Milwaukee Spring II*, 268 N.L.R.B. at 601. The union could have filed a grievance claiming that the company lacked the power, under the management rights clause, to transfer the work. *See UAW*, 765 F.2d at 178,

unfair labor practice charge will probably be deferred to arbitration.[240]

If there is no clause on point, a union's bargaining entitlement obligates the employer to bargain to impasse with the union prior to implementing the change. The union, however, may waive its bargaining entitlement by agreeing to an "entire agreement" or "zipper clause" whereby the parties waive their statutory obligations to bargain over subjects not included in the agreement.[241] The Board sees these clauses primarily as a means by which employers are able to obtain protection from new union demands presented during the term of an agreement. Thus, when a union asks to bargain over a subject not contained in the agreement, the employer can refuse on the grounds that the zipper clause waives the union's right to force the employer to bargain over new issues raised during the term of the agreement. In contrast, when an employer takes unilateral action to impose a new working condition not contemplated by the agreement and asserts that the union waived its entitlement to bargain over the change, the Board looks to see if there is specific language indicating a waiver of the duty to bargain over that subject. Without the union's agreement to a specific clause giving the employer discretion to alter that particular working condition without bargaining, the general rule of interpretation is that the employer remains obligated to bargain.[242]

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182 n.26 (union did not contest the company's right to make the transfer under the contract, but instead filed charges under NLRA Section 7, and Subsections 8(a)(1), 8(a)(3), 8(a)(5), and 8(d)).

240. *UAW*, 765 F.2d at 182 n.26 ("It is not clear why this case was not submitted to arbitration pursuant to *Collyer Insulated Wire* [192 N.L.R.B. 837 (1971)].").

241. The zipper clause contained in the collective bargaining agreement in *Milwaukee Spring* is typical. It provided as follows:

> [Each party] waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Id. at 182 n.27.

242. "While the Board acknowledges that a labor organization may waive the statutory rights granted to it and to the employees it represents, we will not lightly infer such a waiver, which must be in 'clear and unmistakable' language." Universal Sec. Instruments, 250 N.L.R.B. 661, 662 (1980) (quoting Allied Mills, Inc., 218 N.L.R.B. 281, 286 (1975)), *enforced in relevant part*, 649 F.2d 247, 256 (4th Cir. 1981); *see also* Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) (requiring that the intent to waive a statutorily protected right be "explicitly stated"); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746, 751 (6th Cir. 1963). *But see* Litton Microwave Cooking Prods. Div., Litton Sys. v. N.L.R.B., 868 F.2d 854 (6th Cir. 1989), *rev'g* 283 N.L.R.B. No. 144, 125 L.R.R.M. (BNA) 1081 (1987) (denying enforcement of Board order to bargain based on the requirement of clear and unmistakable language and holding that the broad management rights clause combined with the union's

In any event, unless an employer has some need for either speed or secrecy in making and implementing a decision, a bargaining obligation during the term of an agreement is not a major constraint. All that an employer needs to do is give the union notice, bargain to impasse, and then make the change.[243] At this point, the freedom of the union to strike in response to the change is questionable because the employer may claim the right to implement the change under the management rights clause of the contract.[244] If so, the change in working conditions will be arbitrable, and the employer may obtain a *Boys Markets* injunction to enforce the no-strike clause should the union engage in a responsive work stoppage rather than complying with the change and filing a grievance.[245]

If a court action under Section 301 is filed to compel arbitration and to enforce a no-strike clause, the courts normally would read together the zipper clause, the no-strike clause, and the grievance arbitration clause as suggesting that the parties intended to resolve disputes over implied contract obligations by means of arbitration.[246] If arbitration is mandated, the arbitrator will resolve the dispute based on the wording of the management rights clause and on the parties' expectations derived from past practice.[247] Thus, the issue of

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prior failure to request bargaining over prior management relocation decisions constituted evidence that the union believed the company could relocate production unilaterally without bargaining during the term of the agreement). *See generally* Nelson & Howard, *The Duty to Bargain During the Term of an Existing Agreement*, 27 LAB. L.J. 573 (1976).

243. For a discussion of the criteria the Board uses to determine when the parties are at impasse, see *supra* note 228.

244. *See UAW*, 765 F.2d at 180-83. In affirming the Board, Judge Edwards argued that a zipper clause "has the effect of incorporating all possible topics of bargaining—both those actually discussed and those neither discussed nor contemplated during bargaining—into the contract." *Id.* at 180. Judge Edwards concluded, contrary to the Board, that the zipper clause prevented the employer from altering the status quo on any mandatory subject unless the company had the contractual right to make the change under the management rights clause. *Id.* at 182-83. Thus, the arbitrator determines the issue and the union is obligated to obey and grieve.

245. Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970) (A federal court has jurisdiction under Section 301, without violating the anti-injunction provisions of the Norris-LaGuardia Act, to issue an injunction to enforce a union's agreement not to strike if the strike is over a dispute subject to arbitration.).

246. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.").

247. *See* Milwaukee Spring Div. of Ill. Coil Spring Co., 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985); Babcock & Wilcox Co., 80 Lab. Arb. (BNA) 212, 216-17 (1982) (Klein, Arb.); Safeway Stores, Inc., 42 Lab. Arb. (BNA) 353, 357 (1964) (Ross, Arb.); *see also* Abrams & Nolan, *Subcontracting Disputes in Labor Arbitration: Productive Efficiency Versus Job Security*, 15 U. TOL. L. REV. 7 (1983); Comment, *Arbitral*

bargaining entitlements tends to drop to the background, and the focus shifts to the implied property entitlements that grow out of a collective bargaining agreement. Arbitrators are therefore faced with the task of assigning property entitlements by filling in gaps in collective agreements.[248]

B. *Statutory and Contract Property Entitlements*

The legal system protects property entitlements with the equitable remedy of an injunction, rather than simply compensating the holder, when the entitlement has been infringed.[249] These entitlements can be transferred by contract, but they cannot otherwise be appropriated. From the perspective of an arbitrator, all entitlements are normally assumed to be incorporated into the parties' contractual relationship. If a collective bargaining agreement is silent on a particular entitlement and the employer, without union consent, takes action that impacts adversely on bargaining unit work, the arbitrator will have to determine how the entitlements involved in the controversy are divided. The arbitrator looks to implicit restrictions on management action that flow from other clauses in the agreement, to the parties' expectations as evidenced by past practice, and to the wording of the management rights clause.[250] The arbitrator's decision establishes a set of property entitlements that not only settles that controversy but also provides a basis for the parties' future bargaining over the same issues. The arbitrator's reasoning and decision are, however, specific only to that particular bargaining unit. Although the decision may influence other parties in the same industry in terms

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Treatment of Subcontracting, *supra* note 186. For a thoughtful comparison of arbitrator and NLRB reasoning in work transfer cases, see Comment, *The Bases and Limits of Arbitral Decisionmaking in Plant Relocation and Transfer of Work Disputes*, 7 INDUS. REL. L.J. 362 (1985) [hereinafter Comment, *Bases and Limits of Arbitral Decisionmaking*]. For a discussion of the implications of the effects of *Milwaukee Spring I* and *II* on collective bargaining over work preservation clauses that limit the discretion of employers to transfer work, see Schwab, *supra* note 216.

248. *See* Wachter & Cohen, *supra* note 200, at 1408-15 (proposing a sunk-cost-loss rule approach by arbitrators to set default entitlements during the terms of collective bargaining agreements).

249. *See* Calabresi & Melamed, *supra* note 200, at 1092.

250. Arbitrators normally interpret the management rights clause from a perspective of good faith, reasonableness, past practice, and bargaining history to determine if management is acting within the scope of the clause. *See* Abrams & Nolan, *supra* note 247; Comment, *Arbitral Treatment of Subcontracting*, *supra* note 186, at 386-89; Comment, *Bases and Limits of Arbitral Decisionmaking*, *supra* note 247, at 369. For an argument that an economic approach based on the sunk-cost-loss rule would provide arbitrators with a reasoned and fair means to determine whether an employer is seeking to violate a wage clause or simply responding to market forces without attempting to increase the rate of return to capital at the expense of agreed-upon wages, see Wachter & Cohen, *supra* note 200, at 1412-14.

of their expectations with respect to similarly worded agreements, the consequences are very different from those of an NLRB opinion which establishes a property entitlement for all parties similarly situated.[251]

When an employer unilaterally acts to reduce unit work, the union may file an unfair labor practice charge, as well as grieve the action. Under the NLRA, the question for the Board is whether the employer has failed to maintain the terms of the agreement under Section 8(d).[252] Because employers may act unilaterally at any time with respect to a permissive subject of bargaining without violating the NLRA, the classification of a subject as permissive gives the employer a property entitlement in that area. The only way a union can constrain unilateral employer decisions regarding a permissive subject is by bargaining for an explicit clause enforceable through arbitration.

The relationship between the parties' statutory obligation to maintain the terms of an agreement under Section 8(d) and mid-term changes in a working condition classified as a mandatory subject is more complex. There are four ways in which Section 8(d) can be interpreted with reference to an employer action implicating a mandatory subject that is not addressed in the agreement. First, the Board could hold that management is free to act unilaterally on any mandatory subject unless it is explicitly constrained by the contract or unless the decision violates Section 8(a)(3).[253] This interpretation of the NLRA embodies a protective view of management rights; collective bargaining provides workers with a means to restrict management discretion, but the restrictions must be explicitly incorporated into the agreement or else management is free to act.[254] This view of Section 8(d) obligations also assumes that the NLRA was not meant to alter the traditional common law presumption that management possesses all the property entitlements in the operation of its business and in the establishment of work rules unless explicitly restricted by statute.[255] This is the strongest management rights position.

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251. *See infra* notes 253-94 and accompanying text.

252. NLRA § 8(d), 29 U.S.C. § 158(d); *see* Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601, 602 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

253. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3); *see Milwaukee Spring II*, 268 N.L.R.B. at 604 (citing University of Chicago v. NLRB, 514 F.2d 942, 949 (7th Cir. 1975)).

254. *Milwaukee Spring II*, 268 N.L.R.B. at 602.

255. For a pristine version of management's reserved rights, see Phelps, *Management's Reserved Rights: An Industry View, Management Rights and the Arbitration Process*, 9 NAT'L ACAD. ARB. PROC. 117 (1956). Phelps stated that:

> When we speak of the term "management's rights" . . . we are referring to the residue of management's pre-existing functions which remains after the

Second, the Board could hold that the mandatory classification does more than simply create a bargaining obligation; in fact, it requires the parties either to reach agreement on any change in a mandatory subject or to maintain the status quo in accordance with past practices followed during the term of the agreement.[256] Under this view of Section 8(d), a union has a property entitlement during the term of the agreement in working conditions established by past practices unless the union agrees to a clause granting management the discretion to alter prior conditions.[257] It forces the employer to incorporate an explicit clause into the agreement authorizing employer control over the mandatory working condition if the employer wants the discretion to act in a manner inconsistent with past practice.[258] This is the weakest management rights position.[259]

A third approach is to make the employer's discretion to act unilaterally turn on a combination of past practice, the parties' intent, and the wording of the management rights clause.[260] This approach

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negotiation of a collective bargaining agreement. In the absence of such an agreement, management has absolute discretion in the hiring, firing, and the organization and direction of the working forces, subject only to such limitation as may be imposed by law . . . .

Id. at 105.

256. *See, e.g.*, Milwaukee Spring Div. of Ill. Coil Spring Co., 265 N.L.R.B. 206, 209 (1982) (*Milwaukee Spring I*) (refusing to permit the transfer of work to save labor costs because it would be an indirect breach of the wage clause and would undermine the binding nature of collective bargaining agreements), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985). Mandatory subjects are now narrowly defined by the Board as decisions that turn on labor costs. *See* Otis Elevator Co., 269 N.L.R.B. 891, 893-94 (1984) (plurality opinion) (*Otis Elevator II*). Therefore, unless explicitly authorized by the agreement, unilateral changes in "mandatory subjects" would always be an indirect violation of a clause related to labor costs and a violation of Section 8(d).

257. *See* Schwab, *supra* note 216, at 256-65.

258. *Id.* Professor Schwab used the Coase Theorem to analyze whether the initial assignment of the entitlement, as per *Milwaukee Spring I* or *Milwaukee Spring II*, influences efficiency or wealth distribution when the union and employer bargain and allocate the right to transfer work according to which party places the highest value on the presence or absence of a work preservation clause. *Id.*

259. This position reflects the statutory policy of encouraging the parties to bargain about all mandatory issues related to labor costs and job security and to arrive at an understanding that is incorporated into the collective agreement. If the employer wishes to maintain discretion to reduce labor costs in response to new technology or shifts in the product market, the employer needs to obtain language in the agreement which grants the employer that flexibility. *See Milwaukee Spring I*, 265 N.L.R.B. at 210 (Management rights clause reserved to management the "right to decide whether, and how, its products will be manufactured." The Board, however, found "nothing in this clause which expressly grants Respondent the right to move, transfer, or change part of its operations . . . to avoid the comparatively higher labor costs imposed by the collective agreement."), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

260. *See* Stein, *Management Rights and Productivity*, 32 ARB. J. 270 (1977), *reprinted in* C. CRAVER, L. MERRIFIELD & D. ROTHSCHILD, COLLECTIVE BARGAINING AND LABOR

poses a different type of statutory issue: whether the Board should set forth general rules of interpretation, reflecting underlying statutory policies, to guide the analysis of past practices and the parties' intent in particular disputes.[261]

The fourth approach is similar, except that it explicitly views the question as one that is reserved for the arbitrators and that is independent of statutory policies, so long as agreements include an arbitration clause, a no-strike clause, and a zipper clause.[262] This leaves the role of gap filling during the terms of agreements to arbitrators acting on a unit-by-unit basis, with no statutory vision of management rights in the background.

The best illustration of Board and court reasoning when confronted with a case that presents issues raising these alternative ways of interpreting Section 8(d) is *Milwaukee Spring I*[263] and *Milwaukee Spring II*.[264] In *Milwaukee Spring I*, an employer facing financial difficulties sought mid-term concessions from the union.[265] When the union refused to make concessions, the company decided to relocate bargaining unit work to one of its non-unionized plants.[266] There was, however, no explicit clause in the parties' agreement that either limited relocation or obligated the employer to maintain the work in question in the bargaining unit.[267]

The union responded by filing an unfair labor practice charge under Section 8(d),[268] claiming that the relocation was a breach of

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ARBITRATION 488-90 (1988). Stein characterizes this view as a "modified residual rights theory" that includes the following modifications: "1) that management prerogatives be exercised in a reasonable and rational form; 2) that the intent of an action be not to subvert the letter or spirit of the agreement; and 3) that long-established practices are not easily discontinued." *Id.*, *reprinted in* C. CRAVER, L. MERRIFIELD & D. ROTHSCHILD, *supra*, at 489.

261. *See, e.g.*, *Milwaukee Spring II*, 268 N.L.R.B. at 605-12. In his dissent, Member Zimmerman first analyzed the company's discretion to transfer bargaining unit work without violating Section 8(d) from the perspective of both the policies underlying the mandatory classification and the statutory policy that encourages parties to reach mutually agreeable solutions through bargaining. *Id.*

262. *See UAW*, 765 F.2d at 175, 182 n.27.

263. Milwaukee Spring Div. of Ill. Coil Spring Co., 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

264. 268 N.L.R.B. 601 (1984), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

265. *Milwaukee Spring I*, 265 N.L.R.B. at 207.

266. *Id.*

267. *Id.* at 210.

268. Altogether, the union filed unfair labor practice charges under Subsections 8(a)(1), 8(a)(3), 8(a)(5), and 8(d) of the NLRA. *Id.* at 207. On rehearing, however, the parties stipulated that the decision to relocate work was economically motivated and that the employer had satisfied its bargaining obligation in regard to the decision to transfer the work,

implied obligations derived from the wage and union recognition clauses.[269] The NLRB found that the employer was transferring the work to avoid obligations under the wage and recognition provisions.[270] Consequently, the Board held that the employer's unilateral act violated his statutory obligation to refrain from modifying the agreement prior to its expiration;[271] without an express clause that authorized the employer to transfer unit work without union consent, the employer was not free to transfer the work.[272] This holding was consistent with the second approach described above,[273] and it embodies a limited view of management rights.

While that decision was pending on appeal, the NLRB decided to reconsider its decision and requested that the case be remanded for further consideration.[274] In *Milwaukee Spring II*, the Board reversed itself in an opinion that is consistent with the first approach described above, that which is the most protective of management rights.[275] The NLRB held that the employer was free to transfer the work after bargaining to impasse, as long as there was no explicit clause in the agreement that restricted its discretion to transfer work.[276] The underlying assumption of the *Milwaukee Spring II* opinion is that Section 8(d) does not limit the traditional discretion of management to make unilateral alterations in any term or condition of employment absent specific limiting language in the contract.[277] Indeed, the Board's opinion suggested that all property entitlements necessary to manage a business remain with the employer unless explicitly waived.[278]

In a dissenting opinion in *Milwaukee Spring II*, Member Zimmerman argued for the adoption of the third approach—evaluating the dispute in light of past practice, the parties' intent, and the con-

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thus mooting the charges under Subsections 8(a)(1), 8(a)(3), and 8(a)(5) and leaving only the Section 8(d) charge to be determined by the Board. *See Milwaukee Spring II*, 268 N.L.R.B. at 601-02.

269. *Milwaukee Spring I*, 265 N.L.R.B. at 207.

270. *Id.* at 208-09.

271. *Id.* at 208.

272. *Id.*

273. *See supra* notes 256-59 and accompanying text.

274. For a procedural description of the case, see UAW v. NLRB, 765 F.2d 175, 178-79 (D.C. Cir. 1985).

275. *See supra* notes 254-55 and accompanying text.

276. Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601, 603-04 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

277. This interpretation of Section 8(d) reflects the concern of protecting core management decisions from union demands, a concern expressed most clearly by the Supreme Court in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). *See supra* notes 224-27 and accompanying text.

278. *Milwaukee Spring II*, 268 N.L.R.B. at 603.

tract's management rights clause.[279] He would have found that the transfer violated Section 8(d) if the "relocation decision [was] motivated solely or predominantly by a desire to avoid terms of the collective-bargaining agreement."[280] Specifically, he would have looked to the facts of the particular case to determine whether the employer was seeking to avoid the wage bargain embodied in the agreement.[281] In his view, the Board should interpret labor contracts so as to encourage the parties to resolve issues over work relocation through bargaining,[282] and thus he would have interpreted the parties' understanding of their agreement in light of the statutory policy favoring

279. *Id.* at 605-12 (Zimmerman, Member, dissenting); *see supra* note 261.

280. *Milwaukee Spring II*, 268 N.L.R.B. at 605 (Zimmerman, Member, dissenting).

281. *Id. at* 610. This approach does not yield much predictability for future similarly situated parties. It is favored in labor arbitration because an arbitrator deals with a specific dispute within a particular bargaining unit and his decision will have no precedential effect on other unrelated parties. The Board, however, must worry about administering a rule based on a case-by-case analysis, and the parties will not know where they stand until the Board's post hoc analysis is made, at least a year after the employer's decision. Given the potential for a large award of back pay if the employer is found to have violated Section 8(d), the case-by-case analysis may tend to deter employers from acting without union consent. If, due to the uncertainty in outcome, this approach has the same practical consequences as option two, *supra* notes 256-59, the more predictable rule would arguably be preferable to save adjudication costs. *But see* Wachter & Cohen, *supra* note 200 (arguing for the application of a sunk-cost-loss rule on a case-by-case basis). Professors Wachter and Cohen would apply a test that focuses on whether an employer is engaging in strategic behavior in response to the product market in order to obtain deferred compensation owed to workers under the collective bargaining agreement:

> The sunk-cost-loss suffered by the firm is the loss of expected profits accruing to the firm's sunk investments in labor (through specific training and monitoring) and in physical capital. The sunk-cost-loss rule deters strategic behavior by both parties. The firm is less likely to act strategically, by expropriating the workers' deferred compensation, if in order to cut its wage bill the firm must simultaneously suffer lost expected profits. In addition, workers are less likely to retaliate strategically by increasing monitoring costs because the sunk-cost-loss incurred by the firm provides objective evidence to the workers that supports the firm's claim of a product market decline.

Id. at 1379. The authors applied this test to the facts of *Milwaukee Spring* and concluded that the result was correct because: (1) the firm was responding to the loss of a contract from a major customer; (2) it was likely that the firm would reduce work production hours in addition to wages, thereby reducing returns to capital as well as to labor; and (3) that the loss of one-third of the work performed at the Milwaukee Spring plant implied a large sunk-cost-loss in equipment. *Id.* at 1406-07.

This approach is arguably more objective than Member Zimmerman's focus on motive, but it essentially unpacks the type of considerations one would look at to determine motive. Moreover, there will continue to be substantial uncertainty as to how the Board would view the evidence and resolve factual conflicts. The concepts should prove to be helpful to arbitrators dealing with disputes within particular bargaining units, but they are more questionable when the Board seeks to provide predictability and to minimize the costs of case-by-case adjudication.

282. *Milwaukee Spring II*, 268 N.L.R.B. at 608-09 (Zimmerman, Member, dissenting).

bargaining.[283]

On review, the United States Court of Appeals for the District of Columbia Circuit affirmed, essentially taking the fourth approach.[284] In an opinion authored by Judge Edwards, the court held that the combination of the zipper clause, the no-strike clause, and the broad arbitration clause meant that the parties anticipated that issues arising over the transfer of work would be decided by reference to the collective bargaining agreement.[285] In the court's view, the Board should normally defer a Section 8(d) charge of this sort to arbitration because the parties, by their agreement, have consented to have an arbitrator interpret the labor agreement.[286] In the absence of a request to defer by the employer, however, the burden was on the union to produce proof during the Board proceedings that the parties understood the management rights clause as not authorizing the company to transfer work without the union's consent. Because the union had not met its burden, the court affirmed the NLRB's decision.[287]

Both the second NLRB opinion and the District of Columbia Circuit decision make arbitration the central forum for resolving future disputes over mid-term modifications of a working condition that is not explicitly addressed in the agreement. The Board's opinion is sufficiently strong in its vision of management rights so as to discourage a union from filing an unfair labor practice charge in a similar circumstance. The District of Columbia Circuit's opinion reinforces the centrality of arbitration for mid-term disputes by encouraging the Board to defer if a union does file charges. Both opinions tend to make arbitration the principal forum in which disputes over gaps in agreements will be resolved based on an arbitrator's assumptions about the appropriate balance in management and worker influence over workplace decisions.

The other major set of property entitlements under the NLRA are employee Section 7 rights.[288] As noted below, although a few employee Section 7 rights are inalienable, once the employees have a bargaining agent most of these rights may be transferred by the union through bargaining.[289] The most significant Section 7 right is the pro-

283. *Id.* at 612.

284. UAW v. NLRB, 765 F.2d 175, 179-84 (D.C. Cir. 1985).

285. *Id.* at 182-83.

286. *Id.* at 182 n.26.

287. *Id.* at 183.

288. NLRA § 7, 29 U.S.C. § 157.

289. The traditional distinction in this area has been that a union may bargain away an employee's economic rights, but not the representational reinforcing rights. *See* NLRB v. Magnavox Co., 415 U.S. 322, 325-26 (1974) (A union cannot waive employee rights to distribute literature and post notices on company bulletin boards.). In *Metropolitan Edison*

tection that employees enjoy when engaged in a strike for better working conditions.[290] This is, however, the one entitlement that a union is presumed to transfer if the union enters into an agreement with a broad grievance arbitration clause.[291]

It is important to note that most employee entitlements that concerted pressure are limited in the sense that interpretations of Section 7 have given employers certain entitlements that enable them to respond to employee concerted pressure in ways that may place employee jobs in jeopardy.[292] Thus, for each employee property entitlement under Section 7, there is a set of corresponding employer entitlements that places limits on the employee's statutory protection.[293]

Co., however, the Supreme Court indicated that a union could waive a union leader's statutory right not to be differentially sanctioned for participating in concerted activity, with little analysis of the nature of this statutory right. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705-07 (1983). The Court found the right to be more closely analogous to giving up the right to strike for economic gains than to an interference with union members' statutory right to select whomever they choose as their leaders. *Id.* at 706. At the same time, however, the Court recognized that the statutory protection is based in part on the adverse impact which differential sanctioning can have on the rank-and-file's willingness to assume positions of leadership. *Id.* at 702-03. The Court's approach suggests a willingness to characterize most Section 7 rights as economic in nature, rather than representational, and therefore subject to waiver unless a right is directly related to selecting, decertifying, or criticizing a bargaining representative. *See generally* Harper, *supra* note 202.

290. Section 7 protects the right of employees "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." NLRA § 7, 29 U.S.C. § 157. In NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938), the Court limited the protection provided by this right by permitting employers to permanently replace employees who are striking to improve their economic working conditions. *Id.* at 345-46. This far-reaching decision was not actually necessary to determine the issue before the Court, and it had been reserved for later determination by the Board. *See* Mackay Radio & Tel. Co., 1 N.L.R.B. 201, 216-22 (1936). For a thoughtful and vigorous criticism of the Court's decision in *Mackay*, see J. ATLESON, *supra* note 17, at 21-24.

291. *See, e.g.*, Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-06 (1962) (A strike over a dispute that is to be arbitrated under the collective bargaining agreement violates that agreement even if the agreement does not include a no-strike clause.); *see also* Gateway Coal Co. v. UMW, 414 U.S. 368, 380-84 (1974) (The obligation to arbitrate under a collective agreement gives rise to an implied no-strike obligation enforceable by an injunction.).

292. The right of an employer to permanently replace an economic striker under *Mackay* can be conceptually treated as an entitlement that the employer can transfer to the union. Normally, employees engage in an economic strike between contracts so that the question of employer waiver does not emerge. It will occur during the term of an agreement, however, if a union seeks contract protections that go beyond the statutory protections that are provided for an activity such as refusing to cross a stranger picket line. *See, e.g.*, Butterworth-Manning-Ashmore Mortuary, 270 N.L.R.B. 1014 (1984) (An agreement not to discharge or discipline an employee who refuses to cross a stranger picket line does not waive an employer's right to permanently replace the employee in order to continue the efficient operation of the employer's business.).

293. The employer entitlements are justified by the employer's need to maintain the efficient operation of its business. *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (An employer may temporarily replace an unfair labor practice striker, but the employer must

The discretion of either party to transfer their entitlements through bargaining produces the overlap described earlier between Board and arbitral jurisdiction in the interpretation of contractual waivers.[294]

C. *Liability Rules*

Statutory rights protected by a liability rule are not common as a matter of strict interpretation of the NLRA, but as a practical matter, the slowness of NLRA procedures often converts entitlements protected by property rules into entitlements protected by liability rules.[295] A liability rule permits an opposing party to appropriate an entitlement and later pay compensation for the taking in an amount determined by a neutral third party;[296] the entitlement holder is not entitled to injunctive relief.[297] Formally, all statutory protections are protected by property rules because the Board may only issue orders enforceable by equitable relief.[298] As a practical matter, however,

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reinstate the striker to his original position if the employee presents an unconditional request for reinstatement.); *Mackay*, 304 U.S. at 345 ("Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business."); Redwing Carriers, 137 N.L.R.B. 1545 (1962), (An employer can replace an employee who refuses to cross a stranger picket line if the employer can show that it acted to preserve the efficiency of the business operations and that there was no alternative to the discharge.), *enforced sub nom.* Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

294. There are statutory limits on a union's power to waive some entitlements, particularly if the entitlements go to the selection of the bargaining representative. *See supra* note 289. In addition, a union may only waive an employee's Section 7 right to strike in protest of a "non-serious" unfair labor practice. *See* Arlan's Dep't Store, 133 N.L.R.B. 802, 807 (1961). What constitutes a "serious" unfair labor practice, making a waiver ineffective, is unclear. *See* Dow Chem. Co. v. NLRB, 212 N.L.R.B. 333 (1974), *rev'd sub nom.* United Steelworkers v. NLRB, 530 F.2d 266 (3d Cir.), *cert. denied*, 429 U.S. 834 (1976), *on remand*, 244 N.L.R.B. 1060 (1979), *rev'd sub nom.* Dow Chem. Co. v. NLRB, 636 F.2d 1352 (3d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981). For a description of the overlap in jurisdiction, see *supra* notes 59-99 and accompanying text.

295. *See* HOUSE COMM. ON EDUCATION AND LABOR, 98th Cong., 2d Sess., THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS (Comm. Print 1984). The Report set forth the following median days from the "Filing of Charge to Issuance of Board Decision": 484 days in 1980; 490 days in 1981; 633 days in 1982; and 627 days in 1983. *Id.* at 13. The Report also stated: "It now takes nearly a year and a half (501 days was the 1981 average) after the Board issues its decision before the decision is enforced by a federal court." *Id.* This data suggests that the minimum time to obtain a remedy for an illegally discharged worker if the employer refuses to settle earlier is at least three years. *Id.* For the extent and impact of NLRB delays, see HOUSE COMM. ON GOVERNMENT OPERATIONS, DELAY, SLOWNESS IN DECISION-MAKING, AND THE CASE BACKLOG AT THE NATIONAL LABOR RELATIONS BOARD, H.R. REP. NO. 1141, 98th Cong., 2d Sess. (1984). *See generally* Weiler, *supra* note 19.

296. *See* Calabresi & Melamed, *supra* note 200, at 1092.

297. *See id.*

298. Section 10(c) authorizes the Board to remedy unfair labor practices by issuing an "order requiring such person to cease and desist from such unfair labor practice, and to take

back pay awarded two or three years after the appropriation of an employee's statutory right may be the only meaningful remedy because an employee may no longer have any interest in being reinstated.[299] Moreover, the Board rarely uses its power to request an injunction to end the appropriation of a Section 7 right while the unfair labor practice charge is being adjudicated.[300]

The parties are free, of course, to protect the entitlements that they allocated through the collective bargaining agreement either by property rules or by liability rules, but where an agreement is silent, the entitlements are normally treated as protected by property rules.[301] Unless the contract specifies otherwise, the usual remedy in arbitration is to cease and desist from the breach and to compensate

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such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." NLRA § 10(c), 29 U.S.C. § 160(c). The order, however, is not self-executing. If compliance is not forthcoming, the Board may seek enforcement of the order by petitioning the appropriate United States Court of Appeals. NLRA § 10(e), 29 U.S.C. § 160(e). In addition, "any person aggrieved" by a Board order may seek judicial review in the court of appeals. NLRA § 10(f), 29 U.S.C. § 160(f).

299. *See* West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1. For the 1970 through 1979 period, the NLRB's official figures indicate that 32% of all employees who were offered reinstatement declined to return to work. *Id.* at 28 n.132 (citing annual N.L.R.A. statistics on "Remedial Actions Taken in Unfair Labor Practice Cases Closed"). Even the back pay may be relatively insignificant because the proper measure of back pay is not the wages that the employer committing the unfair labor practice failed to pay, but is instead the net loss in wages of the employee (after deducting wages earned in the interim). *See* Pennsylvania Greyhound Lines, 1 N.L.R.B. 1, 51 (1935). Delay, however, may be the most important factor limiting the impact of NLRB remedies. *See supra* note 295 (providing data on the median days from the filing of a complaint to the issuance of an enforceable remedy). One study of the effectiveness of Board remedies found that after six months had passed, less than five percent of the reinstatement offers made to employees as a result of an unfair labor practice were accepted. *See* Stephens & Chaney, *A Study of the Reinstatement Remedy Under the National Labor Relations Act*, 25 LAB. L.J. 31, 40 (1974); *see also* Chaney, *The Reinstatement Remedy Revisited*, 32 LAB. L.J. 357 (1981).

300. Section 10(j) authorizes the Board, upon the issuance of a complaint, to seek "temporary relief or a restraining order" from a United States district court in order to halt the alleged unfair labor practice pending adjudication of the charge by the Board. NLRA § 10(j), 29 U.S.C. § 160(j). Historically, the Board has not used its discretionary power in this area very frequently. *See* Weiler, *supra* note 19, at 1798-1803; Note, *The Use of Section 10(j) of the Labor Management Relations Act in Employer Refusal to Bargain Cases*, 1976 ILL. L.F. 845. From 1985 through 1988, the Board authorized a total of 161 petitions for Section 10(j) injunctions, or an average of 40 cases a year. General Counsel Report on 10(j) Injunctions, Memorandum GC 89-4, Daily Lab. Rep. (BNA) No. 71, at D-1 (April 14, 1989). This average was slightly below the average for the prior ten years. *Id.* From 1975 through 1979, the Board averaged 48 Section 10(j) cases per year, and from 1980 through 1983, the average was up to 59 cases. *Id.* The General Counsel attributed the decline to the increase in the settlement rate for meritorious unfair labor practices. *Id.* Between 1976 and 1981, the settlement rate was 83%; between 1982 and 1988, the rate was 94%. *Id.*

301. For the definition of a property rule, see *supra* note 249 and accompanying text. For the definition of a liability rule, see *supra* note 296 and accompanying text.

for the harm caused by the breach.[302] As a practical matter, however, the obey and grieve doctrine[303] of arbitration often converts union property entitlements under collective agreements into liability rules. The obey and grieve doctrine permits employers to act unilaterally pending arbitration, and it requires that employees follow orders and limit their opposition to grieving, even if the employer's actions are clearly in breach of the agreement.[304] Equitable relief to maintain the status quo pending arbitration is difficult to obtain unless the union can show substantial irreparable harm.[305] The changed underlying circumstances flowing from the contract breach may make delayed equitable relief from an arbitrator meaningless, leaving compensation as the only meaningful relief.[306] This is normally the case with work preservation clauses which lead unions to bargain for liquidated damage clauses in their agreements.[307]

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302. *See generally* O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 494-556 (1983); M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION (1981).

303. The principle of "work first, grieve later" was established early by Dean Harry Shulman. *See* Ford Motor Co., 3 Lab. Arb. (BNA) 779 (1944) (Shulman, Arb.). In establishing the principle, Dean Shulman allowed for a limited number of exceptions to the rule. An employee, for example, need not obey an employer's order if obedience would require the commission of a crime or would create an unusual health or safety hazard. *Id.* at 780. The acceptance of the "obey and grieve" obligation among arbitrators is close to being axiomatic. Arbitrators often deny or limit a remedy for a meritorious grievance if employees have initially resorted to self-help rather than grievance procedures. *See* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 199 n.216 (1985) (citing numerous arbitration awards). For an excellent discussion of the limited "health and safety" exception, see Gross & Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights over Workers' Rights*, 34 BUFFALO L. REV. 645 (1985).

304. *Ford*, 3 Lab. Arb. (BNA) at 780; F. ELKOURI & E. ELKOURI, *supra* note 303, at 199-203.

305. In Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976), the Supreme Court seemed to disapprove of status quo injunctions because a court issuing such an injunction would have to interpret the contract and hold hearings on the likelihood of the union succeeding in arbitration. *Id.* at 410. This would involve the court in the dispute and tend to displace the role of the arbitrator. *Id.* Courts, however, have been inconsistent in their interpretations of *Buffalo Forge*. *See* cases cited *supra* note 235.

306. *See, e.g.*, IOCW of Quincy, Inc. v. Procter & Gamble Mfg. Co., No. Civ. A 88-2048 MC (D. Mass. Oct. 3, 1988) (WESTLAW, Allfeds) (1988 WL 105,625), *aff'd*, 864 F.2d 927 (1st Cir. 1988) (A union unsuccessfully sought an injunction pending arbitration, alleging that the change in work schedules would force employees to quit second jobs and encounter child care problems, and that there was no adequate remedy available through arbitration once the employees had adjusted to the changed schedules.). *See generally* Cantor, *supra* note 235.

307. *See, e.g.*, NLRB v. International Longshoremen's Ass'n, 447 U.S. 490 (1980) (clarifying the difference between work acquisition and work preservation under Section 8(e) as applied to International Longshoremen's Association (ILA) "Rules for Containers," which included a $1000 per container liquidated damages clause for containers loaded or stripped by anyone other than ILA labor within a 50-mile radius of the local port); *see also supra* note 209.

D. *Inalienable Entitlements*

Inalienable entitlements are rights which are established by statute and which the parties cannot bargain away.[308] The most significant group of inalienable entitlements belongs to management and grows out of the statutory prohibitions on secondary pressure that are embodied in Subsections 8(b)(4) and 8(e).[309] The primary-secondary pressure distinction is a murky doctrinal area that is open to widely varying interpretations.[310] As a result, this distinction has become a doctrinal battleground for quarrels over the total removal from the bargaining table of some aspects of core entrepreneurial control.[311]

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308. Calabresi & Melamed, *supra* note 200, at 1110-15.

309. For a definition of a secondary boycott, see sources cited *supra* note 209. Section 8(e) makes illegal any clause in an agreement whereby an employer agrees to refrain from doing business with another employer. NLRA § 8(e), 29 U.S.C. § 158(e). An employer may voluntarily support a union conflict with another employer, but the first employer cannot contract away in advance his discretion to refuse to support a union cause when a specific dispute occurs between another employer and that employer's union. *See* Truck Drivers Union Local 413 v. NLRB, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964). For a discussion of the difference between inducing employees not to perform designated tasks in order to influence the labor relations of another employer and asking supervisors to exercise their discretion to support a union cause, see NLRB v. Servette, Inc., 377 U.S. 46, 50-54 (1964).

310. *See* Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 U. KAN. L. REV. 651 (1971); Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962); Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000 (1965).

311. Although bargaining over work preservation is permitted, the use of concerted activity in the context of bargaining to acquire work that is not traditionally performed by employees in the bargaining unit is characterized as secondary. *See International Longshoremen's Ass'n*, 447 U.S. at 504; NLRB v. Enterprise Ass'n of Pipefitters, Local Union No. 638, 429 U.S. 507, 528 n.16 (1977). If an employer contracts away the right to control work to another employer, then union demands for that work may be classified as secondary even if it is work that is traditionally performed by the bargaining unit. *See International Longshoremen's Ass'n*, 447 U.S. at 504 (citing *Pipefitters*, 429 U.S. at 517). The test of *Pipefitters* has also been used to challenge the ability of unions to obtain a clause from construction industry employers whereby an employer will agree not to "double-breast" (or operate a parallel non-unionized company). Construction sector unions seek protection from employers' double-breasting by bargaining for work preservation clauses in which employers agree to apply the terms and conditions of the union agreement to on-site construction work performed by a business entity that is either directly or indirectly owned or controlled by the same persons or corporations as the signatory company. *See, e.g.*, D'Amico v. Painters Dist. Council 51, 120 L.R.R.M. (BNA) 3473, 3476 (D. Md. 1985). Employers usually claim in response that the clauses are secondary, a form of top-down organization, and an invasion of the jurisdiction of the Board to determine appropriate bargaining units. *See* Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985); Carpenters' Local Union No. 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *D'Amico*, 120 L.R.R.M. (BNA) at 3477. These arguments all have the practical consequence of removing the issue of the formation of a competing double-breasting company from the bargaining table by making the clause illegal under Section 8(e) or by making it an invasion of the Board's primary jurisdiction to resolve representational issues under Section 9. In either case, the clauses become unenforceable through arbitration and Section 301.

From an individual employee's perspective, Section 7 rights are inalienable until the employee is represented by a certified bargaining agent.[312] At that point, most employee Section 7 rights may be transferred by the collective. Those entitlements that remain inalienable, even by the union, normally involve a potential for conflict between the interests of individual employees and those of the bargaining agent.[313] They include the statutory right of employees to distribute literature in the workplace, the access of employees to bulletin boards, and the use by employees of other forms of communication to exchange information over internal union matters.[314]

E. *The Employee's Entitlement to Fair Representation*

Employee demands are expressed through the "collective voice."[315] When employees vote to have a union represent them in collective bargaining, they are agreeing to exclusive representation by the union in the formulation of collective preferences concerning the proper balance between wages, benefits, opportunities for promotion, and job security.[316] It is an unfair labor practice for an employer to bypass the union and deal directly with individual employees.[317] If a discontented group of employees use concerted pressure to seek direct negotiations with an employer, their actions are not protected by Section 7, and the employees may be disciplined.[318] Moreover, unions decide whether individual employee grievances based on claimed contractual entitlements have sufficient merit to justify using union resources to process the grievances.[319]

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312. *See supra* note 57.

313. *See* NLRB v. Magnavox Co., 415 U.S. 322 (1974) (A union cannot waive the statutory right of employees to distribute literature on the employer's premises.).

314. *See id.* at 329 (Stewart, J., concurring and dissenting in part) (arguing that the Board's principal function is to preserve employee free choice and noting that a union may not waive employee rights related to the "[s]election, retention, or displacement of the collective bargaining agent").

315. *See* R. FREEMAN & J. MEDOFF, *supra* note 211, at 7-11.

316. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

317. *See* J.P. Stevens Co. v. NLRB, 623 F.2d 322 (4th Cir. 1980) (upholding Board finding of a Section 8(a)(5) violation based on management bargaining strategy that kept a union in the dark and precluded meaningful negotiations over changes before they were announced), *cert. denied*, 449 U.S. 1077 (1981); NLRB v. General Elec. Co., 418 F.2d 736 (2d Cir. 1969) (The employer committed an unfair labor practice by pursuing a take-it-or-leave-it bargaining strategy that denigrated the union's status as the exclusive representative.), *cert. denied*, 397 U.S. 965 (1970).

318. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975); NLRB v. Shop Rite Foods, Inc., 430 F.2d 786 (5th Cir. 1970).

319. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Black-Clawson Co. v. IAM Lodge 355, 313 F.2d 179 (2d Cir. 1962). Section 9(a) makes the designated representative the exclusive representative of all bargaining unit employees. The proviso provides, however, that "any

This power that the collective exercises over individual employees in both bargaining and grievance processing is limited by the employees' corresponding right to fair representation by the union. In choosing among competing interests within a bargaining unit, a union must not make invidious, discriminatory, or arbitrary distinctions among employees.[320] This employee right to fair representation is inalienable.[321] A union, however, may force employees to challenge union decisions through internal union procedures as long as the union is in a position to provide a prompt and meaningful remedy and the procedures are fair and impartial.[322] Finally, individual fair representation rights are enforceable through the courts[323] or through Board proceedings.[324]

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individual employee or a group of employees shall have the right at any time to present grievances to their employer." NLRA § 9(a), 29 U.S.C. § 159(a). Initially, there were contrary views as to the meaning of this proviso. *Compare* Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956) *with* Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962). Several early decisions interpreted the proviso as creating an employee statutory right to utilize contract grievance procedures through arbitration, even if the union did not support the employee's claim and had refused to take the grievance to arbitration. The union had the right to be present throughout the procedures to protect collective interests, but as long as the employee was willing to bear his share of the arbitration cost, he could go forward. *See* Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963); Pattenge v. Wagner Iron Works, 275 Wis. 495, 82 N.W.2d 172 (1957); *see also* Summers, *supra*, at 366-67. The alternative view was that the purpose of the proviso was only to modify exclusive representation from the perspective of the employer—not from the perspective of individual employees. If an individual employee wished to present a grievance to his employer without going through the union, the proviso enabled an employer, at his option, to hear and adjust the grievance without being charged with an unfair labor practice in violation of the doctrine of exclusive representation. Under this interpretation, the employer could bargain away this option by a clause in the collective agreement and could refuse to deal with any employee not represented by the union. *See Black-Clawson*, 313 F.2d at 185-86; *see also* Cox, *supra*, at 624. Eventually, the interpretation advocated by Professor Cox became the accepted interpretation of the proviso. *See Emporium Capwell*, 420 U.S. at 61 n.12; *Black-Clawson*, 313 F.2d at 184-85.

320. *Vaca*, 386 U.S. at 190; Humphrey v. Moore, 375 U.S. 335, 247-50 (1964).

321. *See* Steele v. Louisville & N. R.R., 323 U.S. 192, 204 (1944) ("So long as a labor union assumes to act as the statutory representatives of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft.").

322. *See* Clayton v. UAW, 451 U.S. 679, 689 (1981). To determine if an employee must exhaust internal union procedures before filing a court action for the union's breach of the duty of fair representation, the court should consider three factors: (1) Is the union so hostile that the employee cannot obtain a fair hearing; (2) can the union's appeal procedures provide the employee full relief; and (3) will the internal appeal procedures unduly delay the employee's opportunity for a judicial hearing on the merits of his claim. *See id.*

323. *See Vaca*, 386 U.S. at 188.

324. *See* Miranda Fuel Co., 140 N.L.R.B 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

F. *The Initial Assignment of Entitlements and Relative Bargaining Power*

The relative power of the parties at the outset of collective bargaining is influenced both by bargaining entitlements and by the initial assignment of statutory property entitlements.[325] The rules governing bargaining facilitate the exchange of property entitlements by reducing the transaction costs of bargaining and by obligating the parties to exchange information about the costs of proposals.[326] The obligation to exchange information empowers unions at a symbolic level and influences employer behavior by constraining bargaining tactics that would undermine a union's representational role.[327] An employer must meet with its employees' union to discuss all mandatory issues raised by the union,[328] and prior to impasse, it may not alter pre-existing working conditions.[329] This prevents an employer from bypassing the bargaining agent and dealing directly with employees so as to undermine union solidarity.[330]

If an employer fails to fulfill any of these bargaining obligations, then its employees can strike both to protest the unfair labor practice and to obtain their bargaining demands.[331] By striking partly in protest of their employer's failure to bargain in good faith, employees may be classified as unfair labor practice strikers, and thus, they can only be temporarily, rather than permanently, replaced.[332] As a result, an employer who refuses both to recognize a union's legitimacy

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325. *See infra* notes 348-93 and accompanying text.

326. *See infra* notes 339-43 and accompanying text.

327. The most significant negative impact of bargaining rules on a union is the exclusion of core management decisions from the mandatory classification under the test of First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). The emphasis on protecting entrepreneurial discretion reflects traditional assumptions about hierarchy and control in the workplace. The practical impact is difficult to measure because of the tactical options of unions seeking clauses on permissive subjects, but some importance must be attributed to the employers' ability to claim that a subject is permissive and to refuse to discuss it. *See generally* J. ATLESON, *supra* note 17, at 125-35; Klare, *Critical Theory and Labor Relations Law*, in THE POLITICS OF LAW 65, 78-79 (D. Kairys ed. 1982); Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 CASE W. RES. L. REV. 396, 402-03 (1979); Stone, *supra* note 1, at 1547-50; Note, *Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination*, 97 HARV. L. REV. 474 (1983).

328. *See* Borg-Warner Controls, 198 N.L.R.B. 726 (1972).

329. NLRB v. Katz, 369 U.S. 736 (1962).

330. *See, e.g.*, NLRB v. General Elec. Co., 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

331. *See, e.g.*, NLRB v. Wooster Div. of Borg-Warner Corp., 236 F.2d 898 (6th Cir. 1956), *aff'd and modified on other grounds*, 356 U.S. 342 (1958).

332. For a discussion of the different treatment of economic strikers as compared with unfair labor practice strikers, see *supra* note 228. In this type of circumstance, employees pursuing economic objectives seek the additional protection accorded unfair labor practice strikers. In order to prevent the Board from treating the employees as unfair labor practice

as a bargaining agent and to discuss mandatory issues in good faith is more limited in the tactics that it can use in response to a work stoppage.

The impact of the assignment of statutory property entitlements to unions and employers is more difficult to assess. The Coase Theorem suggests that, assuming zero transaction costs and perfect information, the parties will contract for their preferred allocation of property entitlements irrespective of their initial assignments.[333] The party who places the highest value on a particular entitlement will either purchase or seek to retain that entitlement so that resources in the workplace will flow to their "efficient," or most valued, use.[334]

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strikers, the employer must show that the strike would have occurred even in the absence of its unfair labor practices. *See Borg-Warner Corp.*, 236 F.2d at 197.

333. The theorem is set forth in Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). It has spawned a large body of scholarly literature. *See* Zerbe, *The Problem of Social Cost in Retrospect*, 2 RES. L. & ECON. 83, 84 (1980).

334. *See* Leslie, *supra* note 216, at 250-54; Schwab, *supra* note 216, at 256-61. The applicability of the Coase Theorem to collective bargaining has been thoughtfully analyzed by both Professors Leslie and Schwab. Most of Professor Schwab's article is devoted to an analysis of whether the initial assignment of entitlements influences the outcome of bargaining in a way that would prevent the parties from agreeing on the most efficient allocation of the entitlement.

By efficiency, Professor Schwab means that resources flow to their most valued use. *Id.* at 253. In the context of collective bargaining, this means that the party that most values the entitlement winds up possessing it when the parties agree to a final contract. *Id.* at 257-61. Professor Schwab concludes that in most situations the parties are likely to arrive at the most efficient allocation by bargaining. *Id.* at 286. He accepts the most efficient initial allocation as a legitimate goal of Board decisions only in those circumstances in which strategic behavior, unequal information, or some other impediment is likely to prevent the parties from agreeing to the most efficient result. *Id.* Otherwise, he concludes, the Board should concern itself primarily with the distributional implications of its decisions and their impact on the relative bargaining power of the parties. *Id.* at 287.

Professor Leslie's observations lead him to a contrary conclusion, that is, that "there are serious transactions costs involved with labor-management gap-filling." Leslie, *supra* note 216, at 254. He identifies three types of obstacles to parties bargaining around allocated statutory entitlements which fill gaps in agreements: (1) trivial entitlements, which result "when the costs of talking about and reducing a tailor-made rule to writing are greater than the gain from having the rule," *id.*; (2) batch theory, which is "the difficulty of comparing the gain of a specific asset with the loss of another when collective bargaining negotiations deal with 'batches' of assets," *id.* at 255; and (3) framing device theory, which is based on studies which suggest "that individuals are generally risk averse when gains are at stake and risk preferrers when losses are at stake," *id.* at 257. He concludes, therefore, that the allocation of statutory entitlements which fill gaps in agreements should be guided by the principle of adopting the gap-filling rule favoring that party who "would value the contractual right more highly." *Id.* at 200.

A thorough treatment of the helpful analyses of Professors Leslie and Schwab is beyond the scope of this Article, but a brief discussion of the principal issues they raise is useful to an understanding of the relationship between the framework of collective bargaining and the outcome of private ordering. The primary concern of this discussion is not efficiency. Moreover, my comments reflect some disagreement with Professor Schwab, by suggesting that the assignment of entitlements is likely to influence outcomes more often than he suggests, and

The following discussion examines the assumptions underlying the Coase Theorem in the context of collective bargaining and the way that the assignment of statutory entitlements impacts on the parties' relative wealth and bargaining power.

There are major empirical questions about the validity of the two basic assumptions of the Coase Theorem—zero transaction costs and perfect information—in the context of collective bargaining. The assumption of close to zero transaction costs is less problematic.[335] Unions are institutional mechanisms for formulating and communicating the collective preferences of employees to employers. This group mechanism overcomes the normal transaction costs that are associated with bargaining between employers and employees.[336] The duty to bargain in good faith obligates the parties to conduct an ongoing dialogue,[337] facilitating the communication of desired preferences. This duty forces the parties to develop an efficient means by which to meet and confer, thereby minimizing bargaining transaction costs.

The assumption of perfect information is more questionable empirically.[338] Courts have interpreted the statutory duty to bargain as mandating an exchange of information that permits each party to assess accurately the costs of their respective offers.[339] This exchange of information allows each party to understand how the other values certain clauses in the agreement, such as wage and fringe benefit clauses. In order to determine how management values the exclusion of clauses that guarantee future employee job security, however, a union must independently assess the employer's likely future

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with Professor Leslie, by concluding that the assignment of entitlements has wealth effects. I do agree, however, with Professor Schwab's conclusion that the Board should be primarily concerned about justifying the allocation of entitlements in light of the impact of the initial assignment on the parties' relative wealth and bargaining power, rather than in light of who would value the entitlement more highly.

335. For an argument to the contrary, see Leslie, *supra* note 216, at 254-58. The two principal transaction costs Professor Leslie identifies flow from the "batch theory" and the "framing device theory." *See supra* note 334. In this Article, these transaction costs are treated as a part of the problem that unions face in valuing an entitlement in terms of the difference between "realized income" and "opportunity costs," and in justifying an agreement to exchange a visible entitlement, such as job security, for other benefits to the membership when there are a substantial number of issues on the bargaining table. *See infra* notes 344-62 and accompanying text.

336. For a description of the manner in which unions express employees' job benefit preferences with a "collective voice" and the positive impact of this union role on the productivity of labor, see J. FREEMAN & R. MEDOFF, *supra* note 211, at 7-16; Leslie, *supra* note 211, at 354-60.

337. *See* Rockwell Int'l Corp., 260 N.L.R.B. 1345, 1347 (1982) (duty to bargain continues during term of existing agreements).

338. *See* Schwab, *supra* note 216, at 278-80.

339. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

responses to potential changes in technology and in the product market. This is because the law does not obligate the parties to exchange the information from which they project future behavior.[340] As a result, a union often bargains over issues related to job security without adequate accurate information about possible employer responses to product market changes.[341] Without adequate information, a union cannot accurately assess the value of clauses restricting future employer actions.[342] Thus, in this circumstance of asymmetric information, the initial assignment of the entitlement to control job security issues may influence who retains the entitlement following bargaining.[343]

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340. An employer must provide all information relevant to a union's performance of its duties as exclusive bargaining agent, but in determining what is relevant, the Board and the courts distinguish between wage data and financial data. Wage data includes data from all factors that enter into the computation of wages. *See* Taylor Forge & Pipe Works v. NLRB, 234 F.2d 227 (7th Cir.) (requiring that an employer provide information on job rates and classifications), *cert. denied*, 352 U.S. 942 (1956); NLRB v. Otis Elevator Co., 208 F.2d 227 (2d Cir. 1953) (time study data); Electric Furnace Co., 137 N.L.R.B 1077 (1962), *enforcement denied*, 327 F.2d 373 (6th Cir. 1964) (pension information). Information which goes beyond the costs of wages and other benefits to include financial data on an employer's overall revenue and costs only has to be revealed if the employer makes an issue of his ability to pay. Empire Terminal Warehouse Co., 151 N.L.R.B 1359 (1965), *aff'd sub nom.* Dallas Gen. Drivers, W. & H. Local No. 745 v. NLRB, 355 F.2d 842 (D.C. Cir. 1966) (A company was not required to reveal financial data when it made no claim of its inability to pay but instead claimed that the rates it paid exceeded the rates of its competitors.).

Decisions that focus primarily on the future "economic profitability" of a company constitute a part of management prerogatives and are permissive subjects of bargaining. *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). Management's duty to disclose information reflects the same management prerogative rationale. *See* Shedlin, *supra* note 221, at 448.

341. Schwab, *supra* note 216, at 279.

342. If a union, rather than an employer, initially possesses the job security property entitlement, then the asymmetry might not create such a problem. For example, under *Milwaukee Spring I*, if the employer wanted the discretion to transfer bargaining unit work without union consent, then the employer would have to bargain for the inclusion of a specific clause providing that power. Milwaukee Spring Div. of Ill. Coil Spring Co., 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985). The request for the clause would alert the union to management concern over the issue and force the parties to discuss more fully the likelihood of a transfer to facilitate bargaining. The exchange of information produced by such bargaining should lead to a more accurate valuation of the work transfer clause by each party. Under *Milwaukee Spring II*, the employer initially possesses the entitlement. *Milwaukee Spring II*, 268 N.L.R.B. at 603. The union can learn how much management values the entitlement only by proposing a work preservation clause that tests the company's resistance. Thus, management's initial entitlement to control mandatory subjects will keep unions from learning of management's potential future plans regarding these subjects, unless the parties bring up these subjects in bargaining. Because unions, unlike management, are not likely to contemplate long run shifts in unit work, the lack of information may cause unions to undervalue work preservation clauses.

343. If a union does not know that a company plans to reduce labor costs by transferring

Although the statutory regulation of collective bargaining helps to lower transaction costs, it also increases the likelihood of strategic behavior.[344] The certification of unions and the protection of concerted activity help to create a bilateral monopoly in the collective bargaining process.[345] When negotiations break down, neither party can go elsewhere to strike a bargain.[346] Instead, both parties are essentially single purchasers without a competitor for their immediate offers, even though the business enterprise operates within a competitive product market. Consequently, the parties engage in bluffs and threats about strikes and replacement of strikers in an effort to force the other party to agree on a method for dividing the surplus generated by union labor and employer capital. In this bargaining environment, a union and an employer might not accurately assess the true value that each assigns to the right to control job security.[347] Therefore, without an accurate assessment, one cannot assume that bargaining will generate an agreement that reflects the true value of job security to the parties.

The initial assignment of an entitlement also partially determines the value that the parties place on that entitlement.[348] There are two

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unit work to another plant, then the union will undervalue a clause that protects union job security by restricting management discretion. *See* Schwab, *supra* note 216, at 279.

344. *Id.* at 268-72.

345. A bilateral monopoly exists when there is no more than one seller and one buyer in the relevant market. *See* Leslie, *supra* note 211, at 364 ("Unionization of a firm having monopsony power in the labor market creates a bilateral monopoly.").

346. When a union strikes, the employer can hire replacements and the employees may be forced to seek employment elsewhere, but NLRA obligations create very high transaction costs which severely restrict the employer's ability to seek employees outside of the members of the certified unit. Moreover, strikers remain eligible to vote in any decertification election for one year. NLRA § 9(c)(3), 29 U.S.C. § 159(c)(3). The courts employ a presumption that the union continues to represent replacements until either a decertification election occurs or the employer shows that the union does not enjoy majority support. *See* Pennco, Inc., 250 N.L.R.B. 716 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982). *But see* Curtin Matheson Scientific, Inc. v. NLRB, 859 F.2d 362, 367 (5th Cir. 1988) (employer was justified in good faith doubt as to union's continuing majority status where over 80% of the bargaining unit work force was replaced by employees who crossed a picket line each day), *cert. granted*, 109 S. Ct. 3212 (1989).

347. As a result, a party can use threats and lies to capture a larger share of the surplus generated by firm production than it could in a truly competitive market. *See* Schwab, *supra* note 216, at 268-69.

348. Scholars differ on whether the initial assignment of an entitlement will affect the outcome of bargaining. *Compare* Demsetz, *Wealth Distribution and the Ownership of Rights*, 1 J. LEGAL STUD. 223 (1972) *with* Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982). For a list of scholars on each side of this debate, see Schwab, *supra* note 216, at 273 nn.107-08. Those who claim that the initial assignment will affect the outcome argue that productive resources shift over time to the activity favored by the initial assignment. Furthermore, they argue that the initial assignment influences the value that the parties place on the entitlement. *Id.* at 274. The valuation issue proves most significant in the collective bargaining arena.

types of arguments that are made to justify this claim. The first is that people value "realized income" differently than they value "opportunity cost."[349] That is to say, people demand more in payment to give up something that they already possess than they would willingly pay to purchase the same thing.[350] The second argument is based on the "wealth effects" of the assignment.

With respect to the first argument, assume, for example, that *Milwaukee Spring I*[351] is the governing precedent when an employer seeks to transfer work to save labor costs during the term of a collective bargaining agreement. Under this case, employees possess an entitlement (realized income) that protects their job security from the transfer of bargaining unit work to other employees in order to lower labor costs.[352] In order to have the discretion to transfer this work without union consent, an employer must purchase the entitlement from the union in the form of an explicit contractual clause permitting such transfers.[353] In contrast, in a world governed by *Milwaukee Spring II*, the employer is allocated the entitlement; in order to be protected from work transfers, a union must purchase a clause explicitly restricting the employer's discretion.[354] To purchase the clause, the union must sacrifice future wages or other benefits (opportunity costs). The argument based on the difference between realized income and opportunity cost is that in a world governed by *Milwaukee Spring I*, employees will demand more in wages to give up their entitlement (realized income) than they would be willing to sacrifice in wages (opportunity cost) to purchase the same entitlement in a world governed by *Milwaukee Spring II*.[355] When employees possess job secur-

349. This rests upon the premise that people treat "opportunity cost" income differently that they treat "realized" income. *See* Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979). Some criticize this premise by explaining the difference between opportunity cost and realized income as simply another way of stating the wealth effect of initial entitlement assignments. Thus, they essentially arrive at the same conclusion. *See* Spitzer & Hoffman, *A Reply to Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 53 S. CAL. L. REV. 1187, 1198-99 (1980).

350. *See infra* notes 363-65 and accompanying text.

351. *See* Milwaukee Spring Div. of Ill. Coil Spring Co., 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985); *see also supra* notes 264-73 and accompanying text.

352. *Milwaukee Spring I*, 265 N.L.R.B. at 208; *see supra* notes 270-73 and accompanying text.

353. *Milwaukee Spring I*, 265 N.L.R.B. at 208; *see supra* notes 270-73 and accompanying text.

354. *See Milwaukee Spring II*, 268 N.L.R.B. at 603-04; *see also supra* notes 274-78 and accompanying text.

355. Professor Leslie arrives at a similar conclusion through his analysis of empirical studies which show "that individuals are generally risk averse when gains are at stake and risk

ity, they value it more highly than if they had to purchase the security.

There are a number of reasons why union negotiators might value a realized entitlement in job security differently than they would the opportunity to purchase that security.[356] The primary reason is the political risk assumed by a union leader who bargains away an entitlement as visible as job security.[357] It will be difficult for a union leader accurately to assess the overall preferences of the membership regarding job security versus immediate income and other benefits, and there are risks for union leaders in explaining the tradeoffs made in bargaining when it appears that the union has taken a backward step on such an important issue as job security.[358] As a result, it may be a safer political strategy for a union leader to preserve pre-existing benefits and settle for smaller gains in the wage and benefit package.

Moreover, the distinction between realized income and opportunity costs may apply with even more force when the parties bargain over statutory entitlements that reflect shared values of worker solidarity, such as the right to refuse to cross a picket line of another bargaining unit,[359] the right to request the presence of a union representative during a disciplinary interview,[360] or the right of a union leader to lead a protest against an employer's order without being subjected to more severe discipline than the other participating work-

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preferrers when losses are at stake." Leslie, *supra* note 216, at 257 (citing Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67 (R. Hogarth & M. Reder eds. 1987)). He concludes that "if courts or the Board have adopted a contractual gap-filler favoring management, the union may see an attempt to secure the alternative tailor-made gap-filler (explicit contact clause reallocating the entitlement to the union) as a risky prospect for gain." *Id.* at 258. The results are similar to a union valuing the entitlement from the perspective of opportunity cost. When the gap-filler is allocated to the union, "the union may see a management attempt to secure the alternative tailor-made gap-filler as presenting the union with a risk prospect of preventing loss." *Id.* The risk preference in preventing loss will lead the union to demand more before it will give up realized income in the form of a job security entitlement.

356. Professor Schwab argues that the impact of this argument in collective bargaining is limited because all that a union trades is an unwritten entitlement. Thus, employees will probably use former written contracts, not Board decisions assigning statutory entitlements, as bench marks for their expectations. By employing such benchmarks, union leaders can emphasize the gains in wages or benefits obtained by conceding the entitlement. Schwab, *supra* note 216, at 277.

357. *See, e.g., Milwaukee Spring I*, 265 N.L.R.B. 206 (1982), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub. nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

358. *See* Leslie, *supra* note 216, at 255-57.

359. *See infra* notes 370-74 and accompanying text.

360. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

ers.[361] Because of the potential intensity of feeling over these entitlements among some workers, it will be difficult for a leader to weigh the strong preference of some workers against the relative indifference of others and to make a judgment reflecting the collective's preferences.[362] On the other hand, if there were no federal legislation granting workers these entitlements, it seems unlikely that unions would forego higher wages in order to purchase protection from employer discipline when the union's members engage in a symbolic act of solidarity in support of other employees' bargaining demands. Thus, the Board's position on the scope of employee Section 7 rights is likely to influence the way in which a union values those rights in bargaining in terms of how much the union will demand in wages to forego the statutory protection.

The second argument, in support of the claim that the initial assignment of the job security entitlement influences the way that parties value that entitlement, is based on the "wealth effects" of the assignment.[363] The assignment of the job security entitlement in *Milwaukee Spring I* enhanced the overall wealth of employees working under agreements with wage and recognition clauses. After the decision, they had the same wage and benefits package plus NLRB protection against the mid-term transfer of work to save labor costs.[364] This argument claims that wealthier employees will value job security differently than poorer workers because they have more income and

361. *See* Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1985).

362. *See* D. LESLIE, CASES AND MATERIALS ON LABOR LAW 369, 372-73 (1985); Leslie, *supra* note 216, at 205-57.

363. This argument rests upon the assumption that workers will purchase more job security as their overall income increases. The argument further assumes that the income range of workers does not exceed the point at which job security becomes less important. *See* Schwab, *supra* note 216, at 276 n.119. The actual size of wealth effects, however, constitutes an empirical issue over which scholars differ. *Compare* Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 15 n.3 (1972) (wealth effects normally insignificant) *with* Mishan, *Pareto Optimality and the Law*, 19 OXFORD ECON. PAPERS (n.s.) 255 (1967) (using the illustration of two men in the desert with one barrel of water to demonstrate that the one who holds the initial entitlement drinks most of the water).

364. It can be argued that the decision in *Milwaukee Spring I* had no wealth effect since the employees in the bargaining unit already had an expectancy of job security based on past practices. Milwaukee Spring Div. of Ill. Coil Spring Co., 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985). To the extent that the outcome of a dispute over the transfer of work was "uncertain," however, the decision in *Milwaukee Spring I* enhanced employee wealth by increasing certainty regarding employee reliance on past practice as a part of an employer's obligation to maintain the terms and conditions of an agreement under Section 8(d). In order to alter a past practice without running the risk of a back pay order by the NLRB, employers would need union consent to alter the established past practice or would have to purchase a clause permitting the employer to make such changes unilaterally.

are in a position to spend more to retain their job security. In economic terms, the increased wealth resulting from the initial assignment of job security to workers alters the workers' collective preferences regarding the tradeoffs between job security and other benefits. With this increased wealth, workers are able to demand a larger wage increase to contract away the job security that they enjoy under *Milwaukee Spring I* than they would have been willing to forgo to purchase the same protection in a world governed by *Milwaukee Spring II*.[365]

These comments on the *Milwaukee Spring I* and *II* decisions illustrate the ways in which Board decisions, concerned with economic issues, impact on the relative wealth of labor and management, their respective bargaining power, and the outcome of negotiations.[366] As noted above, Board decisions concerned with employee rights under Section 7 may have an even greater impact on the parties' relative power because of their link to basic values of worker solidarity.[367] The Board's recent decisions dealing with the statutory protection accorded to employees who refuse to cross picket lines of other unions, when working under a collective bargaining agreement with a general no-strike clause, provide a useful illustration of how this type of Board decision influences bargaining.[368]

The Board has taken three distinct positions on whether a general no-strike clause waives Section 7 protections of employees who refuse to cross the picket lines of employees in another bargaining

365. Professor Schwab suggests that as long as the parties face an "either/or" choice on the outcome, the initial assignment of the entitlement might not affect the outcome of the bargaining, even if the initial assignment affects the relative wealth of the parties. Schwab, *supra* note 216, at 277 ("In an either/or situation, wealth effects must substantially change the parties' valuations before a switch in legal rule alters the most valued or efficient outcome."). In many bargaining situations, however, bargaining over entitlements will not pose "either/or" choices. Instead, the parties often settle on intermediate solutions that limit employer discretion in some circumstances but not in others. It is then left up to an arbitrator to sort through the available solutions to decide a particular case. Thus, resolution of the entitlement at issue will not pose an "either/or" choice.

366. For the relationship between Board opinions and the assignment of entitlements, see *supra* notes 261-87 and accompanying text.

367. *Cf.* Schwab, *supra* note 216, at 280-82 (analyzing an employee's entitlement to have a union steward present during a disciplinary interview under NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975)). Professor Schwab argues that few obstacles prevent the parties from reaching an efficient allocation of this entitlement. For this reason, any justification for the initial allocation of the entitlement must rest upon criteria other than efficiency. *Id.* In *Weingarten*, the Court used the relative bargaining power of the parties to justify the initial allocation. 420 U.S. at 262 (forcing a lone employee to face the interview without a union official "perpetuates the inequality the Act was designed to eliminate"). The Court also found that the initial assignment of this entitlement to employees amounts to an element of employee due process rights implicit in "just cause." *Id.* at 260-61.

368. *See infra* note 374.

unit.[369] In the mid-1970's, the Board began to hold that a no-strike clause will not waive the statutory protection from discipline of employees refusing to cross unless the clause specifically compels employees to cross picket lines.[370] Thus, a union could agree to a general no-strike clause in exchange for an arbitration clause without losing its option to seek additional compensation in exchange for an agreement that obligates bargaining unit members to cross picket lines of other employers. Depending on its business, the primary employer might have a strong interest in avoiding interruptions in business due to such activity. Thus, the employer might agree to some increase in compensation or other benefits in exchange for the union's concession.

Recently, however, the Board reversed its prior position and held that a general no-strike clause waives employees' statutory protection unless there is explicit language permitting employees to refuse to cross picket lines.[371] This ruling effectively transfers the entitlement from the union to the employer since almost all collective bargaining agreements include a general no-strike clause.[372] Because the Board assumes that a general no-strike clause waives the statutory protection, employees who refuse to cross picket lines of other bargaining units will only be protected from discipline if the union obtains an explicit clause to that effect in the agreement.[373] The burden shifts to

369. *See infra* notes 370-77 and accompanying text.

370. *See* W-1 Canteen Serv., 238 N.L.R.B. 609 (1978), *enforcement denied*, 606 F.2d 738 (7th Cir. 1979); Operating Eng'rs Local 18 (Davis-McKee, Inc.), 238 N.L.R.B. 652 (1978). *But see* NLRB v. Rockaway News Supply Co., 345 U.S. 71, 79-80 (1953) (general no-strike clause waived employees' right to engage in sympathy strike). *See generally* Note, *Coterminous Interpretation: Limiting the Express No-Strike Clause*, 67 VA. L. REV. 729 (1981).

371. Metropolitan Edison Co., 279 N.L.R.B. 313 (1986), *aff'd sub nom.* IBEW, Local 803 v. NLRB, 826 F.2d 1283 (3d Cir. 1987); Indianapolis Power & Light Co., 273 N.L.R.B. 1715 (1985) (*Indianapolis Power I*), *remanded on other grounds sub nom.* Local 1395, IBEW v. NLRB, 797 F.2d 1027 (D.C. Cir. 1986).

372. *See* BUREAU OF NATIONAL AFFAIRS, INC., *supra* note 157, at 79-84. The Bureau of National Affairs ("BNA") sampled 400 out of 5000 collective bargaining agreements on file and found that 94% included a no-strike pledge. *Id.* Sixty percent of the pledges were unconditional, or general no-strike clauses, and 35% were conditional, primarily because pledges were unenforceable if the employer refused to comply with contract grievance procedures. *Id.* Twenty-five percent of the sampled agreements explicitly reserved the right of employees to observe a picket line. *Id.* at 84. Among the agreements with observance clauses, 16% applied to any picket lines at the signatory employer's plant, 53% applied to any plant, 31% applied subject to other conditions, such as approval of the picket line by the local union, and 12% applied only to lines set up by the employer's own union. *Id.*

373. *See, e.g.*, *Indianapolis Power I*, 273 N.L.R.B. at 1715-16 (The suspension of an employee who refused to cross a picket line did not violate Subsections 8(a)(1) and 8(a)(3) because general no-strike clauses waive employees' statutory protections unless the contract or extrinsic evidence demonstrates that the parties agreed to exempt sympathy strikes.).

the union to purchase the clause by agreeing to forego other benefits. How much a union will have to give up to obtain a clause protecting workers who refuse to cross picket lines will depend on the nature of the employer's business and the extent to which the employer values the freedom to compel employees to cross picket lines by the threat of discipline.

A third approach modifies this second ruling in a way that may transfer the entitlement back to the union. At the urging of the federal appellate courts, the Board has further clarified its recent position by holding that a no-strike clause waives the statutory protection unless a union can show by extrinsic evidence that the parties did not intend for the no-strike clause to act as a waiver.[374] The central issue under this interpretation becomes the type of extrinsic evidence necessary for a union to meet its production burden and to avoid the waiver.[375] There are essentially two alternatives: (a) the union must show a mutual understanding between the union and the employer that there was no waiver; or (b) the union must produce evidence that it unilaterally took the position during bargaining that the general no-strike clause would not waive the statutory protection for employees

374. On appeal from *Indianapolis Power I*, the District of Columbia Circuit remanded the case to permit the Board to consider extrinsic evidence concerning the parties' intent on the waiver issue. Local 1395, IBEW v. NLRB, 797 F.2d at 1036. On remand, Chairman Stephens and Member Cracraft adhered to the rule announced in *Indianapolis Power I*, but clarified it by stating that careful attention should be paid to extrinsic evidence. Indianapolis Power & Light Co., 291 N.L.R.B. No. 145, 130 L.R.R.M. (BNA) 1001, 1003 (1988) (*Indianapolis Power II*). Because the administrative law judge had found that the parties had disagreed as to whether the no-strike clause waived the sympathy strike protection, the Board members concluded that it was not waived. 130 L.R.R.M. (BNA) at 1003-04. Member Johansen concurred on the grounds that the waiver has to be express under the standard of *Metropolitan Edison*. *Id.* at 1004 (Johansen, Member, concurring); *see also* Arizona Pub. Serv. Co., 292 N.L.R.B. No. 144, 130 L.R.R.M. (BNA) 1385 (1989) (*Arizona Public Service II*). In *Arizona Public Service II*, the Board relied on the *Indianapolis Power II* rule that "careful consideration [must] be accorded extrinsic evidence bearing on the parties' intent, such as bargaining history and past practice under the no-strike clause." 130 L.R.R.M. (BNA) at 1386 (citing *Indianapolis Power II*, 130 L.R.R.M. (BNA) at 1003).

The Board originally held in *Arizona Public Service I* that the general no-strike clause permitted discipline of employees who refused to cross a stranger picket line. Arizona Pub. Serv. Co., 273 N.L.R.B. 1757, 1758 (1985) *(Arizona Public Service I), remanded sub nom.* Electrical Workers Local 387 v. NLRB, 788 F.2d 1412 (9th Cir. 1986). On remand, the Board examined the parties' bargaining history and past practice and found that they did not intend to waive the employees' right to participate in sympathy strikes. *Arizona Public Service II*, 130 L.R.R.M. (BNA) at 1386; *see also* United Food & Commercial Workers Union, Local 1439, 293 N.L.R.B. No. 4, 130 L.R.R.M. (BNA) 1387, 1387-88 (1989) (applying the *Indianapolis Power II* rule to reconsider original decision and relying on bargaining history to conclude that the no-strike clause did not waive statutory protection for sympathy strikes).

375. *See, e.g., Arizona Public Service II*, 292 N.L.R.B. No. 144, 130 L.R.R.M. (BNA) 1385 (1989); *Indianapolis Power II*, 291 N.L.R.B. No. 145, 130 L.R.R.M. (BNA) 1001 (1988).

who refuse to cross picket lines.[376] If the NLRB takes the second alternative, there is no need for the union to produce evidence that the employer agreed with this interpretation of the general no-strike clause. If extrinsic evidence regarding a union's unilateral position is sufficient to avoid the waiver, then the Board's reliance on extrinsic evidence has the same practical consequence as the Board's initial position—that the union retains the statutory protection unless a waiver is established by explicit language in the agreement.[377] As long as a union is aware that it must merely state during bargaining that the no-strike clause does not, in the union's view, waive the statutory protection for sympathy strikers, explicit language will be required to rebut the union's statements and to create a waiver on which the employer can rely.[378] The Board's position on the type of extrinsic evidence that the union must produce to avoid the waiver is still being defined. In *Indianapolis Power & Light Co.*,[379] the Board appeared to adopt the position that evidence showing that the union did not regard the general no-strike clause as a waiver is sufficient,[380] but in two subsequent opinions where the NLRB relied on *Indianapolis Power II*, the Board seemed to assess the evidence in terms of a search for a mutual understanding that there was no waiver.[381]

Even if the Board confirms its approach in *Indianapolis Power II*,

376. *See, e.g., Indianapolis Power II*, 130 L.R.R.M. (BNA) at 1001. The Board took alternative "b" and ruled that the parties' agreement to disagree was sufficient extrinsic evidence for the Board to conclude that there was no waiver. *Id.* at 1003-04.

377. *See* Fischl, *supra* note 2, at 805-06 n.49; *supra* note 370 and accompanying text.

378. *See Indianapolis Power II*, 130 L.R.R.M. (BNA) at 1003-04.

379. 291 N.L.R.B. No. 145, 130 L.R.R.M. (BNA) 1001 (1988) (*Indianapolis Power II*).

380. *See* 130 L.R.R.M. (BNA) at 1004.

381. *See* United Food & Commercial Workers Union, Local 1439, 293 N.L.R.B. No. 4, 130 L.R.R.M. (BNA) 1387 (1989); Arizona Pub. Ser. Co., 292 N.L.R.B. No. 144, 130 L.R.R.M. (BNA) 1385 (1989) (*Arizona Public Service II*). In *Arizona Public Service II*, the Board relied on bargaining history and concluded that "company officials recognized that there was no agreement that sympathy strikes were covered by the existing no-strike language." 130 L.R.R.M. (BNA) at 1386. The Board also looked to past practice and found employer "acquiescence" in sympathy strikes. *Id.* Finally, the Board noted that the Board interpretations in effect when the agreement was ratified would not have found a waiver based on the language in the no-strike clause. *Id.* All three points that the Board relied on look to establishing a "mutual understanding" that there was no waiver based on past practice, bargaining history, and expectancies. The Board's reasoning in *United Food & Commercial Workers Union* is similar. 130 L.R.R.M. (BNA) at 1388-89. In *United Food & Commercial Workers Union*, the Board relied primarily on bargaining history. The Board found that the union had rejected a clause that the employer proposed and that was "more comprehensive" in its restrictions than the clause that the parties included in the agreement. *Id.* at 1389. Furthermore, the Board reasoned that the more comprehensive clause "would not have prohibited employees from joining the sympathy strike in the present setting." *Id.* Therefore, the agreement on a less restrictive clause suggests that the parties understood that this clause would not prohibit the sympathy strike in question. Again, the Board essentially found a mutual understanding in the extrinsic evidence. *Id.*

that does not necessarily mean that unions can be confident of the outcome of a dispute over statutory protection if they made their position clear during bargaining. By making the outcome turn on the parties' intent as evidenced by bargaining history and past practice, the Board has shifted the focus of the dispute from a statutory policy aimed at protecting employees who act in sympathy with fellow workers to the parties' intent in a specific bargaining unit.[382] Depending on the extrinsic evidence that unions produce, there may be different outcomes in two bargaining units with identical no-strike clauses. Thus, statutory policies concerned with protecting worker solidarity drop to the background in favor of a contractarian image of the parties' intent. The nature of the Board's inquiry is now bounded more by the parties' relationship, as in arbitration, than by justifications based on statutory policy.[383] This approach will almost inevitably lead to the deferral to arbitration of picket line disputes in the future.[384] Arbitrators, however, may not give as much weight to the values underlying worker solidarity as to those protecting productivity; instead, they will seek compromise solutions that maintain working relationships when disputes arise within a particular bargaining unit.[385] Therefore, if disputes are left to arbitrators, there may be a greater tendency to view the entitlement as the employer's unless the union can produce evidence of a mutual agreement to the contrary.[386]

The impact of these recent Board decisions regarding sympathy work stoppages on the parties' relative wealth and bargaining power depends, in part, on whether the Board will in fact defer future disputes to arbitrators. If the Board retains jurisdiction, it appears that unions may be able to maintain control of the entitlement based on the reasoning of *Indianapolis Power II*.[387] Because of the symbolic

382. *See United Food & Commercial Workers Union*, 130 L.R.R.M. (BNA) at 1388-89; *Arizona Public Service II*, 130 L.R.R.M. (BNA) at 1386.

383. *See United Food & Commercial Workers Union*, 130 L.R.R.M. (BNA) at 1388-89; *Arizona Public Service II*, 130 L.R.R.M. (BNA) at 1386.

384. *See infra* notes 394-444 and accompanying text.

385. For a discussion of the values emphasized in arbitral reasoning, see *infra* notes 503-35 and accompanying text.

386. Arbitrators tend to place a high priority on management's right to run its business, maintain productivity, and discourage insubordination. For the influence of these values on arbitral reasoning in disputes over the disciplining of employees who engage in sympathy work stoppages, see Denver Hilton Hotel, 79 Lab. Arb. (BNA) 1017 (1982) (Goodman, Arb.); National Homes Mfg. Co., 72 Lab. Arb. (BNA) 1127 (1979) (Goodstein, Arb.); Manitou Constr. Co., 61 Lab. Arb. (BNA) 727 (1973) (Williams, Arb.). *But see* Allied Employers, Inc., 84 Lab. Arb. (BNA) 5 (1984) (Kienast, Arb.).

387. 291 N.L.R.B. No. 145, 130 L.R.R.M. (BNA) 1001 (1988); *see supra* notes 376-81 and accompanying text.

importance of union solidarity,[388] a union's leadership will normally need to obtain specific and substantial gains to justify waiving the statutory protection.[389] On the other hand, if the Board requires the union to produce evidence showing a mutual understanding that there was no waiver, the employer will obtain the entitlement as part of a general no-strike clause in the absence of such evidence, thereby enhancing the employer's wealth, particularly if the business is one in which employees are more likely to encounter stranger picket lines.[390] How much either party would demand or give up in concessions to reallocate the entitlement will vary with the circumstances of the business; the point to be understood is the impact of the initial allocation on wealth and bargaining power.[391]

The impact of permitting arbitrators to decide on a unit-by-unit basis where the entitlement lies is more difficult to assess. The parties' own evaluations of the way in which their past practices, bargaining history, and former arbitration awards will be assessed by an arbitrator will shape their respective conclusions as to who controls the entitlement.[392] If their relationship does not establish a clear entitlement that is owned either by the employer or by the union, the parties will have a more difficult task in determining the relative value of a clause that will clarify ownership. It also places arbitrators in the role of influencing the parties' relative bargaining power based on arbitral values rather than statutory policy.[393]

Thus, the initial assignment of property entitlements related to

388. *See* Local 1395, IBEW v. NLRB, 797 F.2d 1027, 1033 (D.C. Cir. 1986).

389. *Id.*

390. The employer may also obtain damages for the union's breach. *See* Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). Clauses concerned with the observance of picket lines are found in 85% of retail agreements, approximately 50% of the construction and communications sector agreements, and 48% of the service sector agreements. *See* BUREAU OF NATIONAL AFFAIRS, INC., *supra* note 157, at 84.

391. The Supreme Court often emphasizes that the Board should not be involved in regulating the economic weapons of the parties and thereby balancing bargaining power. *See, e.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310 (1965); NLRB v. Brown, 380 U.S. 278, 283 (1965); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 490 (1960). As a result, the Board often downplays this consideration when justifying its decisions. Nevertheless, these policy concerns are in fact central to the Act. *See* NLRB v. City Disposal Sys., 465 U.S. 822, 835 (1984) (relying on "a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements"); NLRB v. J. Weingarten, Inc., 420 U.S. 251, 262 (1975) (justifying the right of an employee to have a union official present at a disciplinary interview by reference to the Act's attempt to redress the "perceived imbalance of economic power between labor and management") (quoting *American Ship Bldg. Co.*, 380 U.S. at 316).

392. *See infra* notes 503-35 and accompanying text.

393. *See supra* note 386.

job security and employee concerted activity are likely to be critical to the relative bargaining power of the parties and to their psychological posture at the bargaining table. The forum where the disputes are resolved also has implications for the way in which disputing impacts on a shared ideology of the workplace within the labor movement. The student comments in this issue explore more fully the relationship between the initial assignment of specific statutory entitlements by the NLRB and the respective roles of the NLRB and labor arbitrators in interpreting clauses that either waive those entitlements or allocate them when collective bargaining agreements are silent. The following Section examines the way deferral and waiver doctrines interact to involve arbitrators in disputes over statutory rights.

V. THE IMPACT OF WAIVER AND DEFERRAL ON DISPUTE RESOLUTION

A. *Deferral to Grievance Arbitration Under the NLRA*

Section II of this Article described the shared jurisdiction of the NLRB and labor arbitrators over two distinct types of disputes. First, the example of an employee who refused to drive an unsafe truck was used to illustrate the overlap between Section 7's statutory protection of employees engaged in concerted activity and the typical clause in collective bargaining agreements that prohibits an employer from discharging an employee for reasons other than just cause.[394] Some collective agreements further expand the scope of the shared jurisdiction by including a clause that the employer will not discriminate against an employee due to union activity. Such clauses essentially incorporate Section 7, and Subsections 8(a)(1) and 8(a)(3) into the agreement.[395]

Second, the example of the mid-term implementation of a drug and alcohol testing program was used to illustrate the overlap between Subsections 8(a)(5) and 8(d) and union grievances over unilateral modifications of the agreement.[396] The Board has traditionally deferred to arbitration in this second type of dispute on the grounds

394. *See supra* notes 59-101 and accompanying text. The BNA found discharge and discipline clauses in 94% of the contracts surveyed; 83% of the clauses used "just cause" while the remainder listed specific offenses. *See* BUREAU OF NATIONAL AFFAIRS, INC., *supra* note 157, at 6. Moreover, many arbitrators will imply a just cause limitation on an employer's right to discipline even if the agreement does not include such a limitation. *See* F. ELKOURI & E. ELKOURI, *supra* note 303, at 652 n.6 (citing numerous awards).

395. The BNA found that 50% of the agreements surveyed prohibited discrimination based on union membership or non-membership and 37% barred discrimination based on union activity. *See* BUREAU OF NATIONAL AFFAIRS, INC., *supra* note 157, at 112.

396. NLRA § 8(d), 29 U.S.C. § 158(d); *see supra* notes 102-42 and accompanying text.

that alleged modifications of collective bargaining agreements are essentially issues of contract interpretation for arbitrators.[397] More recently, the Board has expanded the deferral doctrine to include charges involving employee Section 7 rights.[398] As a result, arbitration is increasingly the primary forum for adjudicating both contract and statutory entitlements whenever there is shared jurisdiction.[399]

The NLRB currently defers adjudication of an unfair labor practice charge prior to arbitration if: (1) the parties' agreement provides for arbitration; (2) the dispute is arbitrable; and (3) the employer is willing to arbitrate.[400] An individual employee can defeat deferral, however, by showing that the interests of the union are adverse to the

397. *See* Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

398. The deferral doctrine was extended to Section 8(a)(3) unfair labor practice charges in National Radio Co., 198 N.L.R.B. 527 (1972) (3-2 decision). Five years later, in another 3-2 decision, Chairman Murphy voted with the two dissenters in *National Radio* to trim the deferral doctrine back to charges filed under Subsections 8(a)(5) and 8(d). General Am. Transp. Corp., 228 N.L.R.B. 808, 810 (1977). Seven years later, the Board overruled *General American Transport Corp.* by a 3-1 majority and revitalized the *National Radio* decision calling for deferral in charges under Subsections 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2). United Technologies Corp., 268 N.L.R.B. 557 (1984). *See generally* Edwards, *supra* note 202; Harper, *Union Waiver of Employee Rights Under the NLRA: Part II*, 4 INDUS. REL. L.J. 680 (1981); Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355 (1985); Sharpe, *supra* note 138.

399. Dissenting in *Olin*, Member Zimmerman cited the Board's statistics that indicated that 2185 pending unfair labor practice cases had been deferred to arbitration as of the end of December 1983. Olin Corp., 268 N.L.R.B. 573, 581 (1984) (Zimmerman, Member, dissenting). From October 1981 to the end of December 1983, over 3800 cases had been deferred. *Id.* In only 163 of these deferred cases were complaints issued. *Id.* Over 1700 deferred cases were dismissed, withdrawn, or settled. *Id.* The majority challenged the dissent's interpretation of the statistics and emphasized its focus on deferral by the Board rather than by the General Counsel. *Id.* at 575 n.9. For a statement of the guidelines to be followed by regional directors subsequent to *United Technologies* and *Olin*, see Memorandum GC 85, 115 Lab. Rel. Rep. (BNA) 334 (Mar. 6, 1984).

The differing views of the Board members in *Olin* regarding the extent of post-arbitration deferral led Professor Greenfield to examine the rate of post-arbitration deferral in two regional offices before and after the Board decision in *Olin*. *See* Greenfield, *supra* note 135. She found a total of 103 case files in which the two regional offices engaged in review of an unfair labor practice charge subsequent to an arbitral award between January 1983 and June 1985 (13 months before and 17 months after *Olin*). *Id.* at 40-41. Thirty-seven of the charges were reviewed prior to *Olin* and 66 were reviewed subsequent to the decision. *Id.* at 42. Prior to *Olin*, the regional offices refused to defer in seven cases (18.9%), and in each of these cases, they made an independent determination of the unfair labor practice charge. *Id.* The remaining 30 cases were either withdrawn by the charging party after arbitration (17) or deferred (13). *Id.* In the 66 cases examined after *Olin*, the regional offices independently reviewed only 2.5 cases (3.8%). *Id.* at 44. Of the remaining cases, 30.5 were deferred and 33 were withdrawn. *Id.* at 45. If the withdrawn cases are excluded, the regional offices deferred in 65% of the cases before *Olin* and in 92.3% of the cases after *Olin*. *Id.* at 41-42.

400. *United Technologies Corp.*, 268 N.L.R.B. at 560. For an overview of the Board's inconsistent approach to deferral, see Comment, *supra* note 90, at 343-52.

individual employee's interests.[401] In addition, a union can block deferral by demonstrating that the employer's conduct is sufficiently inconsistent with the employer's statutory obligations so as to constitute a rejection of the principles of collective bargaining.[402]

Subsequent to arbitration, the charging party can again attempt to convince the NLRB to adjudicate de novo the unfair labor practice charge. The standard the Board uses is less deferential to arbitration than the standard for judicial review, but generally, it still provides arbitrators with substantial latitude in their resolution of statutory rights.[403] In *Olin Corp.*,[404] the Board announced that it would regard an arbitrator's decision as an adequate resolution of the unfair labor practice charge if "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."[405] Moreover, an arbitrator's decision need not be totally consistent with prior NLRB precedent: "Unless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act," the NLRB will defer.[406]

Shortly after the Board adopted its revised deferral standards in *United Technologies Corp.* and *Olin Corp.*, the General Counsel issued guidelines, based on the two decisions, for the regional offices to follow in deciding whether to defer charges.[407] The implementation of this deferral policy at the regional level results in most deferral decisions being made by regional directors, subject to review only by the General Counsel, not by a federal court.[408] There is no judicial review of a General Counsel's decision to dismiss a charge on the grounds of

401. *United Technologies Corp.*, 268 N.L.R.B. at 560 (quoting *General Am. Transp. Corp.*, 222 N.L.R.B. at 817 (Penello & Walther, Members, dissenting)).

402. *Id.*

403. For the judicial standard of review for arbitration awards, see *supra* notes 158-90 and accompanying text.

404. 268 N.L.R.B. 573 (1984).

405. *Id.* at 574.

406. *Id.*

407. *See* Memorandum GC 85, 115 Lab. Rel. Rep. (BNA) 333 (Mar. 6, 1984).

408. Only final orders of the Board are subject to judicial review under Section 10(f). NLRA § 10(f), 29 U.S.C. § 160(f); *see* NLRB v. United Food & Commercial Workers Union, Local 233, 108 S. Ct. 413 (1987). When the issuing of a complaint pending arbitration is stayed, the stay normally occurs at the regional level. Even if a complaint is issued, a regional director may withdraw the complaint at any time prior to a hearing. The withdrawal may be appealed to the General Counsel, but there is no Board review. 29 C.F.R. §§ 102.18-102.19 (1988). The Supreme Court has affirmed that such decisions by the General Counsel are not subject to judicial review either under Section 10(f) of the NLRA or under the Administrative Procedure Act, which provides for the review of a final agency action "for which there is no other adequate remedy in a court," 5 U.S.C. § 704 (1982). *United Food & Commercial Workers Union*, 108 S. Ct. at 420-26.

deferral.[409]

The statutory limits on judicial review of decisions made by the General Counsel mean that the courts only examine a deferral decision in the more controversial cases in which the General Counsel or a regional director decides against deferral, but the Board decides deferral is appropriate.[410] Thus, the bulk of the deferral decisions are made under the discretion of the General Counsel and are essentially insulated from any form of judicial supervision.[411] Consequently, the somewhat negative reaction of the federal courts to the Board's current deferral standards may have only a limited practical impact on the regional counsels' processing of most cases that raise deferral issues. Nevertheless, the courts' skeptical responses, particularly to the *Olin Corp.* standards, merit careful consideration because of the courts' underlying concerns about arbitration as a forum for adjudicating statutory rights.[412]

In *Taylor v. NLRB*,[413] a case having a fact pattern similar to that in Illustration 1 in which an employee refused to drive a truck with safety problems,[414] the Eleventh Circuit rejected the *Olin* standards outright.[415] The court read *Olin Corp.* as implying that deferral was "proper in all cases unless it is affirmatively demonstrated that some unusual circumstances require that the ALJ conduct an independent inquiry into a grievant's statutory claims."[416] In the Eleventh Circuit's view, this result could not be reconciled with Supreme Court opinions that emphasized the right of employees to a de novo adjudi-

409. An exception to the Court's conclusion in *United Food & Commercial Workers Union* (that a decision of the General Counsel is not subject to review as a final agency action for which there is no other remedy) might be found if a court concludes that the Board is using deferral in a way that constitutes an abdication of the Board's statutory authority, thereby violating congressional intent. *See* Heckler v. Chaney, 470 U.S. 821, 838-39 (1985) (Brennan, J., concurring); Leedom v. Kyne, 358 U.S. 184 (1958).

410. If a regional director defers and the General Counsel affirms the deferral, there is no court review. *See supra* note 408. If the regional director goes forward with a charge, however, the employer will raise deferral as an affirmative defense first before the ALJ and later before the Board. If the Board either orders deferral or refuses to defer, the Board's decision may then be reviewed by a federal court under Section 10(f). NLRA § 10(f), 29 U.S.C. § 160(f); *see, e.g.*, Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986) (remanded because the Board failed to explain its decision to defer); American Freight Sys., 722 F.2d 828 (D.C. Cir. 1983) (remanded because the Board failed to explain why the unfair labor practice charge was not deferred).

411. *See supra* note 399 providing statistics on deferral.

412. *See, e.g.*, Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986); Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986); Garcia v. NLRB, 785 F.2d 807 (9th Cir. 1986).

413. 786 F.2d 1516 (11th Cir. 1986).

414. *See supra* notes 61-101 and accompanying text.

415. *Taylor*, 786 F.2d at 1521.

416. *Id.* at 1522.

cation following an adverse arbitration award for claims arising under either Title VII,[417] Section 1983,[418] or the Fair Labor Standards Act.[419] In addition, the court was troubled by the fact that the driver's grievance had been denied by a bipartite committee with equal labor and management representation; there was no neutral party.[420] Consequently, the court was concerned that the union might have negotiated away the individual's statutory rights "in the interest of the collective good."[421] The logic of the opinion suggests that the Eleventh Circuit may well respond with similar disapproval to the Board's deferring to a grievance settlement short of arbitration, a situation in which there is inevitable tension between the interests of the individual and the interests of the collective.[422]

Similarly, in *Garcia v. NLRB*,[423] the Ninth Circuit reversed a deferral decision of the Board in a case in which an employee had been discharged for refusing to follow instructions to honk his horn as an attention-gathering device at delivery stops.[424] The employee believed that honking the horn under those circumstances would have violated state law.[425] The decision partly agrees with *Olin Corp.* in that the court found the arbitrator's award to be "palpably wrong" because it violated public policy.[426] As an alternative basis for its holding, however, the court suggested that the Board had read too broadly the *City Disposal Systems'* dicta regarding employee insubordination as a waiver of statutory protection.[427] The Board read *City Disposal Systems* as suggesting that the Board has the discretion to defer to an arbitrator's decision where the arbitrator has determined

417. 42 U.S.C. §§ 2000e-2000e-17 (1982 & Supp. IV 1986); *see* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (An employee whose grievance is dismissed at arbitration may bring a Title VII claim arising from the same set of facts.).

418. 42 U.S.C. § 1983 (1982 & Supp. IV 1986); *see* McDonald v. City of W. Branch, 466 U.S. 284 (1984) (An arbitration award does not preclude a subsequent civil rights action under 42 U.S.C. § 1983.).

419. 29 U.S.C. §§ 206-207 (1982 & Supp. IV 1986); *see* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981) (An arbitration of a wages claim does not preclude a later FLSA suit based on the same facts.).

420. *Taylor*, 786 F.2d at 1522.

421. *Id.*

422. The collective has an interest in conserving union resources for those circumstances in which they are most needed, and the individual has an interest in pressing his grievance as far as possible to seek relief. Under fair representation doctrine, the union has discretion to refuse to arbitrate if it feels that the likelihood of success is outweighed by the costs of grieving. *See* Curth v. Faraday, Inc., 401 F. Supp. 678, 681 (E.D. Mich. 1975).

423. 785 F.2d 807 (9th Cir. 1986).

424. *Id.* at 808.

425. *Id.* at 808 n.1.

426. *Id.* at 810.

427. *Id.* at 811.

that there was just cause to discipline an employee who refused to follow an employer's order although the employee had a reasonable alternative means, other than outright refusal, by which to protest the order.[428] As the Ninth Circuit read the dicta in *City Disposal Systems*, however, the "reasonable alternative" exception applied only to situations in which the employee's refusal was accompanied by behavior that was "abusive or disruptive of company discipline."[429] The court concluded that a refusal to break state law could not be construed as an abusive means of enforcing contract rights, and the refusal was therefore protected concerted activity under Section 7.[430] Even the Ninth Circuit's opinion impliedly suggests, however, that insubordinate behavior which is not reasonably necessary to the enforcement of contract rights is outside of Section 7's protection.[431]

This interplay between a contractual waiver of Section 7 rights and the deferral doctrine emerges most clearly in an opinion of the District of Columbia Circuit in which the court reversed a Board deferral decision. In *Darr v. NLRB*,[432] an employee who was also a union steward circulated a petition protesting the discharge of three shop stewards; the company responded by changing employee break schedules.[433] The employee protested that the schedule changes prevented her from being able to discharge her shop steward duties, and she refused to observe the changed schedule.[434] The company took no immediate action against her.[435] Three days later, however, the company confiscated the petition.[436] The employee, who was not on an authorized break, then went to the Company Overseer's office to protest, along with several other employees who were on authorized breaks.[437] The company thereupon suspended her for taking an unauthorized break, ordered her off the premises, and after she refused to leave, discharged her.[438] The arbitrator ordered her reinstated because she had been wrongly discharged for engaging in protected concerted activity.[439] Because she was insubordinate in refusing to leave the plant when directed to do so, however, the arbitrator

428. *Id.*
429. *Id.*
430. *Id.*
431. *Id.* at 808-11.
432. 801 F.2d 1404 (D.C. Cir. 1986).
433. *Id.* at 1405.
434. *Id.*
435. *Id.*
436. *Id.*
437. *Id.*
438. *Id.*
439. *Id.* at 1406.

ordered her reinstatement to be without back pay.[440]

An ALJ found the award to be repugnant to the NLRA, but the Board rejected his findings and instead deferred to the arbitrator's decision, concluding that it is "the essential nature of the arbitration process to balance the competing claims of the parties by adjusting the equities involved to reach a harmonious result."[441] The District of Columbia Circuit reversed the Board's decision, concluding that the Board had failed to explain adequately the basis for its decision.[442] The court pointed to at least four theories under which the Board's decision could have been justified: (1) that the NLRA issue was sufficiently identical to the contract issue actually litigated, so that estoppel applied; (2) that the Board's function should be to review arbitrators' awards under an appellate body's more limited scope of review; (3) that the Board was merely deferring to the arbitrator's interpretation of a contract clause on which the statutory right depended; or (4) that by entering into a collective bargaining agreement, the union waived the individual employee's statutory right to seek redress before the Board for discipline based on insubordination, as long as the employee had access to grievance arbitration.[443] The opinion suggests that the court viewed the waiver theory as being the most likely rationale for the Board's decision to defer, but because the Board had failed to articulate the basis for its decision, the court remanded the case.[444] Both the third and fourth theories that the court advanced illustrate the conceptual overlap between deferral and waiver doctrines. This overlap is the central focus of the following discussion of waiver.

B. *The Waiver of Statutory Property Entitlements*

The principle that statutory entitlements may be waived through collective bargaining lies at the heart of the model of labor relations that is embodied in both federal common law and the NLRA. The interrelationship between no-strike clauses and grievance arbitration assumes the capacity of the collective to waive an employee's statutory protection under Section 7.[445] The scope of the Section 7 rights that an employee retains once the employee is covered by a collective bargaining agreement will turn, in part, on the interpretation of the

440. *Id.*
441. *Id.* at 1406-07.
442. *Id.* at 1409.
443. *Id.* at 1408.
444. *Id.* at 1408-09.
445. *See supra* note 55 and accompanying text.

agreement.[446] Because a union controls both access to grievance procedures and the arguments presented to arbitrators over the relationship between contract language and employee Section 7 rights, waiver enhances collective control over employee statutory entitlements.[447]

It is important to distinguish the two ways in which waiver contributes to the centrality of arbitration. The most common situation is illustrated by the prior discussion of the relationship between statutory rights and contractual entitlements that exists when an employee claims he was disciplined for engaging in an activity protected by Section 7, such as taking part in a sympathy work stoppage.[448] When an unfair labor practice charge is filed, the employer sets up the union's waiver of the employee's statutory protection under the no-strike clause as an affirmative defense and requests deferral so as to permit an arbitrator to determine whether the parties intended the no-strike clause to include sympathy work stoppages.[449] The employer's position is that the issue should be resolved by looking to the specific understanding of the parties when they agreed to the no-strike clause and that the parties agreed to have an arbitrator resolve disputes arising under the collective bargaining agreement.[450] The employee, however, will argue that the dispute should be resolved by looking to

446. *See supra* notes 55-101 and accompanying text.

447. As long as a union does not breach its duty of fair representation by either acting in bad faith or arbitrarily deciding to settle a grievance short of arbitration, the union can prevent an individual employee from obtaining a hearing before an arbitrator on the merits of the grievance. *See* Vaca v. Sipes, 386 U.S. 171, 191 (1967). Under the NLRA, employers have no obligation to entertain a grievance presented by an individual employee without the authorization of the union. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61 n.12 (1975); Black-Clawson Co. v. IAM Lodge 355, 313 F.2d 179, 185-86 (2d Cir. 1962). For a discussion of whether a union's decision not to proceed with an employee's grievance should result in a deferral by the Board to the union's decision when statutory rights are involved in the grievance, see Comment, *supra* note 90, at 367. *See also* Lynch, *supra* note 12, at 625-28.

448. *See, e.g.*, Indianapolis Power & Light Co., 273 N.L.R.B. 1715, 1715 (1985) (*Indianapolis Power I*); *see also supra* notes 369-93 and accompanying text.

449. *See, e.g., Indianapolis Power I*, 273 N.L.R.B. at 1715. The respondent in *Indianapolis Power I* relied on the no-strike clause as a defense to the unfair labor practice but made no request to defer the dispute to arbitration. *Id.* The Board will not defer if an employer is not willing to arbitrate. *See supra* note 400 and accompanying text. If an employer does request deferral, the current Board approach to resolving sympathy strike issues, such as looking at the wording of the no-strike clause and at extrinsic evidence regarding the parties' understanding when they agreed on the clause, would be identical to the ways in which the issue would be addressed by an arbitrator. *See, e.g.*, National Homes Mfg. Co., 72 Lab. Arb. (BNA) 1127, 1129-30 (1979) (Goodstein, Arb.); Westinghouse Transp. Leasing Corp., 69 Lab. Arb. (BNA) 1210, 1212-15 (1977) (Sergent, Arb.). Therefore, under current Board standards, an unfair labor practice charge over discipline for engaging in a sympathy work stoppage would seem to be subject to deferral. *See* United Technologies Corp., 268 N.L.R.B. 557 (1984); *supra* notes 382-86 and accompanying text.

450. *See supra* notes 394-444 and accompanying text.

the statutory policies embodied in Section 7 and thus should be decided by the Board and not by an arbitrator.[451]

The second circumstance contributing to the centrality of arbitration is the waiver of an individual employee's access to the Board as a forum for resolving disputes over statutory protections, rather than a specific contractual waiver of the statutory entitlement. For example, assume that an employee files an unfair labor practice charge, claiming that the employer disciplined him for filing excessive grievances.[452] In response, the employer claims that the employee was disciplined for work-related problems, not for filing excessive grievances, and requests a stay of the unfair labor practice charge pending a determination by an arbitrator of whether there was just cause to discipline the employee.[453] The Board would likely defer under the standards of *United Technologies Corp.*[454] Deferral in this circumstance is implicitly a decision that the union waived the employee's right to have the Board determine the statutory claim by agreeing to grieve and arbitrate "just cause" for discipline.[455]

Two Supreme Court decisions illustrate the implications of the expanding waiver doctrine in the first type of circumstance. The most famous waiver case to reach the Supreme Court is *Metropolitan Edison Co. v. NLRB*.[456] In *Metropolitan Edison*, the Court rejected an employer's claim that two prior arbitration decisions, which upheld the employer's right to sanction differentially union leaders who participated in unprotected work stoppages, constituted a waiver of union leaders' Section 7 rights to be treated the same as other disciplined employees.[457] The awards had imposed higher responsibilities on union officials to uphold the no-strike clause of the agreement than they imposed on rank-and-file union members.[458] The arbitrators had not focused specifically, however, on the statutory right of a leader not to be differentially sanctioned, nor on whether the parties intended to waive the Section 7 right when they agreed to the no-strike clause.[459] The Supreme Court refused to regard the former

451. *See supra* notes 382-86 and accompanying text.

452. *See, e.g., United Technologies*, 268 N.L.R.B. at 557 (An employee who was threatened with discipline for filing grievances filed a grievance over the threats, withdrew the grievance, and then filed unfair labor practice charges.).

453. *See id.*

454. *Id.* at 560; *see also supra* note 400 and accompanying text.

455. *United Technologies*, 268 N.L.R.B. at 563 (Zimmerman, Member, dissenting); *see* Edwards, *supra* note 202, at 29-30.

456. 460 U.S. 693 (1983).

457. *Id.* at 708-10.

458. *Id.* at 709.

459. *Id.* at 709 n.13 (The Court observed that the arbitrators did not specifically find that

arbitrations as determinative of the issue.[460] Instead, the Court announced a rule of interpretation that the waiver of a statutory right will not be inferred from a general contractual provision, and it held that a union leader's protection from a more severe sanction should be upheld by the NLRB unless the waiver of the right is explicitly incorporated into the agreement.[461]

The *Metropolitan Edison* doctrine keeps a union leader's entitlement from being transferred automatically when the union signs a no-strike clause unless there is explicit language to the contrary. Moreover, the opinion implicitly suggested that the question of waiver should not be deferred to an arbitrator because an arbitrator is likely to look to the parties' understanding regarding the responsibility of a union leader in the particular bargaining unit, rather than simply applying the *Metropolitan Edison* rule of interpretation.[462] In arbitration, the statutory policies that justify this rule of interpretation will not play a major role. Arbitrators are concerned primarily with a union's obligation to obey and grieve in order to maintain the integrity of grievance arbitration; there is little reason for an arbitrator to be concerned either with a union's autonomy to establish the obligations of leaders or with qualified union members being discouraged from becoming leaders.[463] Thus, in order to preserve the statutory policies that underlie the standard for waiver which the Court set forth in *Metropolitan Edison*, the Board would have to avoid deferring a dispute over the waiver of a Section 7 statutory right. The waiver issue will, however, be deferred if the Board follows *United Technologies Corp.* and *Olin Corp.*[464]

The second relevant Supreme Court opinion is *NLRB v. City Disposal Systems*,[465] the case used in Illustration 1 to demonstrate the tension between the doctrines of fair representation, waiver, and deferral.[466] The issues before the Court in *City Disposal Systems* were the meaning of "concert" under Section 7,[467] and whether an individ-

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the bargaining agreement imposed an explicit duty to end work stoppages but that they did attempt to determine the parties' intent in entering into the no-strike clause.).

460. The Court also noted that the agreement did not make the arbitration awards binding beyond the term of the agreement. *Id.* at 709.

461. *Id.* ("We do not think that two arbitration awards establish a pattern of decisions clear enough to convert the union's silence into binding waiver.").

462. *Id.* at 708-09; *see* Comment, *Selective Discipline of Union Officials*, *supra* note 186, at 463-64.

463. *See* Comment, *Selective Discipline of Union Officials*, *supra* note 186, at 459.

464. *See supra* notes 394-444 and accompanying text.

465. 465 U.S. 822 (1984).

466. *See supra* notes 59-101 and accompanying text.

467. 465 U.S. at 825; NLRA § 7, 29 U.S.C. § 157 ("Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid

ual employee who invoked a contractual right to refuse to drive a truck that he thought was unsafe was engaged in protected concerted activity.[468] The NLRB had held that an employee acting alone in the assertion of a contract right was engaged in protected concerted activity under Section 7.[469] The majority of the Supreme Court agreed, finding no meaningful distinction between two or more employees claiming a contractual right to refuse to drive an unsafe truck and a lone employee's refusal.[470] In contrast, the dissent's opinion was as much a plea to contain disputes arising in the context of collective bargaining agreements within grievance arbitration procedures as it was a disagreement about the meaning of "concert."[471] Ironically, however, both the majority and the dissenting opinions tend to reinforce grievance arbitration as the preferred forum for resolving disputes over employee refusals to follow employers' orders. As the following analysis of each opinion indicates, the majority and the dissent disagreed on the meaning of "concert,"[472] but both incorporate a common vision of employee rights that are defined primarily through collective bargaining and grievance arbitration once a union has been certified.

To avoid confusion, it should be noted that the following analysis of the two opinions does not focus on the disagreement over the meaning of "concert," the specific issue before the Supreme Court.[473] Instead, the focus is on the relationship between the way the majority framed the dispute on remand and the dissent's characterization of the dispute as essentially one to be resolved under the collective bargaining agreement. The thrust of the analysis is that both opinions frame the ultimate resolution of the dispute in a way that makes arbitration the most likely forum to resolve similar conflicts in the future.

After finding that the lone employee's refusal was concerted, the *City Disposal Systems* majority remanded for a finding as to whether the collective bargaining agreement had waived the employee's Section 7 protection by the combination of a no-strike clause and a safety clause which permitted an employee to refuse to drive a truck "unless

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and protection."). For a thorough discussion of the meaning of "concerted activities for the purpose of . . . mutual aid and protection," see Fischl, *supra* note 2.

468. NLRB v. City Disposal Sys., 465 U.S. 822, 824-25 (1984).

469. City Disposal Sys., 256 N.L.R.B. 451, 454 (1981), *enforcement denied*, 683 F.2d 1005 (6th Cir. 1982), *rev'd and remanded*, 465 U.S. 822 (1984).

470. NLRB v. City Disposal Sys., 465 U.S. at 832.

471. *See id.* at 841-47 (O'Connor, J., dissenting).

472. *Id.* at 838-39.

473. *Id.* at 841. For an analysis of the Court's reasoning on the meaning of concert, see Fischl, *supra* note 2, at 826-31, 830 n.158.

such refusal [was] unjustified."[474] Consequently, the Court framed the central issue on remand as the understanding of the parties when they agreed on no-strike and safety clauses, rather than the clarity in contract language that is necessary to waive an employee's statutory protection when protesting unsafe working conditions.[475] The question on remand for the Sixth Circuit thus became whether the parties had agreed to a different standard than the one embodied in Section 7, and if so, whether the contractually established standard would permit an employer to discipline an employee who refused to drive an unsafe truck. Prior precedent had established that an employee's refusal was protected under Section 7 if it was based on a reasonable and honest subjective belief that the truck was unsafe, but the safety clause of the collective agreement might only protect the refusal if the truck was shown objectively to be unsafe.[476] As a result, the wording of the agreement and the parties' understanding became the critical questions, rather than the policies underlying Section 7.

The Sixth Circuit's opinion on remand further illustrates the extent to which contract language becomes the focal point for determining the scope of an employee's statutory protection. That court interpreted the no-strike clause in light of two contract clauses regarding unsafe trucks and concluded that the union had not waived the employee's statutory protection under Section 7.[477] "In sum, [the employee's] right under the collective bargaining agreement was to refuse to operate equipment that he or another employee had reported to be unsafe until City Disposal demonstrated that the truck's safety had been approved by the mechanical department."[478] The essence of the opinion is not the policies underlying the protection of employee Section 7 rights when an employee is protesting unsafe working conditions. Instead, the Sixth Circuit focused almost exclusively on the intent of the parties regarding the discipline of an employee protesting an unsafe truck, an intent that was evidenced by the wording of the two pertinent clauses in the agreement.[479] Because the meaning of contract language is normally for an arbitrator to determine, and not for the Board, the Supreme Court and the Sixth Circuit opinions invite the NLRB to defer to contract grievance procedures when simi-

474. *Id.* at 840.

475. *See* Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) ("[T]he waiver must be clear and unmistakable.").

476. NLRB v. City Disposal Sys., 465 U.S. at 841.

477. City Disposal Sys. v. NLRB, 766 F.2d 969, 972-74 (6th Cir. 1985).

478. *Id.* at 973.

479. *Id.* at 972.

lar charges are filed in the future.[480] This tendency is reinforced by federal common law doctrine which holds that the meaning of contract language and the parties' intent should be the exclusive province of the parties' contractual procedures for resolving disputes.[481]

In her dissent in *City Disposal Systems*, Justice O'Connor took the waiver and deferral doctrines one step further and suggested that the NLRB might have deferred to the union's determination that there was no objective basis for the grievance.[482] She noted that the discharged employee pursued his contract rights by filing a grievance the day after his discharge,[483] but the union found no objective merit in the grievance and declined to process it.[484] The normal model of labor relations suggests that an employee in this situation has no remedy under the collective agreement unless the employee can show that the union breached its duty of fair representation by refusing to process the grievance.[485] By asserting a statutory rather than a contract right through the filing of an unfair labor practice charge, however, a disciplined employee may be able to avoid the obstacle of proving that the union breached its duty of fair representation. Thus, because a union has refused to grieve and is not a party to the NLRB proceedings, the employer is not in a position to raise deferral as a defense to the unfair labor practice charge unless the Board characterizes the union's refusal as a settlement of the grievance.[486] To avoid this result, Justice O'Connor implicitly suggested that the Board should have construed the union's refusal as equivalent to a settlement of the employee's contract and statutory claims, thereby eliminating the employee's access to a hearing before either the Board or an arbitrator.[487]

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480. 465 U.S. at 838-39; 766 F.2d at 972-73.

481. *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 411-12 (1976); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-85 (1960); *supra* notes 158-90 and accompanying text.

482. NLRB v. City Disposal Sys., 465 U.S. at 844 n.4 (O'Connor, J., dissenting).

483. *Id.* at 827.

484. *Id.*

485. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

486. In *City Disposal Systems*, the employer did not plead that the union's refusal to grieve was equivalent to a settlement. The company instead raised the employee's failure to exhaust internal union remedies to review the refusal as a bar. *See* City Disposal Sys., 256 N.L.R.B. 451, 453 (1981).

487. NLRB v. City Disposal Sys., 465 U.S. at 844 n.4 (O'Connor, J., dissenting) (citing Schaefer v. NLRB, 464 U.S. 945 (1983) (O'Connor, J., dissenting from the denial of certiorari)); *see* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 410 (1976). For differing views on Justice O'Connor's suggestion that the NLRB defer to a union's settlement of an employee's statutory charge, compare Comment, *supra* note 90, at 368-69 (favoring deferral to reinforce private ordering) with Lynch, *supra* note 12, at 625-28 (opposing deferral to protect statutory policies embodied in Section 7 of the NLRA).

The *City Disposal Systems* majority, however, avoided any discussion of the tension between the employee's protection under Section 7 and the apparent view of the union that the employee was disciplined for just cause by emphasizing that the only issue before the Court was whether the employee's protest was concerted activity.[488] Nevertheless, the majority opinion, which remanded the case for a determination as to whether there was a contractual waiver, tends to encourage deferral just as the dissent's focus on reinforcing union control over employee claims of unjust discipline encourages reliance on private ordering by the parties. If a union supports an employee's unfair labor practice charge in a future case, the Board will probably defer to an arbitrator if the employer raises contractual waiver as an affirmative defense.[489] On the other hand, if the union does not support the charge and either settles the contract grievance or refuses to grieve, the Board may defer to the settlement unless the employee is able to demonstrate that the union's decision constituted a breach of the duty of fair representation.[490] In sum, the waiver and deferral doctrines work together to make grievance arbitration the central forum for protecting both contract and statutory entitlements once a union is certified. In arbitration, however, the statutory values that led the *City Disposal Systems* majority to conclude that the sole employee's protest was "concerted" will be less of a factor in the resolution of the specific dispute than they will be before the Board. In the case of a Board deferral to a union settlement, the predominant policy becomes preserving exclusive representation by reinforcing the union's control over the enforcement of an employee's statutory rights.[491]

The waiver doctrine also applies in a limited way to employer statutory rights, but only in contexts in which those rights operate as limits on employee statutory entitlements.[492] For example, Section 7 protects an employee who refuses to cross a stranger picket line that is

488. NLRB v. City Disposal Sys., 465 U.S. at 841.

489. *See supra* notes 394-444 and accompanying text; *see also* Comment, *supra* note 90, at 355-58.

490. *See supra* note 99. *Compare* Vaca v. Sipes, 386 U.S. 171 (1967) *with supra* note 400 and accompanying text (Board's refusal to defer if employee's and union's interests are adverse to each other).

491. *See, e.g.*, NLRB v. City Disposal Sys., 465 U.S. at 841-47 (O'Connor, J., dissenting).

492. The employee statutory entitlements in question are derived primarily from NLRA § 7, 29 U.S.C. § 157. The scope of these entitlements, in the sense of the protection for employees exercising Section 7 entitlements, is limited by the permissible responses of employers based on a business justification rationale. *See, e.g.*, NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938) (An employer may permanently replace economic strikers.); NLRB v. Wooster Div. of Borg-Warner Corp., 236 F.2d 898 (6th Cir. 1956), *aff'd and modified on other grounds*, 356 U.S. 342 (1958) (An employer may only replace unfair labor practice

primary, but the employer may replace the employee for business reasons.[493] The employer can waive this right to replace, just as the union can waive the employee's Section 7 protection.[494] As with union statutory entitlements, the general rule of contract interpretation is that the waiver of the statutory right must be evidenced by specific language in the agreement.[495] Whether arbitrators tend to follow this rule of construction if the union grieves the replacement under the just cause clause, however, is open to question.[496]

The Court's reasoning in both *Metropolitan Edison Co. v. NLRB*[497] and *NLRB v. City Disposal Systems*[498] also illustrates the way that disputes reflect and contribute to the ideology of the workplace.[499] In *Metropolitan Edison*, the Court relied on the autonomy of workers to select their leadership and to protect the judgment of leaders from being influenced by fear of reprisals due to their leadership roles.[500] Thus, an employer must act with reference to the employees as a collective, rather than sanctioning individual leaders, unless the union has consented to differential sanctions. Similarly, *City Disposal Systems* protects the protest of a sole employee by identifying his protest as being in solidarity with all employees working under the collective bargaining agreement.[501] Both opinions confront basic values about the statutory protection of employees engaged in collective action to improve working conditions. The cases reinforce values of worker solidarity, but even if they had been decided in favor of the employers, the visibility of the decisions would have provoked a response from unions as a group over the erosion of statutory protec-

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strikers temporarily unless the employer can show that the strike would have occurred even in the absence of unfair labor practices.).

493. *See* Redwing Carriers Inc., 137 N.L.R.B. 1545 (1962), *enforced sub nom.* Teamsters, Chauffeurs & Helpers Local Union No. 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

494. *See* Butterworth-Manning-Ashmore Mortuary, 270 N.L.R.B. 1014, 1015 (1984).

495. *See id.* (applying the "clear and unmistakable" standard of Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), to an employer's waiver of the right to replace an employee refusing to cross a stranger picket line). *But see* Fischl, *supra* note 2, at 806 n.51 (criticizing application of "clear and unmistakable" waiver requirement to employer statutory entitlements).

496. *See, e.g.*, Allied Employers, Inc., 84 Lab. Arb. (BNA) 5 (1984) (Kienast, Arb.) (interpreting no-strike clause as a waiver of the employer's statutory right to replace a sympathy striker).

497. 460 U.S. 693 (1983).

498. 465 U.S. 822 (1984).

499. For a definition of the term "ideology" as it is used here, see *supra* note 29 and accompanying text.

500. *Metropolitan Edison*, 460 U.S. at 704-15.

501. *City Disposal Sys.*, 465 U.S. at 832.

tions for collective action.[502] The framing of the dispute and the legal arguments used to justify the results are part of an ongoing discourse over workers' rights. Decentralizing the disputes to arbitration in the future alters the nature of this discourse and its contribution to the community of union members that exists across bargaining unit lines. The way that the context of arbitration influences the framing of disputes, as well as the justifications used to resolve the conflicts, is the subject of the next Section.

VI. A COMPARISON OF PUBLIC FORUMS AND GRIEVANCE ARBITRATION

Prior sections of this Article focused on why the initial assignments of statutory entitlements matter, and they also discussed the procedures for resolving disputes over gaps in collective bargaining agreements involving the allocation of contract entitlements and determinations of waivers of statutory entitlements. The central claim has been that recent doctrinal developments have converged so as to encourage unions and management to rely on arbitration to resolve their mid-term disputes. This Section focuses on the consequences of this increased reliance on arbitration.

The way that the Board and the courts approach the waiver of individual Section 7 rights has been described in the context of employees refusing to cross stranger picket lines,[503] employers giving union leaders more severe sanctions than other employees,[504] and unions exercising their power to waive individual employees' access to NLRB proceedings.[505] Concerns over the protection of statutory policies have led the Board and the courts to develop a general rule of interpretation: To be effective, a waiver must be explicit.[506] The three examples illustrate, however, that the Board does not always follow this rule. Nevertheless, concerns over statutory policies are always a major factor in the Board's decisions.

When these same types of disputes are resolved in arbitration, however, the emphasis shifts to an analysis of the nature of the relationship between the parties as established by their collective bargain-

502. For examples of union leaders' reactions to Board and court decisions eroding the statutory rights of workers under the NLRA, see sources cited *infra* note 534.

503. *See supra* notes 369-92 and accompanying text.

504. *See supra* notes 456-64 and accompanying text.

505. *See supra* notes 465-91 and accompanying text.

506. *See, e.g*, Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983); *supra* notes 126-30 and accompanying text.

ing agreement.[507] Arbitrators interpret both the language of the agreement and the parties' intent in the light of unstated assumptions about the appropriate relationship between labor and management in a market economy.[508] Additionally, an arbitrator is expected to be fair and even-handed in resolving disputes and to encourage the parties to carry out their respective contract responsibilities so as to maintain productivity.[509] Thus, statutory values such as the institutional autonomy of unions and solidarity among workers tend to drop away as basic principles to be considered in resolving disputes over the waiver of Section 7 protections.[510]

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507. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (An award must draw "its essence from the collective agreement.").

508. Two related areas in which labor arbitration decisions have been examined in some depth are work transfers and subcontracting. *See generally* Dash, *The Arbitration of Subcontracting Disputes,* 16 INDUS. & LAB. REL. REV. 208 (1963); Fairweather, *Implied Restrictions on Work Movement—The Pernicious Crow of Labor Contract Construction,* 38 NOTRE DAME LAW. 518 (1963); Greenbaum, *The Arbitration of Subcontracting Disputes: An Addendum,* 16 INDUS. & LAB. REL. REV. 221 (1963); Gross, *Value Judgments in the Decisions Of Labor Arbitrators,* 21 INDUS. & LAB. REL. REV. 55 (1967); Wallen, *How Issues of Subcontracting and Plant Removal Are Handled by Arbitrators,* 19 INDUS. & LAB. REL. REV. 265 (1965). The studies find that arbitrators are willing to place "implied limits" on subcontracting, but that these limits are overcome if the employer's decision is based on efficiency. *See, e.g.*, Gross, *supra*, at 70-72 (finding that the predominant values providing content to arbitral concepts of good faith and fairness are efficiency and employer control over the production process); Comment, *Bases and Limits of Arbitral Decisionmaking, supra* note 247, at 380 ("Arbitrator's recognition of broad managerial rights presumptively including the right to relocate is further reinforced by their acceptance of market-oriented values and thinking.").

Two excellent studies focusing on other areas come to a similar conclusion about the predominant emphasis on maintaining production and protecting employer control of the workplace. *See* Atleson, *Obscenities in the Workplace: A Comment on Fair and Foul Expression and Status Relationships*, 34 BUFFALO L. REV. 693, 714 (1985) ("[T]he underlying notion is that the expression of disrespect for 'authority' is undesirable and also punishable."); Gross & Greenfield, *supra* note 303, at 684 (An analysis of 584 reported arbitration awards dealing with employee health and safety revealed that "the management rights value judgment is dominant and that this value judgment clearly controls the appearance and use of another value judgment: the notion that a worker has a right to a safe and healthful workplace.").

509. *See* Shulman, *supra* note 18, at 1024. Shulman warns:

> To consider . . . arbitration as a substitute for court litigation or as the consideration for a no-strike pledge is to take a foreshortened view of it. In a sense it is a substitute for both—but in the sense in which a transport airplane is a substitute for a stagecoach. The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government.

Id.

510. *See* Comment, *Selective Discipline of Union Officials, supra* note 186, at 462-63; *see also* Gross & Greenfield, *supra* note 303, at 674-84 (reviewing the limited impact of the policies underlying the Occupational Safety and Health Act (OSHA) on the reasoning of arbitrators in disputes over employee safety and health).

In a similar sense, arbitrators will approach problems of filling gaps in collective bargaining agreements differently than will adjudicators in public forums. An arbitrator looks to the parties' expectations based on past practice, bargaining history, industry custom, and implied obligations of fair dealing.[511] An arbitral award will be justified by working through categories of analysis that are internal to the parties' relationship.[512] If the parties do not like an award, they can negotiate around the arbitrator's decision.[513]

An arbitrator must render a decision that is acceptable to the parties within the parameters of their expectations. If an arbitrator reasons from values external to the private regime in interpreting the contract, one party or the other may strike the arbitrator's name from future lists as well as challenge the award by filing an action to have it set aside.[514] Moreover, other parties facing a similar conflict will view the opinion not as precedent, but as an illustration of that arbitrator's approach to resolving recurring conflicts. Thus, the incentive structure for arbitrators is to justify the opinion by drawing on values internal to the system of private ordering, and not to challenge its assumptions or to render opinions that would substantially shift the parties' bargaining power. As a creature of the system, an arbitrator is poorly positioned to deal with statutory issues that could shift the

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511. *See* F. ELKOURI & E. ELKOURI, *supra* note 303, at 342-65, 437-57.

512. *See, e.g.*, Pacific Southwest Airlines, 71 Lab. Arb. (BNA) 1136, 1138 (1978) (Greer, Arb.); Monarch Rubber Co., 44 Lab. Arb. (BNA) 246, 250 (1965) (McCoy, Arb.); National Lead Co., 28 Lab. Arb. (BNA) 470, 474 (1957) (Roberts, Arb.); *see also* Torrington Co. v. Metal Prods. Workers Union, Local 1645, 362 F.2d 677 (2d Cir. 1966) (affirming district court decision that vacated the arbitrator's award based on the employer's past practice of paying employees for time off for voting).

513. *See* American Postal Workers Union v. United States Postal Serv., 789 F.2d 1, 9 (D.C. Cir. 1986). In support of its decision to refuse to disturb an arbitrator's award, the court noted that the parties are never without a remedy if they are unhappy with the award: "The parties' remedy in such cases is the same remedy they possess whenever they are not satisfied with the arbitrator's performance of his or her job: negotiate a modification of the contract or hire a new arbitrator." *Id.* at 7.

514. To challenge the enforceability of the award, the employer will utilize the Supreme Court's language in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960):

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

Id. at 597; *see, e.g.*, Roadmaster Corp. v. Production & Maintenance Employees' Local 504, 851 F.2d 886 (7th Cir. 1988) (affirming a district court that set aside an arbitrator's award because the arbitrator exceeded his powers under the agreement by relying on Section 8(d) of the NLRA to justify an award rather than by relying on the parties' collective bargaining agreement).

balance of negotiating power or alter a structural characteristic of the model of labor relations.[515]

Conversely, when the Board is faced with a dispute over whether the employer has violated the obligation to maintain the terms and conditions of an agreement, the Board is concerned about the potential impact of its decision on all parties similarly situated. The Board enjoys the option of drafting an opinion that will fix the entitlement for all parties who do not have a clause on point in their agreement.[516] Alternatively, the Board may base its result on extrinsic evidence regarding the intent and expectations of the disputing parties without relying on a general rule of interpretation.[517] When the Board takes this alternative, however, statutory policy drops to the background, just as in arbitration, and the Board assumes the arbitrator's role within the private regime.[518]

As noted earlier, the Board may also take an intermediate approach and interpret the parties' agreement and expectations based on past practice in a way that protects the union's voice in workplace decisions and the employees' reliance on obligations implied by the nature of the collective bargaining agreement.[519] For example, in a case like *Milwaukee Spring*, the Board would examine whether the employer was responding to a change in the product market or simply attempting to get out of the wage bargain by substituting one group of workers for another.[520] This type of analysis is informed by values such as the decision's predictability for, and influence on, other parties dealing with similar situations, the volume of future litigation that the opinion will foster, the protection of capital mobility, the encouragement and effectuation of efficiency, the institutional integrity of unions, and the reinforcement of the regime of private ordering

515. *See* Comment, *Bases and Limits of Arbitral Decisionmaking*, *supra* note 247, at 396-98.

516. *See, e.g.*, Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*) (reversing prior decision granting the entitlement to transfer work to the union, and instead granting it to the employer), *rev'g* 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*) (granting the entitlement regarding the transfer of work to the union unless the employer had language to the contrary in the agreement), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985). For a thorough analysis of how these opinions would influence the bargaining among all other parties similarly situated, see Schwab, *supra* note 216.

517. *See, e.g.*, *supra* notes 368-93 and accompanying text (discussing the consequences of the Board's opinion in Indianapolis Power & Light Co., 291 N.L.R.B. No. 145, 130 L.R.R.M. (BNA) 1001 (1988) (*Indianapolis Power II*)).

518. *See supra* notes 382-86 and accompanying text.

519. *See supra* note 281.

520. *See supra* notes 279-83 and accompanying text (discussing Member Zimmerman's dissenting opinion in *Milwaukee Spring II*, 268 N.L.R.B. at 605-12); *see also* Wachter & Cohen, *supra* note 200, at 1406-15 (arguing for the application of a sunk-cost-loss rule on a case-by-case basis). For a definition of the sunk-cost-loss rule, see *supra* note 281.

through collective bargaining. Arbitrators may share many of the same concerns regarding collective bargaining, because the concerns are implicit in the regime of private ordering, but the Board is more compelled to justify its decision within the broader context of statutory policy. The potential for contrary views to be applied to a specific conflict is greater in the public forum than in the private ordering regime defined by the parties' agreement and expectations.

Moreover, statutory decisions in public forums which establish the parameters for private ordering are highly visible.[521] In contrast, parties may quietly contract around the established parameters within their own bargaining unit. The public image of the preferred way of structuring the private ordering may, however, be set up in such a way as to make contracting out of that image unlikely.[522] Thus, the visibility of public forums permits a more unified reaction among organized workers. The mobilization of broader-based support can be a basis either for seeking legislative change or for dedicating resources to future strategic litigation seeking a more favorable general rule.[523] In short, decisions in public forums are part of a broader political process by which workers or employers seek to obtain rules of law that will govern the framework of collective bargaining based on broadly based shared interests.

Arbitration, in contrast, decentralizes conflicts to the level of specific bargaining units; shared interests across bargaining unit lines are less visible. Only employees represented by the same union in the same industry are likely to pay much attention to an arbitrator's award, and even then an unfavorable reaction simply results in that arbitrator not being selected again. Challenges to the assumptions underlying the model of labor relations that are implicit in the system of private ordering are less likely to occur as long as the resolution of

521. *See, e.g.*, Schwab, *supra* note 216, at 247 n.7 (describing the extensive public controversy and debate in response to the Board's *Milwaukee Spring* opinions).

522. *See, e.g.*, Gateway Coal Co. v. UMW, 414 U.S. 368 (1974) (implying a no-strike clause over an arbitral dispute despite the failure of the parties to include such a clause in the collective bargaining agreement); Electrical Workers v. General Elec. Co., 407 F.2d 253, 259 (2d Cir. 1968) (A contract clause designed to negate the presumption of arbitrability was said to raise "a substantial question whether a 'national labor policy' may be so blithely diluted."), *cert. denied*, 395 U.S. 904 (1969).

523. *See, e.g., Construction Industry Labor Law Amendments of 1987: Hearings on S. 492 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. (1987) (hereinafter *Construction Labor Law Hearings)*; *Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 100th Cong., 1st Sess. (1987) (testimony on proposed legislation to protect unions from operation of dual shops (one unionized and one non-unionized) in the same competitive market area and to prohibit unilateral repudiation of a pre-hire agreement).

conflicts is managed on a unit-by-unit basis.[524]

These arguments are not meant to suggest that the management of disputes through private ordering does not have its advantages for unions. The model of private ordering gives unions control over the management of disputes.[525] Grievances, including those involving assertions of statutory rights by individual employees, can be negotiated without either the presence or the intervention of a public official charged with the enforcement of the NLRA. Cohesion and unity within each bargaining unit is reinforced by this exclusive representation, and disputing within the unit can lead to a more united front and a stronger bargaining posture. Employee solidarity within the bargaining unit may be an important element in a union's capacity to obtain better wages, working conditions, and union security clauses, thereby providing unions with a viable economic base. The daily administration of grievance procedures as a form of ongoing employee participation in the formulation and administration of workplace rules therefore provides a justification for employees to support their unions.[526]

Arbitration is the principle means of assuring the even-handed and fair administration of these workplace rules. The central assumption of the private ordering regime is that employees will forgo the right to protest employer actions through work stoppages in exchange for the opportunity to take grievances to a neutral third party. Thus, obey and grieve has become the fundamental tenet of labor arbitration.[527] This underlying assumption is in sharp contrast to the statutory right of employees to engage in concerted activity.[528] The inherent contradiction is resolved by the contractarian image of collective bargaining. Employees have exchanged their right to strike for an arbitration clause,[529] and they are therefore obliged to obey and grieve. The assertion of any contract or statutory entitlement inconsistent with the underlying obey and grieve value is likely to be subjected to careful scrutiny, with the union carrying the burden of justifying the exception to an arbitrator.[530] In contrast, if the same

524. *See* Rogers, *supra* note 1.

525. *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975).

526. *See generally* R. FREEMAN & J. MEDOFF, *supra* note 211; Feller, *supra* note 17.

527. *See supra* note 303 and accompanying text.

528. NLRA § 7, 29 U.S.C. § 157.

529. *See supra* note 50 and accompanying text.

530. *See* Gross & Greenfield, *supra* note 303, at 656 (It is the employee who has the burden of persuasion in establishing that a work environment was unsafe in order to justify refusing an order: "Reasonable doubts about safety and health are resolved against the employees who raise that defense.").

issue were to emerge in a Section 7 adjudication before the NLRB, the burden would normally be on the employer to show a business justification for disciplining an employee engaged in concerted activity.[531]

Similarly, the parties' and industry's past custom and practice are seen as the bases for the parties' expectations when entering into collective bargaining agreements. Thus, arbitrators resolve disputes over gaps in agreements by looking at the way that similar disputes have been resolved in the past.[532] For example, because employers have traditionally enjoyed substantial managerial control over decisions concerning the appropriate mix of the input factors of production, past practice will normally favor employer discretion. The primary constraints on this employer discretion are the covenants of good faith, fair dealing, and reasonableness. The analysis of these concepts further turns on whether an employer has a business justification for the action it has taken, which becomes an inquiry into whether the decision was "efficient."[533]

These observations are not meant to suggest that interpretations of the NLRA in public forums tend to be more favorable to unions than private arbitration. Indeed, many unions have become reluctant to file unfair labor practice charges for fear that the Board will establish a new precedent less favorable to labor than the pre-existing interpretation of the statute.[534] In some types of disputes, the perspective

531. *See* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). The initial burden of proof to show that an employee was disciplined at least in part for engaging in protected activity under Section 7 is on the General Counsel. *Id.* at 401. If the initial burden is met, the employer will then be found to have violated the Act unless the employer can show that the employee would have been disciplined even had the employee not engaged in the protected activity. *Id.* at 401-02. Alternatively, the employer may show that the union waived the employee's protection under Section 7. *See* City Disposal Sys. v. NLRB, 766 F.2d 969, 972-74 (6th Cir. 1985) (reviewing the collective bargaining agreement to determine if the employee's statutory right to refuse to drive a truck based on a reasonable belief that the truck was unsafe was waived by the collective agreement). In other circumstances, the employer may meet his burden by showing an economic justification in the form of a substantial adverse impact on the employer's business resulting from the employee's concerted activity. *See* Redwing Carriers, 137 N.L.R.B. 1545, *enforced sub nom.* Teamsters, Chauffeurs & Helpers Local Union No. 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

532. *See supra* note 250 and accompanying text.

533. *See* Gross, *supra* note 508.

534. Serious disillusionment with the enforcement of the NLRA by the Board has been expressed by both labor leaders and labor law scholars. *See, e.g.*, *AFL-CIO Chief Calls Labor Law a Dead Letter*, Wall St. J., Aug. 16, 1984, at 8, col. 2 (AFL-CIO President Lane Kirkland advocating repeal of the NLRA because it no longer serves labor's cause); *Construction Labor Law Hearings*, *supra* note 523 at 36-64 (Testimony of Robert Georgine, President of Building and Construction Trades Department, AFL-CIO). Addressing the need for legislation to protect collective bargaining in the construction sector, President Georgine stated: "This legislation is necessary because the National Labor Relations Board has failed to enforce

of an adjudicator seeking an equitable solution by looking to the parties' expectations about their particular working relationship will favor an employee more than a solution reflecting tensions among competing statutory policies. The central point is that the criteria used to allocate disputes among forums should be sensitive to the distinct perspectives which flow from differences in the institutional setting of the disputing process.[535]

VII. CONCLUSION

This Article examined the ways in which federal common law and doctrinal developments under the NLRA interact to enhance the centrality of labor arbitration. The presumed relationship between no-strike clauses and arbitrability makes it difficult for labor and management to rely on any means other than arbitration to resolve disputes arising under collective bargaining agreements. Moreover, the limited scope of judicial review protects the autonomy of arbitral reasoning from judicial control.

The combination of the deferral and waiver doctrines has further contributed to arbitration's central role by encouraging the displacement of disputes over statutory entitlements from public adjudication before the Board to the private, bargaining-unit-specific forum of labor arbitration. Examples of this displacement were analyzed under different statutory provisions.[536] One example involved the assignment and transfer of Section 7 statutory entitlements which define the degree of protection due employees engaged in concerted activity.[537] The other example involved disputes over changes in working conditions under Section 8(d) when collective bargaining agreements do

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certain provisions of the National Labor Relations Act in the manner which Congress intended, and instead has interpreted the Act in a manner which has undermined the stability of labor relations in this vital industry." *Id.* at 37; *see also* Stone, *supra* note 17, at 979 ("[D]espite the almost universal consensus that there is a crisis in labor law, there is no current consensus at all on what is wrong with the Act or how the current deplorable situation, however defined, came about."); Summers, *Past Premises, Present Failures and Future Needs in Labor Legislation*, 31 BUFFALO L. REV. 9, 18 (1982) (arguing that the assumptions and purposes of American labor law have not been fulfilled); Sweeny, *Is There a Need To Amend the National Labor Relations Act?*, 52 FORDHAM L. REV. 1142, 1143 (1984) (President Sweeny of the Service Employees International Union, AFL-CIO answers the question his title poses: "No! The National Labor Relations Act . . . is, for all practical purposes, now dead."). *See generally* HOUSE COMM. ON EDUCATION AND LABOR, 98th Cong., 2d Sess. THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS (Comm. Print 1984).

535. *See* Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986); Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986); *supra* notes 410-44 and accompanying text.

536. NLRA § 8(a)(1), (a)(3), (a)(5), (d), 29 U.S.C. § 158(a)(1), (a)(3), (a)(5), (d).

537. For an example of this type of displacement, see Illustration 1, *supra* notes 62-101 and accompanying text.

not specifically address the respective contractual rights of the parties in regard to the working condition that the employer plans to alter unilaterally.[538]

The framework governing collective bargaining is treated on two institutional levels, those of public and private resolution. The public level is that of the NLRB responding simultaneously both to political currents arising from the selection and confirmation process of the executive branch and the Senate,[539] and to the demands of doctrinal continuity and predictability imposed through judicial review of Board decisions.[540] The private level is labor arbitration. Arbitrators must approach a dispute from the perspective of the parties' agreement and past practices, and they must explain the final award in terms of justifications that both parties will regard as legitimate. Otherwise, that arbitrator will not be selected again by the parties.

The central claim of this Article is that the increased reliance on labor arbitration as the means by which these disputes are resolved has significant implications for the legal framework that shapes the structure of collective bargaining. The values and assumptions embodied in the framework determine the ways in which entitlements are allocated through the process of both statutory and contract interpretation. The allocation of the entitlements, in turn, impacts on the relative power of the parties engaged in bargaining.[541] Deferring more disputes over the entitlements to private arbitration, rather than encouraging their adjudication in a public forum, makes the disputes less visible and inhibits public dialogue over both the result and the values reflected in the reasoning as justification for the ruling.

A thorough analysis of the deferral doctrine has been beyond the scope of this Article, but some general conclusions follow from the foregoing comparison of Board and arbitral reasoning:

1. Section 8(a)(1) and 8(a)(3) charges should not be deferred. Rather than focusing on the statutory policies embodied in Section 7, an arbitrator will tend to focus on whether an employer had just cause to discipline an employee given the work setting and the need to discourage insubordination and to maintain productivity. Even if the arbitrator does recognize that the employee's protest is arguably protected activity under Section 7, the arbitrator will normally resolve the tension between statutory protections and contract justifications

538. *See* Illustration 2, *supra* notes 102-42 and accompanying text.

539. The five NLRB members are "appointed by the President by and with the advice and consent of the Senate." NLRA § 3(a), 29 U.S.C. § 153(a).

540. NLRA § 10(e)-(f), 29 U.S.C. § 160(e)-(f).

541. *See supra* notes 325-93 and accompanying text.

for discipline by looking to the parties' intent when they agreed on particular contract clauses, rather than by looking to statutory policy. Both the issues of contractual waiver and just cause should be determined in the light of the statutory policies underlying Section 7 protections rather than concerns internal to the parties' working relationships. Arbitrators are not bound to follow a rule of interpretation derived from statutory policy. Publicly visible Board decisions, which provide precedent for all collective bargaining agreements, are critical to maintaining the rule of interpretation established in *Metropolitan Edison*: "[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' "[542]

2. Section 8(a)(5) charges that involve the failure of an employer to bargain over mid-term modifications of a mandatory subject should not be deferred. Section 8(a)(5) protects a union's voice in critical workplace decisions. The Board requires that the waiver of a duty to bargain through a zipper clause and a broad management rights clause be clear and unmistakable.[543] Arbitrators tend both to assume that all issues are contained within agreements and to make the issues turn on whether management's actions are reasonable given the breadth of an agreement's management rights clause.[544] Thus, the focus shifts from the protection of a union's voice in workplace decisions prior to their implementation to whether the employer's actions were reasonable given past practices and the parties' expectations when they agreed on the management rights clause.

3. Section 8(d) charges in which an employer has bargained to impasse prior to implementing a mid-term modification present the strongest case for deferral.[545] On the surface, the issues appear to be contractual and to be rooted in the parties' bargaining history, past practices, and contract language because the question is whether the employer failed to maintain the terms and conditions of the agreement. If evidence suggests that the parties did in fact bargain over the working condition being contested and that the resolution of the dispute will turn on evidence of the parties' expectations under the agreement, the dispute should be deferred. On the other hand, if there is no evidence that the parties contemplated the type of change being implemented by the employer, the resolution of the dispute essentially allocates a property entitlement to one party or the other.[546] Disputes

542. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).
543. *See supra* note 242.
544. *See supra* notes 510-15 and accompanying text.
545. *See supra* notes 397-98 and accompanying text.
546. *See supra* notes 249-94 and accompanying text.

that involve gaps in contracts and that are resolved by balancing management's need for entrepreneurial discretion to adjust to product market changes on the one hand and employee expectations based on established working conditions on the other, should be decided in a visible public forum. The justification for the allocation of the entitlement should be subjected to public scrutiny and debated in terms of basic values regarding our concepts of justice in the workplace and the impact of the allocation on the relative bargaining power and wealth of similarly situated parties.[547]

These recommendations do not address the undermining of statutory rights and contract entitlements by the substantive and procedural norms of both public and private forums that permit unilateral employer action pending adjudication of a dispute. The comparison of property and liability rules illustrated the way that employee statutory and contract property entitlements are often converted, as a practical matter, into liability entitlements by the employer's freedom to act pending adjudication.[548] The obey and grieve doctrine of labor arbitrators reinforces managerial control over the workplace in the same way.[549] The only way to restrict employer conversion of employee statutory rights is by the increased use of Section 10(j) injunctions[550] by the Board in order to protect workers' statutory rights pending a final Board order.[551] Similarly, courts need to be more willing to issue status quo injunctions to protect employee contract entitlements where the unilateral implementation of a changed working condition will so alter the prior situation that an arbitrator is unable or reluctant to grant a remedy that preserves the entitlement.[552]

What these proposed standards for deferral do address is the relationship between the forum and the substantive outcomes of disputes. The burden of the argument in this Article has been to demonstrate that disputes are framed differently in public and private forums, and that this difference matters for the substantive results of disputing. In arbitration, the breadth of legitimate discourse over contract entitlements which impact on statutory rights is bounded by the collective bargaining agreement and the parties' expectations.[553] Before the Board, however, unions may draw on a broader set of poli-

547. *See supra* notes 325-93 and accompanying text.
548. *See supra* notes 295-307 and accompanying text.
549. *See supra* notes 299-300 and accompanying text.
550. *See supra* note 300 (discussing Section 10(j) injunctions).
551. *See supra* notes 303-04 and accompanying text.
552. *See supra* notes 305-07 and accompanying text.
553. *See supra* notes 503-35 and accompanying text.

cies which include encouraging organization, protecting the union's voice in workplace decisions, and promoting worker solidarity.[554] These arguments permit the union to challenge the structure of the legal framework governing collective bargaining because this structure is not treated as a given before the Board. It is instead the substance over which the parties are expected to struggle when they invest in litigation.[555] Therefore, the possible range of outcomes is less constricted.

The visibility of the forum is related, but independently important, because it enables the parties to focus on the way that the state's intervention in the workplace impacts on the relative bargaining power of the parties, both through the ongoing refinement of the scope of statutory rights and through the task of filling in gaps in collective bargaining agreements.[556] Making public forums the principal level for the processing of disputes that influence bargaining power contributes to a general understanding of the role that the state plays in balancing the power of labor and management. Focusing on the substantive outcomes of the disputes and on the way that the outcomes impact on the relative power of the parties helps to counteract the image of a neutral state that simply reinforces private ordering in the shadow of the law.

Finally, and again independently, the public visibility of dispute processing is also necessary to sustain public discourse over the rela-

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554. The legislative "Findings and Declaration of Policy" in justification of the NLRA state:

> 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 . . . 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 representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

NLRA § 1, 29 U.S.C. § 151.

555. Dispute processing in a public forum leads to "public discourse" labeled "precedent" when articulated by courts. *See* Trubek & Esser, *supra* note 29. The average time from the filing of a charge to the obtaining of an order enforceable by a federal court of appeals is at least three years. *See supra* note 295. By this time, parties engaged in an ongoing bargaining relationship will have accepted some accommodation in the specific dispute that led to the statutory charges being filed in order to maintain production and workers' wages and benefits. With the exception of those cases that involve a potential for a large back pay award to a group of employees, the cost of litigation will normally be more than the monetary value of any award resolving the specific controversy. The parties are primarily investing in litigation to seek favorable "precedent." For an analysis of the strategic behavior of repeat litigators and the implications for the allocative efficiency of precedent and the distribution of wealth, see Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency*, 8 HOFSTRA L. REV. 811 (1980).

556. *See supra* notes 325-93 and accompanying text.

tionship between workers' rights and the state. Dispute processing resolves specific conflicts, and through their resolution, impacts on the parties' relative power. Disputing also results in the formulation of norms that will impact on the way similar conflicts are resolved in the future. Simply put, workplace disputes are quarrels over the substance of the ideology of the workplace; over time, these quarrels may result in the transformation of that ideology in ways that can encourage political action and transform institutional structures. Localizing dispute processing over statutory rights within bargaining units fulfills the first function of disputing, but it inhibits the other two functions and constrains dispute processing as a source of legal change.