

October 1993

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### Recommended Citation

Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 Chi.-Kent L. Rev. 59 (1993).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol69/iss1/4>

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# IN DESPAIR, STARTING OVER: IMAGINING A LABOR LAW FOR UNORGANIZED WORKERS

MICHAEL H. GOTTESMAN\*

I began representing unions—principally the Steelworkers Union—in 1961. Those were the halcyon days. Union density was near its all-time high, close to forty percent.<sup>1</sup> The *Steelworkers Trilogy* had just been decided, in which the Supreme Court waxed romantic about collective bargaining and labor arbitration.<sup>2</sup> In just a few years, the Steelworkers would negotiate the Experimental Negotiating Agreement (the “ENA”) with the steel industry, substituting interest arbitration for strikes as the terminal point in negotiations,<sup>3</sup> as well as the Steel Industry Civil Rights Decree, hailed by the Fifth Circuit as implementing Title VII’s policies “to an exceptionally thorough degree.”<sup>4</sup> Throughout the 1970s, the Steelworkers (and other industrial

\* Professor of Law, Georgetown University Law Center. I wish to thank Amy Patricia Walters for superb research assistance. I have benefitted from conversations with a number of labor law academics, including all of the principal contributors to this Symposium, about the proposals contained in this article.

1. Union density as a percentage of *private* nonagricultural wage and salary workers has declined from a high of 38% in 1954 to 11.5% in 1992. The 1954 figure is available in Paul C. Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1772 n.4 (1983). For the 1992 figure, see *New Administration is Seen as Giving Labor Chance to Check Declining Unionization*, 142 Lab. Rel. Rep. (BNA) 300 (Mar. 15, 1993) [hereinafter *New Administration*]. Organized labor as a percentage of the overall work force (public and private combined) declined from 34.7% in 1954 to 15.8% in 1992. For the 1954 figure, see U.S. BUREAU OF THE CENSUS, *THE STATISTICAL HISTORY OF THE UNITED STATES I*, at 178 (1976). For the 1992 statistic, see *New Administration, supra*, at 297.

2. In the *Steelworkers Trilogy*, the Supreme Court limited judicial intervention in private sector contract disputes between labor and management, and promoted arbitration as the proper vehicle to maintaining the vitality of the collective bargaining process. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

3. For a description of the ENA, see Charles J. Morris, *The Role of Interest Arbitration in a Collective Bargaining System*, 1 INDUS. REL. L.J. 427, 498-503 (1976). See also, descriptions by principal negotiators for the steel industry and the Steelworkers Union, R. Heath Larry, *Inflation, Labor and the Law*, 13 DUQ. L. REV. 203, 218-21 (1974); Bernard Kleiman, *Collective Bargaining in Perspective*, 13 DUQ. L. REV. 481, 490-92, 497 (1975).

4. *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 881 (5th Cir. 1975), *cert. denied sub nom. Harris v. Allegheny-Ludlum Indus., Inc.*, 425 U.S. 944 (1976). The decree radically altered seniority systems throughout the steel industry, so that workers of all races could transfer to seniority units other than the one to which they were initially assigned. As blacks had been disproportionately assigned by employers to the lower-paid and uncomfortable hot-end departments (coke ovens and blast furnaces), they benefitted disproportionately from this new opportunity. The decree also established quotas based on race and sex for the filling of trade, craft and apprenticeship vacancies. Comparable provisions were negotiated in 1974 by the Steel-

unions, such as the Auto Workers) would win enormous wage and benefit increases that produced a standard of living for industrial workers unprecedented in American history.<sup>5</sup>

Like most of my colleagues who represented unions, I thought the National Labor Relations Act (the "NLRA"),<sup>6</sup> and the system of collective bargaining it established and fostered, an unqualified triumph. This rosy view was shared by labor law academics, virtually all of whom devoted their energies in that era to lauding the NLRA and advocating methods for incrementally improving its virtually (but not quite totally, for what need would there be for scholars if perfection were already at hand?) perfect design.<sup>7</sup>

Looking back, I can see that the decline of the NLRA was underway even as I began my optimistic journey. The ENA was not merely, as we thought it then, a solution to a short-term problem,<sup>8</sup> but an early

workers Union and the aluminum industry, without the umbrella of a court-approved consent decree, and gave rise to the litigation that ended with the Supreme Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (holding that a racial quota negotiated voluntarily by private employer and union to address underrepresentation of minorities in craft jobs does not violate Title VII, even though there is no history of prior discrimination by the employer or union).

5. Average weekly earnings of production workers in "blast furnaces and basic steel products" rose from \$166.40 in 1970 to \$509.04 in 1981. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2340, HANDBOOK OF LABOR STATISTICS 318-19 (1989). The comparable figures for production workers in "motor vehicles and equipment" were \$170.07 and \$450.72, and in "petroleum and coal products" \$183.18 and \$491.62. *Id.*

6. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. 1993)).

7. See, e.g., Julius G. Getman et al., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976); Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973); William B. Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964); Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962); Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969). Some scholars today remain optimistic that with appropriate amendments to the NLRA there can be a resurgence of collective bargaining through exclusive representatives. See, e.g., CHARLES B. CRAVER, *CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR UNION* (1993); Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397 (1992) [hereinafter Craver, *National Labor Relations Act*]; William B. Gould IV, *Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform*, 38 STAN. L. REV. 937 (1986); Donna Sockell, *The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality*, 30 B.C. L. REV. 987 (1989).

8. The steel industry had endured a lengthy strike in 1959, which ended only when the Supreme Court upheld a Taft-Hartley injunction after 116 days of strike. *United Steelworkers v. United States*, 361 U.S. 39 (1959). As the parties began negotiations in each triennial period thereafter, steel industry customers, concerned that they might be without steel should another strike occur, began stockpiling. Unable to secure sufficient steel from the American producers to build an adequate stockpile, the steel customers began buying from foreign steel producers. Although no steel strikes occurred after 1959, customers could not know that in advance; thus, there were periodic intervals when steel customers turned to foreign producers to help build

signal that the economic conditions that had enabled the NLRA to succeed were coming to an end.

Today, of course, the global economy is an ever-present reality, the Steelworkers Union, despite exceptional leadership, is half its former size,<sup>9</sup> and the system of collective bargaining that the NLRA promotes is invoked by an ever-shrinking percentage of American workers. At latest count, less than twelve percent of the workers covered by the NLRA are union-represented.<sup>10</sup> "Our national labor policy"<sup>11</sup> is not serving eighty-eight percent of America's workers.<sup>12</sup>

In Part I, I proffer my views as to why the NLRA has fallen so far. I suggest that the ills that afflict the NLRA are only partially curable by amendment of its now-evident weaknesses. The reality is that the vast majority of American workers likely would not embrace collective bargaining as we know it (i.e., exclusive representation by national unions that attempt to organize employees of all employers in an industry) even if such bargaining were available free of all the present legal infirmities. And while collective bargaining through employer-specific or workplace-specific institutions ("enterprise unions")<sup>13</sup> is imaginable, it is not likely to develop spontaneously out of

their stockpiles. The foreign producers, in turn, ultimately realized that they could exploit the *periodic* need for their product by conditioning their willingness to satisfy it upon the customers' entering into *long-term* purchasing commitments. The ENA was designed to prevent this "tying" tactic of foreign producers by providing assurance to American customers that there would be no steel strikes and thus no need to turn to foreign producers to build stockpiles. It was believed at the time that this would effectively eliminate the threat of foreign competition. See Morris, *supra* note 3, at 498-99; Larry, *supra* note 3, at 218 n.63.

9. Membership in the Steelworkers Union fell during the seventies from a high of over 1,000,000 in 1975 to 481,000 by 1989. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 401 (1988) (average per capita membership of actively employed members for a two-year period ending the year cited); U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 424 (1991).

10. *New Administration*, *supra* note 1, at 300.

11. See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977); *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 136 (1976); *Teamsters Union v. Morton*, 377 U.S. 252, 260 (1964).

12. Worse still, the NLRA to some extent obstructs the opportunity for workers to negotiate with their employers through other mechanisms. Section 8(a)(2) of the NLRA forbids the creation of some mechanisms for employer-employee dialogue, see *infra* text accompanying notes 93-98, and the Act as a whole preempts the authority of state legislatures to promote other forms of collective activity (e.g., legal enforcement of a duty to bargain with minority unions, such as Matthew Finkin advocates). Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993). For a description of the NLRA's preemptive sweep, see generally, Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 374-83 (1990).

13. See, e.g., PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 218-24 (1990).

a legal regime focused solely on promoting the right to collective bargaining.

If my predictions are accurate, there is need to examine what role (if any) the law should play with respect to workplaces where no union has been chosen. That is the subject of Part II.

## I. WHY THE NLRA HAS FAILED: EMPLOYEE FEAR OF JOB LOSS

The diagnosis that follows is not predicated on an empirical study, nor on other traditional academic foundations. It represents merely the conclusions of one who participated actively for nearly three decades as a lawyer for a broad cross-section of American labor unions. The proposals for legal change put forth in Part II are not necessarily dependent on the accuracy of this diagnosis—I believe the proposals would have merit *whatever* the explanation for the precipitous decline in resort to collective bargaining—but the reader is surely entitled, as a predicate for evaluating those proposals, to know where their proponent is coming from.

### A. *The Obsolescence of Industry-Wide Unions*

In a nutshell, I believe that the principal reason employees do not opt in greater numbers for unionization today is a fear that, one way or another, going that route will jeopardize their job security.<sup>14</sup> There are many reasons for that fear, only some of which are attributable to defects in the NLRA, and only some of which, therefore, are curable by amending the NLRA.

The NLRA's contributions to this employee fear are well known. The NLRA does not protect workers meaningfully against employer reprisal for attempts to unionize, and it authorizes employers to replace permanently workers who opt to strike.

Workers fear that if they attempt to unionize the employer will retaliate against them. The fear is amply justified. While the NLRA purports to outlaw employer discharges against employees for union-

14. No doubt some part of the explanation of the low rate of unionization is attributable to causes other than those discussed in text. See, e.g., WEILER, *supra* note 13, at 10-15, 105-18 (listing other causes for the decline in union density). But these other causes would not produce the widespread declination of unionization that now exists in the United States, and indeed would have little independent weight were the principal impediments (discussed in text) not also present. For example, it is undoubtedly true that a handful of unions were corrupt, and no doubt some employees declined to select corrupt unions as their representatives. But that would not explain why those employees declined to select *other* unions that were *not* corrupt.

izing,<sup>15</sup> the Act catches but a fraction of the culprits, even then only too late, and ultimately visits sanctions on those caught that are so small as to make union-busting the economically rational choice.<sup>16</sup> Not surprisingly, union-busting is going full tilt.<sup>17</sup> Workers otherwise disposed to unionize will decline the opportunity if they think they will be fired for trying.

Workers likewise fear that if they unionize, and then strike, they will be permanently replaced and lose their jobs in that manner.<sup>18</sup> That fear, too, is justified, given the historic but indefensible interpretation of the NLRA's ban on discharge for striking as allowing employers to permanently replace strikers (indeed, to replace permanently even when an adequate supply of temporary replacements is available).<sup>19</sup>

The employee fears thus far identified are attributable to curable defects in the NLRA. There have been proposals for decades to strengthen the prohibition against discharge for organizing.<sup>20</sup> And a bill is pending in Congress to ban permanent replacement of strikers.<sup>21</sup> These proposals are so patently justified that no creditable argument can be advanced against them—except, of course, an argument that the scheme of labor relations they are meant to lubricate (collective bargaining) is itself undesirable. That these proposals have *not* been adopted by Congress suggests that our society has

15. The NLRA protects the workers' right to "engage in concerted activities for the purpose of collective bargaining," 29 U.S.C. § 157 (1982), and forbids discrimination against employees for exercising that right. 29 U.S.C. § 158(a)(3) (1982).

16. See WEILER, *supra* note 13, at 236-41; Weiler, *supra* note 1, at 1769, 1776-87; Paul C. Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 353-63 (1984) [hereinafter Weiler, *New Balance*].

17. See WEILER, *supra* note 13, at 111-18; Weiler, *supra* note 1, at 1776-81; Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 954-69 (1991).

18. Though the NLRA forbids the retaliatory discharge of workers engaged in concerted action, the Act has been interpreted to permit employers to hire permanent replacements for strikers. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

19. See *id.*; see also *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989).

20. See WEILER, *supra* note 13, at 96-99, 294; Weiler, *supra* note 1, at 1804-22; Gerald E. Rosen, *Labor Law Reform: Dead or Alive?* 57 U. DET. J. URB. L. 1 (1979).

21. The House of Representatives passed the Cesar Chavez Workplace Fairness Act H.R. 5, 103d Cong., 1st Sess. (1993) on June 15, 1993 with a vote of 239 to 190. The bill amends the NLRA and the Railway Labor Act and makes it an unfair labor practice for employers to hire or threaten to hire permanent replacements for economic strikers. See 139 CONG. REC. H3518-68 (daily ed. June 15, 1993). The identical Senate version of the bill, S. 55, 103d Cong., 1st Sess. (1993), cleared the Senate Labor and Human Resources Committee on May 5, 1993 by a vote of 10 to 7. *Striker Replacement Bill Clears Labor Committees*, 143 Lab. Rel. Rep. (BNA) 78 (May 17, 1993). Similar legislation was debated during the 102d Congress, but the Senate version failed to survive a senate filibuster.

turned against collective bargaining as the ordering scheme for employer-employee relations; or, more precisely, has abandoned it as the ordering scheme for any but the small fraction of workplaces where collective bargaining has thrived despite the obstacles.

But even if the proposed changes in the NLRA could somehow be enacted, I doubt that we would see a resurgence of collective bargaining to the eminence it enjoyed in the 1950s and 1960s. There might well be a few million workers who would unionize if relieved of the fears of employer reprisal and permanent replacement (and that would be a significant contribution in its own right—how many statutes provide material benefit to that many citizens?), but I know of no serious observer who believes that just curing the NLRA's ills would lift unionization in the private sector beyond the twenty percent mark.

What is it, then, that is deterring the rest of America's workers from unionizing? It is fear of job loss here, too, but fear of a different kind.

If one charts the industries where unions were successful, they are characterized by one common ingredient: the union was able to eliminate competition among employers based on labor costs. In large part, the industries that were unionized were themselves cartelized, and were able to pass much of the increase in labor costs on to consumers.<sup>22</sup> In others, the employers all joined together in multiemployer bargaining (e.g., trucking), or at least coordinated their bargaining with the union (e.g., steel), to assure that labor costs would be equalized.<sup>23</sup> Still other industries were covered by prevailing wage laws that assured that labor costs were not a basis for competition (e.g., public works construction), or by regulatory regimes that fixed prices among competitors and thereby removed any incentive to compete over labor costs (e.g., airlines).

The falloff in union density has coincided with the shrinkage or disappearance of industries in which it is possible for unions to remove labor costs as a ground for employer competition. Foreign com-

22. The automobile and electrical equipment industries are textbook examples of cartelized industries that are also highly unionized. Such oligopolistic industries are characterized by a high degree of interdependence among its members. Even without outright price collusion, there is a game theoretic at work that enables firms within the industry to pass costs along to consumers. *See, e.g.*, EDWIN MANSFIELD, *MICROECONOMICS THEORY AND APPLICATIONS* ch. 12 (4th ed. 1982).

23. Steel industry negotiations were in form like multi-employer bargaining—the companies joined together and negotiated as a group—but the negotiations eventually resulted in separate collective bargaining agreements for each company with variations in noneconomic provisions.

petition by producers with much lower labor costs has of course been the most dramatic change, but deregulation and easier access of new entrants have also furnished increased incentives for cost competition, and have led employers increasingly to attempt to gain a competitive edge through lower labor costs.<sup>24</sup>

At the same time, this country has experienced (perhaps not coincidentally) a chronic shortage of jobs. That shortage would in any climate make employees risk averse about losing the jobs they currently hold. But the fear is magnified, for there is a widespread perception that the shortage may be a permanent condition, as the rest of the world increases its share of the global market's business.<sup>25</sup>

The fear that grips most workers today is not that they will be fired or permanently replaced, but that their jobs will disappear. They worry that their employer will lose out in the competitive world and go under, or that the investors will move their capital (and thus the jobs) to another locale (perhaps another country) whose lower wage scales enable more effective competition. Having absorbed this message, workers today have become persuaded that the key to the survival of their jobs is that their employer be an effective competitor—including, if necessary, a competitor based on lower labor costs.<sup>26</sup>

This altered economic climate has profound implications for traditional unionism. In the past, unions held out the promise that, by organizing an entire industry and equalizing wages, they could secure a larger share of the pie for workers. Within an industry, employees

24. The suffering of the automobile and steel industries in the face of increased foreign competition, and the labor struggles of the airline industry in the wake of deregulation, are too well known to require documentation.

25. Of course, long-service employees would be risk-averse about losing their present jobs even in a healthy job market, for the workplace-specific capital they accumulate cannot be replicated if they transfer to a job with another employer. See WEILER, *supra* note 13, at 76, 141.

26. When sharing informally with union lawyers the thoughts expressed in this article, the point most often challenged is my perception that workers today have internalized their employers' desire to compete based on lower labor costs. I said at the outset that my diagnoses are not predicated on empirical research. But I have noticed that non-unionized employers, when confronted with an organizing campaign, frequently invoke the following theme:

Remember company X down the block. It was a thriving firm until the employees selected a union. The union forced labor costs up despite the company's warning that it couldn't afford them, and the company closed the plant [moved, went out of business, etc.]. Do you want this to happen here?

This theme appears to be part of the standard bag-of-tricks used by management consultants who are retained to resist organizing campaigns. I surmise that these consultants, who are presumed to have expertise in what will scare workers (otherwise why would employers retain them?), have detected employee labor-cost conservatism. And the results of organizing drives resisted by these consultants hardly serve to refute that hypothesis.



of one company furnished "mutual aid and protection"<sup>27</sup> to employees of competing companies, as they waged a common war against the corporate barons. Today, employees do not expect that all employers in an industry will survive. The fittest will survive, and they want their employer to be in that number. Far from joining a movement for equality among all workers in an industry, the endangered worker today is anxious to assure that his or her employer has a competitive edge over others in the industry. And, if labor cost competition is necessary to facilitate gaining that edge, well, it's better than losing one's job altogether.<sup>28</sup>

In sum, as employers within an industry compete with each other to survive, so do their employees. Today's employee wants to win the battle for survival, if necessary at the expense of other employees in the industry working for other employers.<sup>29</sup>

Thus, the traditional union appeal is not congruent with the fears of modern workers. Indeed, the union that appears at the door of an unorganized workplace may be seen by the employees as having dual interests. To be sure, the union hopes to improve the lot of those it seeks to enroll. But at the same time, an important reason for the union's desire to improve their lot (i.e., to bring their labor standards up to those of the already-organized employers) is *to eliminate the competitive advantage the unorganized employer (and derivatively its employees) presently enjoys*.

What is more, the traditional weapon that the NLRA offers to extract better terms from the employer—the strike—is, even apart from the fear of permanent replacement, an anachronism in this competitive world.<sup>30</sup> The last thing the worker frightened for the survival

27. The NLRA seeks to overcome unequal bargaining power between employers and employees, "by encouraging the practice and procedure . . . 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 and protection." 29 U.S.C. § 151 (1982).

28. See *supra* note 26.

29. This is, to be sure, a sorry picture. Indeed, it accounts for another recent phenomenon: the willingness of employees to cross picket lines and take permanently the jobs of strikers. There was a day when it was thought unethical to "steal" the job of a long-term employee who was simply attempting to better his working conditions. Nowadays, the prevailing ethic is different: one who strikes has stupidly left his property (his job) lying unattended so that anyone who happens along can take it (finders keepers!). One hopes that the economy can be transformed so that these incentives disappear. I report them as I see them; I should not be understood to be embracing as desirable the libertarian world that creates these incentives.

30. Collective bargaining under the NLRA has been described as a "mutual deterrence system," where both sides wield economic weapons to exert the necessary pressure for compromise. Weiler, *New Balance*, *supra* note 16, at 367.

of the firm wants is to engage in "economic warfare"<sup>31</sup> that will cripple the employer's ability to compete. In the golden days of steel and auto unionism, a strike was not a job-threatening undertaking. Wounding one employer was wounding all, for the gains extracted from one would be enjoyed ultimately by the workers of all. Today, wounding one's own employer is wounding one's self.

Of course, the grim scenario I have just recounted does not characterize every industry in America. The principal growth areas in our economy are in services, such as hospital care, in which employers do not face global or even national competition. In these areas, unionization may well flourish under a properly-amended NLRA. Indeed, if there were a significant turnaround in job prospects in this country, it might well be that unionization could expand in quantum leaps that would exceed my prognoses. But so long as vast parts of the employment map are marked by endangered workplaces facing competition based in part on labor costs, it seems unrealistic to expect that employees will opt for a regime that is centered on the strike threat and depends upon industry-wide wage equalization to prosper.

### B. *The Barriers to Enterprise Unionism*

The account to this point, if accurate, explains the reluctance of employees to join industry-wide unions, but it does not foreclose the possibility that they would join unions confined to a single company or, perhaps, to a single workplace. (Even within a single company, employees at different plants may be competing. The recent episode in which General Motors engaged in a lengthy review of which plants to close and which to retain exemplifies the incentive for employees to make theirs the most cost-effective plant).<sup>32</sup>

Paul Weiler has identified enterprise unionism as the road to collective bargaining in the future,<sup>33</sup> and Samuel Estreicher's piece in this Symposium points in the same direction.<sup>34</sup> It is, indeed, imaginable that employees will evolve into enterprise unions, but I doubt that would eventuate merely from strengthening the NLRA. Employees

31. "[W]e have built into our labor relations system a species of industrial warfare by which the parties attempt to settle disputes through the deliberate infliction of severe economic losses on each other." *Id.* See also *id.* at 364-67.

32. See, e.g., Donald W. Nauss, *GM Hoping to Cut More Jobs*, L.A. TIMES, Sept. 25, 1993, at D1; Warren Brown & Frank Swoboda, *For GM, a Makeover is Measured in Years*, WASH. POST, Apr. 4, 1993, at H1.

33. See WEILER, *supra* note 13, at 218-24.

34. Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV 3, 15-18, 20-21 (1993).

will be reluctant to commit their fate to an "exclusive" representative—one with authority to bind them—without having some basis for trusting that the representative will be competent and will operate in their interests. Employees cannot simply "create," spontaneously, an institution with the expertise needed to bargain on such complex issues as pensions, insurance and occupational health.

Enterprise unions more likely will evolve out of institutions that begin in the workplace on a less formal, nonexclusive basis and prove their worth in that capacity. A classic example is the National Education Association (the "NEA"), whose affiliates began as nonbinding entities dedicated to working with school management (indeed, whose membership included school principals) on problems of mutual professional interest, acquired and demonstrated expertise, and then evolved in the late 1960s and early 1970s into exclusive bargaining representatives for teachers. Today the NEA is America's largest union, representing teachers in virtually all the public schools in America in locales that are otherwise devoid of significant union activity. By contrast, the American Federation of Teachers, which from the start was organized as a traditional collective bargaining institution, never succeeded at organizing teachers outside the cities with strong union roots.<sup>35</sup> The lesson is that collective bargaining evolves out of institutions that garner employees' trust. They will not spring into existence out of a revitalized NLRA. There must be a law that enables nascent institutions to grow. I suggest in Part II that a regime that encourages "service providers" would provide the soil out of which enterprise unionism might grow.

Yes, amend the NLRA to cure its defects, and permit all who desire representation through exclusive bargaining representatives a meaningful opportunity to have it. But at the same time, let's focus on the role government should be playing vis-à-vis the majority of workplaces that will not, at least in the near future, be organized under the NLRA.

## II. A LABOR LAW FOR UNORGANIZED WORKERS

There exists today a haphazard labor law for workers who do not have an exclusive bargaining representative. The states have declared that the unorganized worker's relationship with the employer is contractual, and state and federal governments have enacted a variety of

35. See Michael Finch & Trevor W. Nagel, *Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform*, 1984 WIS. L. REV. 1573.

substantive statutes designed to assure the provision of minimal terms to all workers.<sup>36</sup> In most cases, of course, the "contract" is invisible:<sup>37</sup> the terms and conditions are those fixed unilaterally by the employer, subject to the minima prescribed by statute. Employees "negotiate" only by accepting or rejecting the employer's proffered terms. The employer's unilateral assessment of the potential of employee exit to more beneficent employers is the only employment-related constraint influencing the terms the employer proffers.

Richard Epstein suggests that this should be the full measure of the law's concern for the unorganized worker.<sup>38</sup> Other contractual relationships prosper with no greater governmental intervention, so why

36. Federal minimal terms protection for employees is evident in now familiar acronyms. *E.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206 (1982); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1982); Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1982); Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1982); Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (1982). Every state has statutes conferring still additional minimum terms. *E.g.*, ME. REV. STAT. ANN. tit. 26, § 625-B (West 1987) (requiring employers to notify employees 60 days in advance of a plant closing and to provide severance pay to employees who lose their jobs as a result); MONT. CODE ANN. § 39-2-904 (1987) (requiring a showing of good cause for employees dismissed in retaliation for refusal to violate public policy or express personnel policies).

37. Some contracts are more visible than others. Courts in several states have found the employer's written personnel policies to constitute enforceable contractual promises. *See, e.g.*, *Small v. Springs Indus., Inc.* 357 S.E.2d 452, 455 (S.C. 1987) (holding that an employer may be bound by provisions of an employee handbook absent a conspicuous disclaimer); *Leithead v. American Colloid Co.*, 721 P.2d 1059, 1062 (Wyo. 1986) (holding that an employee handbook "may change the employer's unfettered right to discharge an employee"); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892 (1980) (holding that employer's written policy statements may create protection against discharge without cause).

38. Richard Epstein is the most prominent exponent of this view. Epstein and other neo-classical economic theorists contend that the law should not interfere with free contractual relationships unless fraud is involved. Under this theory, there is nothing unique in the employment contract that warrants legal intervention; employees have merely contracted to supply labor, the same as product suppliers agree to provide other factors of production. The NLRA abrogates freedom of contract by regulating labor-management contracts and expropriating the employer's property interests. *See, e.g.*, RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* chs. 2-5 (1992); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357 (1983); Richard A. Epstein, *In Defense of the Contract at Will*, 51 *U. CHI. L. REV.* 947 (1984); Richard A. Epstein, *Agency Costs, Employment Contracts, and Labor Unions*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* 127 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

Charles Fried also claims that the NLRA system of restructuring labor markets in favor of employees should be abandoned:

One question in particular I would like to raise is whether it is any longer necessary or even wise to retain the premise that the best protection of workers' interests is to be found in a restructured market, that is, one in which workers are assured of their rights by guaranteed access to a process of bargaining and in which their strength is assured through the monopolistic principle of exclusive representation.

Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 *U. CHI. L. REV.* 1012, 1019 (1984). Instead, Fried proposes that labor relations be guided by the free market and supplemented when necessary by minimal terms. Fried's market solution, however, backs away from Epstein's position that the NLRA represents an unjustifiable redistribution of employer property towards the employees:

not the labor contract? If one truly believes this, the NLRA should be repealed (and Epstein so contends).<sup>39</sup>

The underlying premise of the NLRA is that market failures render the contracting process imperfect.<sup>40</sup> If one accepts that premise, as I do,<sup>41</sup> it not only justifies the NLRA's existence, but leads to the additional question that underlies this paper: If those imperfections are to be addressed by law for the organized worker, why not for the unorganized?

In an earlier day, I would have said that this is a false paradox: the NLRA provides a solution for *all* workers, and those who opt to reject it have no claim upon the government to proffer an alternative. But the conditions I have described in Part I persuade me that NLRA-style representation is not as viable an option in some industries as in others, and thus that workers whose conditions are not suited to the NLRA have a legitimate claim that government seek alternative ways to cure the market imperfections that afflict their efforts to bargain with their employers.

Legislative dictation of minimum terms is of course one way to protect unorganized employees, and certainly there is room for such legislation. But a legal regime that did no more would be arid indeed. There are vast areas of employee interest that can never be captured by such legislation (when can I take my vacation? will I get a raise this year? will I get the next promotion? can we get better food in the

Epstein's analysis is vulnerable at its central premise: the definition of the property rights involved. Only by assuming that the preexisting common law system of property rights had some natural, preconstitutional status can the expropriatory thrust of the [NLRA] . . . be criticized. If, however, property rights are essentially conventional, then Epstein runs up against the problem of showing why the [NLRA] system does not represent simply a redefinition by society of what have always been social conventions in any event.

*Id.* at 1016.

39. See *supra* text accompanying note 38.

40. See *infra* note 86. Cass Sunstein indicates the weak link in the market theory is its assumption that the original distribution of wealth is free of market flaws:

A common attack on [the NLRA] insists that if employees in fact value self-government, the marketplace will produce it. But this attack is vulnerable to a critique that should by now be familiar. It takes for granted the current distribution of wealth and entitlements and the current set of preferences. It fails to take account of the possibility that an unconstrained market in labor may produce relationships, attitudes, and allocations of power that are on balance highly undesirable for society in general.

Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1059 (1984). For Paul Weiler, the essential labor market imperfection is the unequal bargaining power between employer and employee. WEILER, *supra* note 13, at 77-78, 183-84. Moreover, Weiler posits that the relationship of career employees to their workplace creates a special vulnerability to market imperfections. *Id.* at 136-52.

41. Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2785-93 (1991).

cafeteria?). Unless one is content to rely on traditional contract law for all above the minimum (and one should not be, because of market imperfections to be discussed next), the law has an interest, beyond mere dictation of minimum terms, in facilitating a dialogue between employer and employee.<sup>42</sup>

Borrowing from traditional notions of market failure, and from some of the choices made in the NLRA designed to overcome market failure, I have constructed the following set of proposals that I believe are necessary to create a meaningful climate for bargaining by employees who do not opt for exclusive recognition under the NLRA.

### A. Protection Against Reprisal

It is a curious feature of our current labor relations regime that the law protects against employer reprisal (however inadequately) those employees who seek to bargain concertedly with their employer,<sup>43</sup> but affords no protection against reprisal to the individual employee who attempts to bargain with the employer.

The relationship between employer and individual employee is, in every state, deemed contractual.<sup>44</sup> But employees must be bold indeed to insist upon actual negotiation of that contract, as opposed to simply accepting the employer's terms.

The employer-employee relationship is, on a day-to-day basis, one of domination and subordination.<sup>45</sup> The employer commands,

42. Moreover, governmentally dictated solutions are an imperfect mechanism for regulating the workplace. Of necessity, such solutions must be declared at a high level of generality. But often, the parties directly interested could craft workplace-specific solutions that were more desirable. See WEILER, *supra* note 13, at 153-56, 181-85; Gottesman, *supra* note 41, at 2794-98; Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86, 108-09 (1986).

43. See *supra* note 15.

44. But see *supra* text accompanying note 37.

45. Recently, "critical" legal scholars have sought to address the dependency and subordination of the employees by promoting workplace democracy. These scholars view the relationship between employers and employees as essentially artificial (i.e., Karl Marx' critique of capitalist enterprise as the nexus of a social relationship between the owners of the means of production and labor), and criticize the current system of labor relations as inadequate to address the skewed properties of the current system of economic production.

For example, James Raskin criticizes the current system of collective bargaining as faulty because it treats union participation as a "foreign entity" grafted onto the workplace, rather than an "organic 'activity'" that is essential to employees. James B. Raskin, *Reviving The Democratic Vision of Labor Law*, 42 HASTINGS L.J. 1067, 1071 (1991). Similarly, Karl Klare proposes that, "[l]abor law should be framed and administered with a commitment to democratizing decision making in the workplace and to redistributing power in labor markets in favor of employees . . . ." Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 5 (1988). See also Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1977).

and the employee is expected to obey. A willful refusal to accommodate the employer's wishes is insubordination. Against that backdrop, the employee who manifests dissatisfaction with the employer's proffered employment terms—and, worse still, has the audacity to “demand” better—courts the employer's displeasure. Not every employer will understand or appreciate that the terms of the contract are a pre-condition to the onset of the domination-subordination relationship, and necessarily must be arrived at independent of that relationship. And even those employers who do understand this may doubt that the employee who is strident on this issue will be docile where docility is required.

Not surprisingly, then, most employees steer clear of demanding explicit negotiations of employment terms. They accept what the employer offers; if the offer ceases to be the best available, they voice their displeasure by exiting.

The threshold question is whether there is any justification for legal intervention to protect the employee who asserts a right to bargain. Typically in contract law, the parties are free to deal with whom they please. If I am put off by a contractual partner who seeks to renegotiate on terms I find annoying, or in a manner I find offensive, I am free to send him away, to terminate our relationship. I can pick my contractual partners to suit my tastes.

The NLRA manifests a consensus, that I believe still holds,<sup>46</sup> that the employment contract is different. The employee's inability to replace easily the existing employment (because of relative immobility, the unavailability of comparable employment elsewhere, and the accumulated firm-specific benefits that the employee would lose by transferring elsewhere)<sup>47</sup> means that, unless the employer is constrained from reprisal against employee efforts to negotiate, employees will be unwilling to assume their role in a traditional contractual dialogue. While there is much debate about the meaningfulness of the phrase “lack of bargaining power” I suggest that it *is* meaningful at least in this threshold sense: the typical worker in America today lacks the “power” literally “to bargain” with the employer. This is an instance of market failure attributable to the peculiar dependency of the employee on the current job, and perhaps also to the psychology of

46. See WEILER, *supra* note 13, at 136-52; Estreicher, *supra* note 34, at 13-15; Finkin, *supra* note 12, at 195; Clyde W. Summers, *A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129 (1993).

47. See WEILER, *supra* note 13, at 63-71, 140-42.

subordination<sup>48</sup> that attends the day-to-day relationship and that must be ruptured in this instance if explicit bargaining is to occur.

I take it as a given, then, that the law may appropriately act to protect the employee's interest in negotiating without reprisal. That protection is needed all the more by the employee who attempts to negotiate individually, rather than in a group; a group may have combined leverage that will act as a deterrent against employer retaliation, but an individual (except for the rare irreplaceable employee) will not.

Yet the NLRA protects only "concerted activities" against reprisal, and despite the impassioned pleas of some scholars,<sup>49</sup> it has been interpreted consistent with its literal words. The upshot is that if two or more employees approach their employer with bargaining demands they enjoy NLRA protection, but if a single employee does so there is no protection. In a world in which most employees deal individually with the employer, this is a rather astonishing gap.

States might fill the gap by including reprisal for attempting to negotiate as one of the grounds of discharge that will be regarded as "wrongful" and thus a common-law tort. Presumably, state protection of this type would not be preempted by the NLRA so long as the employee is acting alone.<sup>50</sup> And, at least until the NLRA is reformed to provide truly meaningful protection against reprisals, coverage under state tort law might be far more beneficial for employees than amendment of the NLRA to protect individual activity.

The downside, of course, is that it would take forever for fifty states to decide to protect individual employee bargaining activity,

48. See *supra* text accompanying note 45.

49. See, e.g., Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286 (1981) (arguing that the NLRA was intended to protect workers from retaliation whether acting individually or in concert); B. Glenn George, *Divided We Stand: Concerted Activity and the Maturing of the NLRA*, 56 GEO. WASH. L. REV. 509 (1988) (arguing that the conservative construction of "concerted" defeats the NLRA's goal of establishing a procedural system to facilitate communication between employer and employee).

50. The Supreme Court has consistently ruled that the NLRA preempts state law that attempts to regulate conduct that is either protected or prohibited by the NLRA, or that is even arguably prohibited. Gottesman, *supra* note 12, at 355. As the NLRA does not purport to prohibit the firing of employees for activity that is not "concerted," the states presumably are free to regulate such conduct. However, if two or more employees attempt to negotiate in concert, traditional NLRA preemption doctrine suggests that the states would be preempted from providing protection, notwithstanding that NLRA remedies are woefully inadequate. *Id.* at 372-73. *But see id.* at 391-94 (arguing that the common wisdom is wrong, and that the proper construction of the NLRA would not preempt stronger state remedies for conduct prohibited by the NLRA). One can imagine cases in which an employee acts alone, but the employer alleges that it thought the employee was acting in concert with other employees; in that scenario, the employer could argue that its conduct was at least arguably prohibited by the NLRA, thus preempting state regulation.



whereas federal law could decree it in a stroke. The optimal protection would be a federal law with appropriate teeth, as outlined below. In its absence, the second-best would be expansion of the NLRA to protect individuals against reprisal, however inadequate the protection, *but without preemption of state law that provides parallel prohibitions against such reprisals (which might be stronger in substance and remedy than the federal)*.

Whether federal or state, *meaningful* protection of the employee's right to bargain free of reprisal requires measures that would be regarded as radical, and beyond the realm of political acceptability, in today's climate. Employees will not be encouraged out of their shells unless the law provides a truly effective protection against the risk of job loss. Most employees will be extremely risk averse about putting their jobs on the line, and the determinative calculation in their eyes will be whether it is *possible* that by demanding negotiations they will lose their jobs. A regime such as the NLRA provides, even if extended to individual employees, would likely prove meaningless, for several reasons.

First, employees will not be assured that improperly motivated discharges will be caught and corrected.<sup>51</sup> The NLRA places the decision whether to prosecute upon a public official vested with unreviewable discretion. Moreover, even if the employee could be confident that an unfair labor practice complaint would be filed, so long as legal victory depends upon proving the employer's bad motive, a significant percentage of badly motivated discharges will escape condemnation for want of proof. Risk-averse employees will fear that will be their fate.

Prospects of success would be improved, of course, if the burden of proof were inverted (the employer who fires within x months of an employee bargaining demand must prove the absence of bad motive), or if a general regime of protection against discharge without just cause were instituted (so that a finding of motive would in many cases be rendered unnecessary).<sup>52</sup>

Still, even if employees were assured that they could prevail in such lawsuits, the deterrent effect would not be wholly removed. If the remedy is back pay and reinstatement (even if supplemented with

51. See *supra* text accompanying notes 16-17.

52. Of course, there will still be cases where the employer indeed had good cause for discharge, but would not have acted upon that cause but for the employee's protected negotiating demands. In such cases, proof of motive would remain essential. See, e.g., *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3d Cir. 1943).

attorneys fees), the employee will not truly be made whole. Reinstatement to a nonunion workplace rarely works: employees are reluctant to accept it, fearing ongoing employer harassment motivated not only by the initial "insubordination" that prompted the discharge but also by the animosity engendered by the subsequent litigation; and even when employees do accept reinstatement, they usually leave shortly because such harassment does occur.<sup>53</sup>

To be truly effective, a remedy for reprisal discharges must fulfill one or the other of two very ambitious goals. It must either provide a remedy so attractive that employees will be willing to trade (i.e., risk) their jobs for it, or so powerful that employees can be confident their employers will be deterred from discharging. Both goals might be met if employees were entitled to opt against reinstatement, and instead to receive compensatory damages that fully reflect the degree of loss (including future loss) they have suffered by reason of the discharge. Even this would not be enough, however, if employers succeeded in escaping detection in any significant percentage of cases. In that event, as the law and economics literature teaches, the solution is punitive damages geared to the percentage likelihood of detection—the likelier the employer's escape, the higher the damages should be when the employer is caught.<sup>54</sup> The current NLRA's limitation to back pay is an invitation to violations: unless employers are caught virtually one hundred percent of the time, there is economic incentive to violate.

Notice that, in the case of individual bargaining, there is no "public interest" in preferring reinstatement as a remedy. In the union organizing context, the concern is that if the discharged employee does not return to the workplace a pall will have been cast over the organizing effort (and, perforce, at least one pro-union vote will have been removed from the electorate).<sup>55</sup> But in the context of individual bargaining, if every employee knows that he or she will receive adequate monetary compensation if discharged for proffering bargaining demands, the public has no interest in insisting upon reinstatement in disregard of the victimized employee's preference for a forward-looking compensatory remedy.<sup>56</sup>

53. WEILER, *supra* note 13, at 85-87; Weiler, *supra* note 1, at 1791-93.

54. A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 75-84 (2d ed. 1989).

55. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 195 (1941).

56. A minor qualification is that the failure to reinstate in the individual bargaining context might act as a deterrent to future employees who might wish to organize collectively. This seems remote, however.

The remedies available under state tort law for “wrongful discharge” come closer to approximating the package I have suggested than does anything that is likely to emerge in any federal statute. When an employer has discharged an employee for a reason that a state court holds offensive to public policy, and thus tortious, that court holds that the employee is entitled to sue for past and future lost earnings, as well as punitive damages.

I would be nervous about any effort to expand the NLRA to extend protection against individual bargaining unless it were a certainty that the final product—with remedies that surely would be inadequate—was not going to preempt state law. The scenario to be feared is one in which well-intentioned legislators introduce a bill in Congress that would protect individuals against reprisal, provide adequate remedies, and explicitly preserve parallel state law, only to have the bill whittled down during consideration so that the remedies are inadequate and state law is preempted; at that point, it would be employers who would be championing its passage.<sup>57</sup>

### B. Provision of Information

Another anomaly of existing law is that the NLRA requires the employer to provide information to a union when chosen as exclusive bargaining representative, but contains no requirement that information be provided to employees who have not chosen an exclusive representative.<sup>58</sup> Nor does any state mandate the provision of such information on a generic basis.

It is generally understood that there is an information imbalance between employers and employees, and that the imbalance is a form of market failure that justifies legal intervention.<sup>59</sup> The employer knows much more about its operations, policies, etc., than the employees. Furthermore, and perhaps more important, the employer knows what its plans for the future are, and the employees do not. The mat-

57. It should not be forgotten that Montana’s just cause statute, with its minimal remedies, was championed by employers seeking to escape the powerful remedies authorized by the Montana Supreme Court for wrongful discharge. See Gottesman, *supra* note 12, at 368-69 n.57; MONT. CODE ANN. § 39-2-901 (1987).

58. 29 U.S.C. § 158(d) (1988); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

59. See Leslie K. 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, 458-59 (1980) (stating that the legal entitlement of union workers to information about their employer’s financial condition and plans is limited in comparison with Germany); cf. WEILER, *supra* note 13, at 288 (indicating that employee participation committees will serve to provide workers with informational resources not otherwise available).

ters employees would most wish to discuss with their employers are those “entrepreneurial” decisions under consideration by corporate officials that might lead to elimination of jobs or radical alteration of employment conditions.<sup>60</sup>

Meaningful bargaining requires access to all the information possessed by the employer that is pertinent to the terms to be negotiated. The NLRA does not provide this even to unions. While information disclosure is required respecting mandatory bargaining subjects,<sup>61</sup> the Supreme Court has excluded from the “mandatory bargaining” category many employer entrepreneurial decisions that affect employees,<sup>62</sup> in part out of concern that the union (which ordinarily represents competitors of the employer) cannot be trusted to maintain the confidentiality of the information,<sup>63</sup> and in part out of concern that the union would exploit strategic opportunities, which the NLRA creates in the case of mandatory bargaining subjects, to delay implementation of the employer’s plans and/or to strike to prevent their implementation.<sup>64</sup>

60. See Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921 (1993) (arguing that mandatory bargaining should be expanded to include capital allocation decisions (e.g., locating a new plant or relocating current production) because such “economically rational” employer business choices can shield anti-union animus). See also Marleen A. O’Connor, *Restructuring the Corporation’s Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991) [hereinafter O’Connor, *Nexus of Contracts*] (employers can opportunistically breach the implicit employment contract because “informational asymmetries” prevent employees from having access to operational and financial information); Marleen A. O’Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993) (restructuring corporate law is necessary to prevent opportunistic breach by employers).

61. 29 U.S.C. § 158(d) (1988); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

62. The Supreme Court, declaring that “[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business,” has interpreted the NLRA’s bargaining provision *not* to require bargaining “over management decisions that have a substantial impact on the continued availability of employment [unless] . . . the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.” *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678-79 (1981).

63. *Id.* at 682-83 (“[M]anagement may have great need for . . . secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality . . .”).

64. In the case of mandatory bargaining subjects, the employer cannot unilaterally change the status quo without first bargaining to an impasse with the union. *Id.* at 674-75; *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The Court likewise implicitly assumed that a union’s right to strike applies only to mandatory bargaining subjects, *First Nat’l Maintenance*, 452 U.S. at 679 n.17, 686 n.23, but this seems erroneous. It is a refusal to bargain within the meaning of § 8(b)(3), (d) for a union to refuse to sign an agreement on mandatory terms because striking over nonmandatory terms. But if a union announces its readiness to sign a collective bargaining agreement—an agreement that does not contain a clause forbidding strikes over nonmandatory entrepreneurial decisions—there is nothing in the NLRA that would prohibit that strike. Quite

But the objection to furnishing information to an institution that deals with the employer's rivals is inapplicable when an individual employee seeks the information, at least so long as appropriate (and enforceable) pledges of confidentiality are provided by the employee.<sup>65</sup> And, as the employer is under no obligation to withhold implementation pending impasse absent a certified bargaining agent (and need hardly fear a strike by a single employee) the other factors that have influenced the Court to decline ordering bargaining (and hence the employer's furnishing of information) also are inapplicable.<sup>66</sup>

No doubt, employers would be tempted to defy a statutory command that they turn over to employees information they would prefer not to disclose. But it need not require a vast administrative regime to enforce such a command. If there is adequate legislative will, a way can be found. The statute could specify with some precision the categories of information that employers were required to furnish upon request to employees. If the penalty for noncompliance were demonstrably greater than the potential gains from noncompliance, the employers' efficient choice would then be compliance.<sup>67</sup>

There are already a number of federal statutes requiring employers to disclose particular categories of information to employees (ERISA,<sup>68</sup> OSHA<sup>69</sup>), accompanied by substantial penalties for noncompliance. My proposal would merely generalize that obligation to all matters pertinent to the terms and conditions of employment.

simply, the Act contains no provision forbidding strikes over nonmandatory subjects, and unions engage in such strikes all the time (e.g., sympathy strikes). Indeed, § 13 of the Act declares that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on such right." 29 U.S.C. § 163 (1982). Unless a strike violates some other provision—as would a strike over nonmandatory subjects that prevented agreement on mandatory subjects—it is protected by § 13.

65. The common law has always protected the employer's interest in preventing disclosure of trade secrets by current or former employees, and would surely enforce reasonable agreements restricting disclosure of other confidential information. See, e.g., *Schulenburg v. Signatrol, Inc.*, 212 N.E.2d 865 (Ill. 1965); Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. Legal Stud. 683 (1980).

66. The decision to relieve employers of the burden of dealing with unions about entrepreneurial decisions was driven not only by the confidentiality concern, but by others that likewise are inapplicable in the individual employee setting. The Court was concerned in *First National Maintenance* that making bargaining mandatory about these subjects would trigger the NLRA's prohibition against unilateral change until impasse is reached, and thus inject delay that might be injurious to the employer; and the Court thought (perhaps erroneously, see *supra* note 64) that by declaring such decisions nonmandatory bargaining subjects, unions could not call strikes over them. 452 U.S. at 679 n.17, 686 n.23.

67. POLINSKY, *supra* note 54.

68. Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1982).

69. Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1982).

### C. *Collective Goods*

A third type of market failure that infects the contractual relationship between employer and individual employee is what is commonly called the "collective goods" or "public goods" problem.<sup>70</sup> Some conditions of employment cannot be fixed for a single employee; a change to help one necessarily affects many or all. Thus, the employee who wants cleaner air in the plant cannot obtain satisfaction of that demand without its conferral on many other employees as well. There are two implications of this truism:

(1) There are many benefits that employees would collectively "purchase" in bargaining with the employer (e.g., trading a few cents in wages per hour for a reduction in chemical toxins) that no one employee could afford to purchase alone (indeed, that would not be worth the cost for the one employee even if she could afford it).

(2) Absent a mechanism for making all employees pay for such a "collective good," there will be a tendency for many employees to free-ride, and thus for the common interest not to be obtained.<sup>71</sup>

There are many collective goods among the employee's possible terms and conditions of employment, i.e., benefits that cannot be provided to one employee without automatically furnishing it to others: many types of pensions, group health insurance, seniority, etc. Collective bargaining through an exclusive bargaining representative is generally thought to be uniquely suited to solving these collective goods problems. The union bargains on behalf of all the employees, and binds all, so that it can "trade" (in reduced wages) whatever is necessary to purchase the collective good.<sup>72</sup>

What happens to collective goods in the absence of an exclusive representative? The problem is not quite as difficult as it would be, for example, if the *neighbors* of a factory wanted clean air.<sup>73</sup> The factory does not have the option unilaterally to provide the clean air and "charge" the neighbors for the cost of providing it. In the nonunion workplace, however, the employer *does* have the power to provide the clean air and adjust wages appropriately to pay for it. Thus, one possible answer is that the law need not concern itself with collective goods

70. The primary resource on the public goods problem is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

71. See Gottesman, *supra* note 41, at 2789-90; Richard B. Stewart et al., *Market Failure: The Collective Goods and Externality Problems*, in *ENVIRONMENTAL LAW AND POLICY* (forthcoming 1994).

72. Gottesman, *supra* note 41, at 2788-90.

73. The factory-neighbor hypothetical is explored in Stewart et al., *supra* note 71.

problems in the workplace. The astute employer has an interest in learning what collective goods its employees would pay their "fair share" to get, and to implement them unilaterally through wage adjustments. All the employer need do is provide sufficient forum for individual employees to "signal" their preferences (a written questionnaire, for example, might do the trick).

This answer, however, seems too facile. Collective goods are expensive, and their design is usually complex. Pensions, insurance, and clean air are not simple "yes-no" items for a questionnaire. Employees are unlikely (absent retention of expert advisors) to understand all the complexities involved, let alone transmit signals clear enough for an employer to develop a package that optimizes employee interests. Intensive negotiations, with both sides assisted by experts, plainly are the best way to achieve the optimal provision of collective goods.

But is this rejoinder likewise too facile? After all, if employees would be best served by collective bargaining, would they not opt for it (or at least do so if the NLRA's imperfections were removed)? My supposition is that many employees would welcome a regime in which they could negotiate collectively with their employer over some or all collective goods problems, while retaining their right individually to deal with respect to all other issues.<sup>74</sup> One legal solution thus might be to expand the NLRA to afford employees the option of exclusive recognition on particular subjects, to be picked from a menu of collective goods. For example, employees who resist unionization out of fear that seniority will displace merit as the criterion for wages and promotion might opt for unionization if it applied only to pensions and insurance.

Another option would be simply to await the emergence of service providers who would aggregate a number of clients from within a particular work force and thus be able to bargain for collective goods on their clients' behalf. This cryptic observation will hopefully become clear from the discussion that follows next.

74. It is possible to achieve this under the current NLRA. The sports and entertainment unions are exclusive bargaining representatives under the NLRA, but they have opted to leave the determination of some issues (e.g., salaries above prescribed minima) to individual negotiation. But an employee voting today for an exclusive representative has no assurance that the entity, once elected, will "opt" to delegate some issues for individual bargaining. My proposal in text would provide assurances to employees *up front* that election of a union would not result in sacrificing control over issues the employee wants to retain for individual bargaining. It might, therefore, attract employees unwilling to take the risk of loss-of-control that the current NLRA poses.

#### D. Service Providers

Removing the threat of reprisals, and requiring the furnishing of information, are necessary preconditions to real bargaining by individual employees, but it is unrealistic to expect that most employees would have the expertise to use the opportunity meaningfully. Employees lack the expertise to understand the complex information and the pertinent legal constraints applicable to many of the subjects embraced in the employment relationship, such as benefit plans and occupational safety and health. Employees also lack the information about what comparable employers provide that would enable them to assess what demands might be realistic and what employer offers should be accepted. In simplest terms, employees need "experts" to assist them in the bargaining process.

In unionized workplaces, that expertise is provided by the international union. The Steelworkers Union, for example, has staffs of skilled experts in both OSHA and benefit areas, as well as a superb legal office. This centralized core of expertise reaches out to assist the bargainers at each of the discrete locations the union serves as bargaining agent. This expertise is financed out of the dues paid by the union's members.

There is no reason why comparable services could not be available to employees who are not unionized. What is needed are experts to provide similar functions for individual employees, and a funding mechanism that would make the employment of such experts feasible. Plainly, the cost of employing this expertise on an individual-by-individual basis would be prohibitive. But it is not inconceivable that an industry of service providers might spring up, offering a package of pertinent representational services, mirroring the group legal service programs that have begun to emerge.

Indeed, the institutions likeliest to offer such services are traditional unions, who would be willing to bear the costs in the hope that providing these services might lead ultimately to selection as exclusive representative.<sup>75</sup> But other institutions, whether socially oriented nonprofit or profit-making consultants, might devise group programs that would be economically viable.

75. The only potential problem with unions providing this service is the confidentiality problem discussed above. *See supra* text accompanying notes 61-66. The problem would not arise, of course, unless Congress truly mandated employers to provide such "entrepreneurial" information to employees, not the likeliest of my proposals to secure enactment. Even then, it might be possible for unions to build internal "Chinese walls" sufficient to remove the risk of breaching confidentiality.



To facilitate employee awareness of the availability of these services, the law could require employers to provide bulletin boards on which their wares could be advertised, and a forum at the workplace where they could meet with employees to discuss the services they offer to provide.<sup>76</sup> Access could also be mandated for the period after employees have chosen service-providers to facilitate communication between the provider and its employee-clients.

How would the provision of these services be funded? The simplest method, conceptually, would be small premiums paid by subscribers—an equivalent of union dues. The law could require the employer to check off such premiums from wages at employee request.<sup>77</sup> Is it feasible to deliver meaningful services to individual employees without prohibitive cost? I think it might be, if numbers of employees of a single employer joined in purchasing such services.<sup>78</sup> And, as noted, unions would have incentive to provide these services even at a loss, to gain a foothold in the enterprise.

It is foreseeable that eventually a majority of employees within a workforce might subscribe to a single service provider, at which point the subscriber would technically qualify for exclusive representation status under the NLRA.<sup>79</sup> If there is ultimately to be an expansion of

76. *A fortiori*, a Congress prepared to provide this access should be providing it as well to unions seeking to persuade employees to select them as exclusive bargaining representatives. I share Samuel Estreicher's view that the NLRA's failure to provide such access (more precisely, the Supreme Court's persistent refusal to permit the Labor Board to construe the NLRA to require such access) is scandalous. See Estreicher, *supra* note 34, at 36-37.

77. Here again, it should follow *a fortiori* that the law should require employers to check off dues to *exclusive bargaining representatives* upon employee request, upon the union's simple proffer to pay the employer's out-of-pocket costs to effectuate the transfer. The present interpretation of the NLRA, which leaves the availability of a checkoff to collective bargaining, discussed in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), is indefensible for a statute that purports to facilitate union representation when sought by employees.

78. There are other possibilities for financing at least some of the costs of service providers. To the extent that those providers enforced employees' legal rights, their fees could be paid by the government (whose enforcement burden would be correspondingly lightened, see Gottesman, *supra* note 41, at 2808-09) or by fee awards against wrongdoing employers, as many federal statutes already provide. See, e.g., Title VII, ADA, ADEA, FLSA, ERISA.

79. Section 2(5) of the NLRA defines "labor organization" as "any organization of any kind, or an agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (1982). While this definition is likely broad enough to embrace the service providers I have envisioned, those providers might qualify even if they fell without the definition. For § 9 does not, in terms at least, limit employees to selecting only "labor organizations" as their bargaining agents:

*Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.*

NLRA coverage to industries where labor costs cannot be equalized, it will likely be in the form of "enterprise" entities (whether company wide or plant wide).<sup>80</sup> Such entities are likelier to grow out of service providers who have furnished satisfactory representation than to spring up suddenly out of whole cloth. For it is unrealistic to expect that employees, lacking expertise or a focus for rallying together, would commit their fates exclusively, and spontaneously, to a newly formed entity that had no track record engendering trust.<sup>81</sup>

Some might argue that, if the marketplace would support such services, the providers already would have appeared on the scene hawking their wares; ergo, past experience demonstrates that the concept is not economically feasible. But the present legal climate is altogether inhospitable, and thus provides no indication of what might emerge under the preconditions I have outlined. Employees will fear to invoke such services unless protected by law against employer reprisal; potential providers have no capacity to render meaningful service in the absence of information that only the employer possesses.

#### *E. Legal Compulsion on the Employer to Negotiate?*

The discussion to this point has suggested creating rights in individual employees to protection against reprisal for negotiating, information necessary to bargain meaningfully, access to the workplace for employee representatives, and checkoff of fees to the representative. It has been suggested that these provisions might lead to an industry of service providers prepared to assist employees in both the negotiating and contract-law enforcement contexts. Finally, it has suggested the possibility that the NLRA be expanded to permit exclusive representation limited to collective-good subjects if the employees so elect. Harder choices remain to be discussed.

The NLRA does not merely empower employees to select unions, and require that the unions be afforded information. It goes on to oblige the employer to bargain in good faith with the union,<sup>82</sup> and it sanctions economic duress (a strike) as a means by which employees can induce employers to make concessions and reach agreement.<sup>83</sup> In both respects, the NLRA departs from traditional contract law. As

29 U.S.C. § 159(a) (1982). See also § 8(a)(5), (d) (declaring the employer's obligation to bargain with "representatives" chosen pursuant to § 9), 29 U.S.C. § 158(a)(5), (d) (1992).

80. See *supra* text accompanying notes 13, 34.

81. See *supra* text accompanying note 35.

82. 29 U.S.C. § 158(a)(5), (d) (1982).

83. See *supra* text accompanying notes 30-31.

noted before, contract law does not compel anyone to bargain with another.<sup>84</sup> And the use of concerted economic duress as a mechanism for extracting concessions in negotiations would render the ensuing contract voidable at the behest of the other party.<sup>85</sup>

Applying the logic employed in prior sections of this article, it would follow that the special treatment accorded by the NLRA to unionized employees (compulsion on employers to bargain, and enhancement of employee bargaining power to make agreement likelier) should be extended to unorganized employees. Is that logical step sensible? To answer that, we must first determine why the NLRA decreed these exceptions for unionized employees, so that we can determine the appropriate analogue for unorganized employees.

One plausible explanation is that Congress intended the NLRA to have a redistributive effect. The statute's quest to "equalize bargaining power" suggests that broader goal.<sup>86</sup> In 1935, there were virtually no statutorily prescribed minimum terms of employment, and the Nation was in the midst of the Great Depression. The enhanced leverage of compelled bargaining and sanctioned economic duress afforded employees a means to improve what were perceived to be unacceptably poor terms and conditions of employment. Today, with statutory minima everywhere, it is plain that Congress is prepared to legislate what are thought to be minimally acceptable employment terms, and thus it is less evident that compelled bargaining and enhanced leverage are needed for that purpose. (Indeed, as the NLRA does not "work" for all employees, it is a less reliable mechanism for improving employees' terms and conditions: only employees positioned to exercise leverage through strikes have secured significantly improved terms attributable to the NLRA.)

84. *Poughkeepsie Buying Serv., Inc. v. Poughkeepsie Newspapers, Inc.*, 131 N.Y.S.2d 515 (N.Y. App. Div. 1954); *Hurley v. Eddingfield*, 59 N.E. 1058 (Ind. 1901).

85. RESTATEMENT (SECOND) OF CONTRACTS, § 176(2) *illus.* 15-16. Of course, an employee's quitting a job because dissatisfied with the terms would not constitute duress, and if an employer responded by proffering better terms to induce the employee to return the resultant contract would be fully enforceable. But a concerted withholding of work, coupled with picketing and appeals for boycotts, would be considered an antitrust violation ("price" fixing) and render the ensuing contract voidable were it not for the special treatment accorded in the labor (but not the commercial) context. *Clayton Act* §§ 6, 20, 15 U.S.C. §§ 17, 52 (1988); *Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965) (there is a "nonstatutory exemption from antitrust sanctions" beyond the exemption furnished by the Clayton Act).

86. Congress declared, in § 1 of the NLRA, that the "inequality of bargaining power between employees . . . and employers" was one of the evils to which the Act was addressed. 29 U.S.C. § 151 (1982).

Another possible explanation is that Congress truly believed, as it said on the face of the statute, that the *process* of bargaining would lead to agreements where strikes might otherwise occur, thus averting disruptions of commerce.<sup>87</sup> If that is the true explanation for these features of the NLRA, there seems little reason to extend them to the individual employee context, where disruptions of commerce are not a concern.

Perhaps the best explanation for the retention of the NLRA's departures from traditional contract law is that they represent yet another kind of statutory minimum. Congress has determined that "voice" is a job condition that all employees deserve, just as they deserve a minimum wage, family leave, and a safe and healthful environment.<sup>88</sup> Especially as employees are obliged to assume a subservient role in virtually every aspect of the employment relationship,<sup>89</sup> and lack realistic opportunities to exit,<sup>90</sup> they ought to have a means to participate in the formulation of their terms and conditions of employment. To that end, they are entitled to a dialogue with the employer, and to resort to means that are unacceptable in other settings (economic duress) to induce agreement in order that the dialogue will be meaningful.

If this last point explains our continuing allegiance to the NLRA's scheme, it expresses values that are equally applicable to the unorganized workplace. There is an interest in vindicating employee voice there as well. Thus, I am philosophically disposed toward Matthew Finkin's proposal, in this Symposium, that employers be required to bargain with employees in nonmajority configurations.<sup>91</sup> But my heart is at war with my head: transporting that value to unorganized workplaces entails much higher costs, and threatens complications that do not exist when there is an exclusive representative, as I shall discuss shortly.<sup>92</sup>

87. 29 U.S.C. § 151 (1988) (legislative finding that unequal bargaining power has adverse effect on commerce).

88. See Sunstein, *supra* note 40, at 1058 ("What is accomplished by the [NLRA] that is not accomplished by a scheme of minimal terms? The answer lies in the Act's effort to create a process in which workers can use 'voice' as well as 'exit' as a means of expressing their views on how the workplace should be run.").

89. See *supra* text accompanying note 45.

90. See *supra* text accompanying note 47.

91. See Finkin, *supra* note 12.

92. The criticisms offered in this section are not applicable to the suggestion, made earlier, that the NLRA permit exclusive recognition for a limited menu of subjects. See *supra* text accompanying note 71. As a majority of the employees would have selected the union for those subjects, and the union would have power to bind all members of the bargaining unit, there is no

In this section, I examine two possible approaches to providing voice for unorganized employees. In the next, I examine the mechanisms for conferring bargaining leverage on unorganized employees.

### 1. Relaxing the Constraints of Section 8(a)(2)

As presently constituted, the NLRA imposes no requirements on employers to consult with employees who have not selected an exclusive representative, but instead places constraints upon the employer who *does* wish to initiate such a dialogue.<sup>93</sup> The exact scope of the prohibition in section 8(a)(2) of the NLRA is unclear,<sup>94</sup> but it plainly forecloses employers from initiating some dialogues with employees that employers see as desirable for improving productivity, morale, etc. These employer initiatives, no matter how self-serving, at least provide *some* voice to *some* unorganized employees, and can be the springboard for more expansive interchanges down the road. I share the impulse of many observers that section 8(a)(2) should be severely limited.<sup>95</sup>

Many who acknowledge that need would nonetheless constrain the employer out of the concern that originally animated the inclusion of section 8(a)(2) in the statute: that the employer may use these dialogic structures as a means to quell or discourage true unionism. Clyde Summers, in his article in this Symposium, would condition relaxing section 8(a)(2) upon the employer's acquiescence in a series of minimum requirements that, quite likely, would discourage most employers from initiating a dialogue with their employees.<sup>96</sup>

I appreciate the concern that animates Professor Summers's proposal, and I agree that a revised section 8(a)(2) should continue to stifle employer initiatives that are likely to squelch contemporaneous union-organizing efforts. But beyond that, I think the restrictions he proposes surrender too much for too little in return.

Initiatives that would provide *some* dialogue in the vast majority of workplaces that are unorganized and likely to remain so for a long time will be suppressed under the Summers proposal, out of concern

reason why the traditional consequences of union certifications should not apply, limited, of course, to the subjects for which the union has been certified.

93. Under 29 U.S.C. § 158(a)(2) (1988), employers engage in an unfair labor practice when they attempt to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ."

94. *Electromation, Inc.*, 309 N.L.R.B. 990 (1992).

95. See Summers, *supra* note 46; Estreicher, *supra* note 34, at 20-21; Craver, *National Labor Relations Act*, *supra* note 7, at 429-31.

96. Summers, *supra* note 46, at 142-48.

that at the margins those initiatives might discourage unionization in the minority of workplaces where unionization is a viable possibility. This is the tail wagging the dog. Our attitude toward such employer initiatives should be driven by our views about the unlikely-soon-to-be-organized workplaces (for they employ the vast majority of America's workers) and not about the tangential effects on the potentially-organizable workplaces (which employ but a small minority).<sup>97</sup>

A revised section 8(a)(2) that constrained employers only where the margin was in view (i.e., where the prospect of organization was real) would best accommodate these divergent interests. For example, Professor Summers's regime of constraints might be applicable to workplaces where there was a current organizing campaign, or where there had been one within the two years prior. In these situations, the employer would have to dismantle its unilaterally-created committees or else bring them into conformity with Summers's constraints.

To be sure, limiting the application of section 8(a)(2) in this fashion would allow far-sighted employers to adopt union-avoidance dialogic structures before the reality of a unionizing effort ever materialized, and thus deter the initiation of organizing drives. There is no perfect solution. As I have suggested, this unfortunate side-effect is outweighed by the value of such structures in workplaces that have no short-term prospect of being unionized. Moreover, there is always the potential that employee-participation structures, no matter what motivated the employer to create them, will expand beyond the employer's control and in time turn into real collective-bargaining engines. That is the lesson that the NEA taught America's public school districts.<sup>98</sup>

## 2. A Statutory Duty to Bargain?

It is a tempting analogue to the NLRA to command employers of unorganized workplaces to negotiate with individual employees and/or groups that do not constitute majorities, just as they are required to do when an exclusive bargaining representative has been chosen. Such a command would fit neatly with my vision of service providers who would be competent to represent their clients in such bargaining. And there is real prospect that at least in some cases this could lead

97. It is no answer that employers who do not face realistic organizing prospects are not likely to be the subject of charges for adopting programs violative of § 8(a)(2). As any individual may file a charge, it would take only one disaffected employee (or even a union with no realistic prospects of organizing the employer) to bring down such a program.

98. See *supra* text accompanying note 35.

down the road to employee adoption of an exclusive bargaining representative.

Still, the obstacles to proposals for compelled minority bargaining are prodigious, and Professor Finkin has solved only some of them in his article.<sup>99</sup> Imagine an employer with 5,000 employees who wish to bargain in groups of two. Is the employer required to engage in 2,500 separate rounds of negotiation? How much time is the employer required to devote to each? The costs of individual or minority group bargaining would be prohibitive, and the costs of legally policing the employer's performance therein even more so. It is doubtful that the benefits of face-to-face dialogue would warrant the potential economic burden.

Acknowledging that difficulty, Professor Finkin suggests that perhaps the statutory obligation upon the employer to bargain should be triggered only in the case of entities that represent some substantial percentage of the employer's workforce<sup>100</sup> (one could imagine, e.g., a law compelling the employer to bargain with an organization designated by one-third, or forty percent, of the relevant group of employees). But notice that this qualification surrenders at the outset any obligation upon employers to bargain with what will likely remain the vast majority of America's employees, those who will *not* form themselves into groups large enough to meet the threshold trigger.

Moreover, compelling bargaining with those who *do* form such groups may be more complicated than Professor Finkin envisions. Once we create a threshold we invite litigation over the appropriate bargaining unit (forty percent of what?) and ongoing disputes about whether the threshold *continues* to be met as the dialogue goes on. There would be the difficulty of ever-shifting populations: how will the employer know, from day to day, who is within the group represented and who is not? If an agreement is reached, will the group members all be bound? Will *J.I. Case*<sup>101</sup> require nullification of the agreement if an exclusive representative is later chosen? (If so, the employer will be vulnerable indeed: imagine two forty percent contracts and the potential of the two groups at any time to join forces, secure joint NLRA-certification, and thus escape the contracts; the

99. Finkin, *supra* note 12, at 200-11.

100. *Id.* at 204-05.

101. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (holding that, once a union achieves exclusive status, the employer is proscribed from dealing directly with individual employees or groups of employees, and that a collective agreement overrides inconsistent agreements negotiated prior to unionization).

employees will at all times have a one-way option to rescind the agreements reached through this process.)

What would Professor Finkin's bargaining obligation entail? Could employers make unilateral changes short of impasse? (If not, and if different minorities weigh in at different times, the employer might never be able to make changes.) Will government monitor the quality of the employer's good faith in these negotiations?

Finally, the problem of accommodating conflicting bargaining demands from rival minorities within the workforce (possibly balkanized along racial, ethnic, gender or other disquieting lines) would be an additional complication that does not accompany NLRA-mandated bargaining; indeed, perhaps the greatest value of exclusive-representation-bargaining to the employer is that the union is required to mediate the conflicting demands of the employees. What will the law require of an employer presented with mutually inconsistent demands respecting a collective good? Professor Finkin has proposals to deal with the conflicting-demands concern, but I'm not sure that they would truly solve the problem.<sup>102</sup>

Ultimately, the viability of the Finkin proposal depends upon a showing that the benefits (in voice) are worth the considerable cost that would be inflicted on employers. I fear that mandating a bargaining obligation of the NLRA's scope would impose costs of considerable magnitude. It bears recalling that American employers are competing in a global economy, and every cost loaded onto them makes that competition all the more difficult. Moreover, as employers are not infinitely wealthy, Finkin must prove not only that the cost of his proposal is feasible, but also that the benefit (in voice) is more valuable than other benefits that might be achieved by taxing employers in that amount (e.g., the provision of better health care, or other substantive benefits for employees). In making that assessment, we need to ask what value to assign voice if the employees lack any leverage to induce the employer to respond favorably (as the strike weapon is likely to be of little value to a minority group).

For the moment, I deem the case for compelled nonmajority bargaining to be unproved. I would be happy if my fears could be erased.

Still, it would be dangerous to create rights in employees without *any* reciprocal duty on the part of employers. If employers could simply ignore service providers, employees would be discouraged from opting for them. A compromise solution would be to impose an obli-

102. Finkin, *supra* note 12, at 203-09.



gation on employers to meet at a minimum once a month for a specified time (perhaps an hour) with each service provider who represents a specified minimum number and/or percentage of the employer's employees, the obligation to be scaled upward so that as providers represent larger numbers of employees and/or percentages the frequency (or length) of the employer's obligation to meet would grow correspondingly. This obligation-to-meet would not be accompanied by the complexities imposed by the NLRA with respect to majority representatives.<sup>103</sup>

I do not suggest for a moment that this is a satisfactory end point to the government's quest to confer voice on unorganized employees. I hope that Professor Finkin, or others, can perfect vehicles that would do better.

#### *F. Bargaining Leverage: Reformulating Corporate Decision-Making*

The NLRA decrees not only that employees have voice (compelling the employer to bargain) but that that voice be made meaningful through the ability to resort to economic force. As the Supreme Court has explained:

It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.<sup>104</sup>

That choice—to license the use of “economic weapons”—is a departure from the common law of contracts, which makes voidable a contract achieved through infliction of economic duress. However meaningful this departure for organized employees (and there is reason to doubt that the strike weapon is any longer of much use to workers in most unionized workplaces), it is plain that the right to strike provides no meaningful leverage to the unorganized employee seeking to negotiate with her employer. If we accept the NLRA's

103. See *supra* notes 64-65, 99-102.

104. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488-89 (1960).

premise that unionized employees are entitled to statutorily conferred bargaining leverage, it should follow that unorganized employees are as well. But how is such leverage to be delivered to the unorganized employee, who cannot possibly achieve anything by striking while others work?

There are, in truth, two questions to be answered. First, is there any longer a justification for legislative conferral of special leverage upon employees to drive a better deal with their employers? Second, if so, what form might that leverage take in a nonunion workplace?

### 1. Is Special Leverage for Employees Justified?

If legislatures can decree statutory minima where they think them apt, why should they be allowing employees a leg-up in negotiating for benefits above those minima? This is not meant as a rhetorical question; the answer is not self-evident, and champions of legislative empowerment of employees had better be prepared to answer it. Now that Congress has shown itself ready to decree statutory minima (as it was not in 1935), the investiture of enhanced bargaining power cannot be justified as a means to redistribute income. If not that, what?

The strongest justification for legislative leverage is that the legal deck has been stacked unfairly *against* employees, thus weakening the leverage they might have enjoyed in a world without law and making a compensatory infusion of leverage a kind of righting of the balance. Capital and labor are both needed to make a firm successful. In a world without law it is not predetermined how control of the firm might be divided between the two. But nineteenth-century law defined a corporation as "owned" by those who supplied capital, and remitted those who supplied labor to the status of third-party contractors.<sup>105</sup> In consequence, the law imposed a fiduciary duty on corporate officers and boards of directors to administer the affairs of the

105. The perception of the inevitably separate functions of management and labor has persisted since the Industrial Revolution. Prior to the Industrial Revolution, labor was the central factor of production. Thorstein Veblen provides an apt description of the origin of this dichotomy, indicating that labor evolved from "handicrafts" and "petty industry" toward organized, mechanistic production. See THORSTEIN VEBLÉN, *THE THEORY OF BUSINESS ENTERPRISE* 270 (1932).

The advent of modern machine industry transformed the workplace. Previously, the location, pace, means and hours of work had been at the sole discretion of the workers, but now: "All these unskilled men, unused to collective work, had to be taught, trained, and above all disciplined by the manufacturer." PAUL MANTOUX, *THE INDUSTRIAL REVOLUTION IN THE EIGHTEENTH CENTURY* 375 (1983). See also Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 138-47 (1988).

corporation single-mindedly for the benefit of the shareholders. The law thus compelled corporate agents to treat labor adversarially (i.e., to seek those outcomes that maximized the interests of shareholders at the expense of the employees).<sup>106</sup>

There was nothing "natural" about this choice of legal regime. It was adopted by legal institutions that were more responsive to corporate barons than to working people. Perhaps it reflected the relative degrees of attachment to the enterprise that predominated in that era: investors were likely to be closely affiliated with the corporations they owned, while workers tended to be itinerants with little loyalty or longevity with particular firms.

The nineteenth-century ordering of legal relations between shareholders and employees is ripe for reconsideration. Nowadays, it is the employees who devote a lifetime of investment to the business, while shareholders are often absentees who move their money from one firm to another through stock-market exchanges.<sup>107</sup> Indeed, precisely because shareholders are now an absentee class, many believe that in practice control of many corporations has migrated to corporate managers who run affairs largely for their own benefit.<sup>108</sup> Once the reality diverges from the theoretical model, it is fair to ask why managers, any more than nonmanagerial employees, should be the legally preferred beneficiaries.

Oliver Williamson has argued that the law is right in treating the shareholders as the "owners" of the corporation entitled to determine its fate, as they are the group least able to protect their interests through arms-length contracting with the corporation.<sup>109</sup> Williamson's confidence in employees' ability to contract is predicated upon an optimistic view of the efficacy of collective bargaining. Williamson assumes that the employees are covered by a collective bargaining agreement with a grievance-arbitration clause; he assumes, in other

Thus, the capitalist enterprise became the nexus of a social relationship between the owners of the means of production and labor, where labor was subordinate. See KARL MARX, *CAPITAL I* (Vintage ed., 1976).

106. Stone, *supra* note 105, at 145-47.

107. See Martin Lipton, *Corporate Governance in the Age of Financial Corporatism*, 136 U. PA. L. REV. 1, 35-36 (1987) (pointing to shareholders' capacity to "exit" by liquidating their investment on short notice). Conversely, employees are described by some theorists as investors in the firm, at least co-equal with shareholders. Workers' stake in the firm is characterized as a long-term investment of human capital. See, e.g., O'Connor, *supra* note 60; Katherine Van Wezel Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 48-53 (1991).

108. Mark J. Rowe, *Some Differences in Corporate Structure in Germany, Japan and the United States*, 102 YALE L.J. 1927 (1993).

109. Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1209-12, 1227-30 (1984).

words, that employees are able to bargain effectively and collectively to a contract, and able to include in that contract a mechanism for resolving problems that arise during the life of that contract.<sup>110</sup> Williamson's thesis is inapplicable to the eighty-eight percent of America's employees who are not covered by collective agreements. This point has been demonstrated elegantly by Katherine Van Wezel Stone.<sup>111</sup>

## 2. Giving Employees Leverage *within* the Corporate Governing Structure

If employees cannot contract effectively to protect their interests, and "economic warfare" is antithetical to the national interest, the wiser path to empowerment may be to consider ways to enhance employee influence *within* the corporate governing structure, rather than from without via third-party contracting with the corporation. To this end, there are a number of possible approaches. The subject is too complex for extended discussion in this paper. Recently, some scholars have turned their attention to it, albeit their voices are unrepresented in this Symposium,<sup>112</sup> and I simply note the options here with brief observations about them.<sup>113</sup>

### *a. Employee Voice in Selecting Corporate Directors*

The law could allocate to employees a voice in selecting the corporation's directors. Under German law, employees are accorded such a voice.<sup>114</sup> Indeed, nominally employees have equal vote with shareholders in voting for directors. The reality, however, is that employee voice is limited: in case of a tie, the shareholders decide.<sup>115</sup> What is more, the "employee" half of the electorate includes the managers, whose interests often will be antithetical to those of the workers covered by the NLRA.

It seems quite unrealistic to think that American law could be transformed to provide employees a large voice in selecting corporate directors—even a voice as ultimately ineffectual as that in Germany—if they are not also to bear a share of the risks associated with those

110. *Id.* at 1207-09, 1227-30.

111. Stone, *supra* note 105, at 152-59.

112. See, e.g., *id.*; Stone, *supra* note 107; O'Connor, *supra* note 60.

113. I am presently working on a paper that will explore these options more extensively.

114. Alfred F. Conrad, *Corporate Constituencies in Western Europe*, 21 STETSON L. REV. 73, 89-92 (1991).

115. *Id.* at 91.

directors' decisions (i.e., the risks to the corporation, as distinguished from the risks to their own job tenure).<sup>116</sup> Thus, voice in governance is more likely to emerge from the last of the proposals I tender below: conferring a share of the *ownership* of corporations upon employees.

*b. Employee Representative Membership on Board of Directors*

A second approach might be to mandate that the board of directors contain one or more members chosen separately by the employees.<sup>117</sup> Ultimately, however, this is likely to be of limited value—certainly too little to justify declaring victory and stopping the search for meaningful mechanisms for empowering employees. An employee representative on the board can assure that the other directors are aware of employee concerns (and the information pertinent to evaluating those concerns) and would have access to some information that would not otherwise be available to employees.<sup>118</sup> There is real value in this, and it is worth doing, but the reality will remain that the directors and managers will reach decisions that are in the interests of shareholders and managers (perhaps better decisions, because better informed).

*c. Fiduciary Duties Toward Corporate Employees*

A third approach might be to impose fiduciary obligations upon corporate directors toward corporate employees. A number of states have enacted "constituency" statutes which *allow*, but do not require, corporate officers and boards to consider the interests of constituencies that are tied to the corporation (including employees) in reaching corporate decisions. In other words, these statutes release corporate officials from the fiduciary obligation to prefer the shareholders over the employees.<sup>119</sup> These statutes are important symbolically in their recognition that employees are not strangers to the corporations for whom they work.<sup>120</sup> But these statutes, which are merely permissive,

116. See generally LEWIS D. SOLOMON ET AL., CORPORATIONS: LAW AND POLICY MATERIALS AND PROBLEMS ch. 2 (3d ed. forthcoming June 1994) (describing the economics of corporate relations as essentially involving a trade-off between risk and control).

117. See, e.g., Stone, *supra* note 105, at 168-73.

118. Williamson, while arguing for preservation of shareholder control over corporations, recognized the value of allowing minority representation for other groups, simply to cure informational market defects. Williamson, *supra* note 109, at 1205, 1207-09.

119. See, e.g., IND. CODE ANN. § 23-1-35-1(d), (f), (g) (West Supp. 1993); OHIO REV. CODE ANN. § 1701.59(E) (Anderson 1990).

120. The recognition may be more cynical than real: these statutes are widely understood to have been adopted to permit corporate managers to resist takeover efforts and thus prevent the acquisition of the corporation by persons disinterested in maintaining the corporation's presence

leave the decision making in the hands of officers and boards chosen exclusively by the shareholders. Thus, the choice to forego an undeviating preference for shareholders is an act of charity, not compulsion.

One could imagine statutes literally mandating that directors owe fiduciary duties to employees equal in power to those owed shareholders.<sup>121</sup> But given the permissiveness of the "business judgment" rule,<sup>122</sup> these statutes would likely be ineffective so long as directors are chosen by, resemble, and are responsive to, the shareholders. Directors' decisions that favored shareholder (or manager) interests could easily be justified under the business judgment rule.

#### d. *Mandatory Interest Arbitration*

Another approach would be to retain the existing contractual relationship, but substitute mandatory interest arbitration as the terminal point for negotiations. This idea has been much written about,<sup>123</sup> and I have no insights to add about its theoretical merits. I share Paul Weiler's assessment that it is outside the domain of political acceptability in this country, because it commits entrepreneurial decision making (at least as to some range of questions) to "neutrals" who are governmentally appointed.<sup>124</sup>

The corporate antipathy to surrendering decision-making control is exemplified by experience under the Steel Industry ENA. During the life of the ENA, negotiations never ended in interest arbitration: the parties settled. At the same time, however, steel industry labor costs rose at a higher rate than auto industry labor costs—and this was so, although auto companies were far more profitable than steel com-

in the local community. See ABA Committee on Corporate Law, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2268 (1990); cf. Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163, 183-87 (West 1991).

121. Only Connecticut's statute purports to *oblige* corporate directors to take the interests of other constituencies into account in corporate decision making. CONN. GEN. STAT. ANN. § 33-313(e) (1991). There are no decisions interpreting this statute, and much skepticism that the courts would give it real teeth. See ABA Committee on Corporate Law, *supra* note 120, at 2263-68; James J. Hanks, Jr., *Playing With Fire: Nonshareholder Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97, 109-17 (voicing difficulties in formulating and enforcing new director duties).

122. *Kahn v. Sullivan*, 594 A.2d 48 (Del. 1991) (Chancery upholding board decision approving a charitable donation of over \$50 million to construct an art museum); *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (court refusing to enjoin construction of new plant, acknowledging that "judges are not business experts").

123. See, e.g., Morris, *supra* note 3; Weiler, *New Balance*, *supra* note 16; Robert Ackerman, *Arbitration Forums Revisited*, 43 NAT'L ACAD. OF ARB. 179 (1990); R.W. Fleming, *Interest Arbitration Revisited*, 26 NAT'L ACAD. OF ARB. 1 (1973); Kleiman, *supra* note 3; Larry, *supra* note 3.

124. Weiler, *New Balance*, *supra* note 16, at 371-80.

panies.<sup>125</sup> Steel industry negotiators were paying a premium to avoid interest arbitration—a premium higher than auto industry negotiators were prepared to pay to avoid a strike.

If the corporate mentality resists so strongly the surrender of control to a neutral *selected voluntarily by the parties* (recall that the steel industry voluntarily agreed to enter into the ENA, and did so with knowledge of who the interest arbitrators would be—arbitrators that they jointly chose with the union), imagine the vigor with which they would resist legislation to *impose* interest arbitration as the terminal point of negotiation. So long as that corporate mentality can influence legislative decisions, we will not see a conversion to mandatory interest arbitration in the U.S.

#### e. *Optional Alternatives*

Another alternative would be to give corporations a choice. Interest arbitration would be the default rule, but corporations could escape it by giving employees sufficient voice in corporate governance. That voice might consist of one of the other versions discussed herein, perhaps made stronger because it is but an alternative.

#### f. *Employees Stock Ownership*

The final alternative—and the one that I think has the greatest hope of being both meaningful and politically viable—is to give employees a share of corporate ownership that provides both meaningful voice and meaningful responsibility. Employee stock ownership affords both voting power and an interest in the profitability of the corporation *qua* corporation. A mechanism that assured that employees held significant (not necessarily controlling) ownership of corporate stock would mean that employee interests would be taken into account in corporate decision making, but that employees (both in their wage demands and their stock voting) would have an interest in enlarging the corporate pie rather than simply taking the largest available slice from the existing pie.

Skeptics will note that there is a slight transitional problem with this proposal: who pays to put this stock into the employees' hands? My answer is succinct: "I'm working on it."<sup>126</sup>

125. See figures for steel and auto *supra* note 5, reflecting that in 1970 steel employees' earnings were slightly less than autoworkers', while by the end of the decade steel employees' earnings were substantially higher.

126. See *supra* text accompanying note 113.