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The Viability of Distinguishing Between Mandatory and Permissive Subjects of Bargaining in a Cooperative Setting: In Search of Industrial Peace

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I. INTRODUCTION

In July 1985 General Motors entered into an agreement with the United Auto Workers (UAW) setting forth the terms and conditions of a future automobile facility, known as the Saturn Corporation, in Spring Hill, Tennessee. General Motors and the UAW view this project as an unprecedented achievement in "union-management partnership."[1] The goal of the Saturn project is to maintain General Motors' viability as a domestic enterprise through an agreement to build a new subcompact car in the United States. This partnership between the corporation and the UAW will include employee participation and enhanced job security.[2] Faced with mounting competition from overseas

* Throughout the Special Project, this piece is cited as Special Project Note, *Mandatory and Permissive Subjects.*

1. *Advice Memorandum Issued by the NLRB on UAW-GM Saturn Agreement, June 2, 1986*, 1985-86 NLRB Dec. (CCH) ¶ 20,270, at 33,433 [hereinafter *Advice Memorandum*].

2. *Id.*

and with uncertain prospects in the United States, General Motors agreed to restructure the workplace in exchange for economic concessions from its employees.[3] In accordance with a long and productive collective bargaining relationship,[4] General Motors purposefully requested the UAW's input and suggestions in the corporation's economic decision to relocate its subcompact facility in Tennessee.

The Saturn project illustrates the radical restructuring undertaken by the American business community in the wake of foreign competition. General Motors' commitment to protect the job security of its employees affected by negotiated productivity improvements such as the decision to relocate, however, is significant for two other interrelated reasons. First, this action demonstrates that General Motors understood that its employees had little incentive to improve productivity if doing so would result in fewer jobs.[5] Second, General Motors' understanding of its employees' plight provoked management and labor to venture beyond the judicially created scope of collective bargaining.[6] General Motors, hoping to establish a more competitive and efficient enterprise, bargained with the UAW over management's entrepreneurial decision to relocate. In this cooperative effort, General Motors and the UAW have turned a blind eye towards the pigeonhole analysis represented by present labor law and carved out their own areas of bargaining with respect to terms and conditions of employment,[7]

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3. Schlossberg & Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 37 LAB. L.J. 595, 598 (1986). General Motors and the UAW reached an agreement that included a reduction in labor costs in exchange for the development of a Job Opportunity Bank-Security (JOBS) program to protect employees from being laid off as a result of the introduction of technology, the contracting out of services, or the negotiation of productivity improvements. The JOBS program is designed to place and retrain any unit employee who is displaced. Such a program represents a commitment by General Motors, as part of its decision to relocate and through bargaining with the UAW, to prevent unemployment due to alterations in the operation of the facility. *Advice Memorandum*, *supra* note 1, at 33, 481.

4. *See Advice Memorandum*, *supra* note 1, at 33, 481.

5. Friedman, *Negotiated Approaches to Job Security*, 36 LAB. L.J. 553, 555 (1985) (part of the Industrial Relations Research Association Spring Meeting).

6. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); *see also infra* notes 41-49 and accompanying text.

7. National Labor Relations Act § 8(d), 29 U.S.C. 158(d) (1982) [hereinafter NLRA]. Section 8(d) of the NLRA establishes the following duty to bargain: "For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." *Id.*

In 1935 Congress passed the original NLRA, also known as the Wagner Act, which gave employees the right to organize unions and to bargain collectively with their employers. Wagner Act, ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-187 (1982) (as amended)). The NLRA was amended in 1947 by the Labor-Management Relations Act (Taft-Hartley Amendments), ch. 120, § 101, 61 Stat. 136, 136-38 (1947) [hereinafter LMRA]. In 1959 Congress further amended the NLRA by passing the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Amendments), Pub. L. No. 86-257, §§ 701(b), 703, 73 Stat. 542 (1959); *see also infra* notes

based on the real needs and concerns of both management and labor.

The Saturn project is grounded in a mutual respect for collective bargaining. The modern labor-management relationship, however, is plagued by uncertainty. The duty to bargain collectively is an integral part of the National Labor Relations Act (NLRA or Act), as evidenced by sections 8(a)(5) and 8(d).[8] The NLRA attempts to regulate publicly collective negotiation in order to promote industrial peace between labor and management concerning the basic private conditions of employment.[9] Although the NLRA directly addresses the attitude or respect with which an employer must approach bargaining, the Act is deplete of any tangible guidance on the scope of issues about which an employer must bargain.[10]

As the law of collective bargaining has developed since the passage of the NLRA, the United States Supreme Court has attempted to define the scope of bargaining by distinguishing between "mandatory" and "permissive" subjects of bargaining.[11] If the Court labels a subject as mandatory, the employer or union must, at the other's request, bargain in good faith about the subject until an impasse occurs.[12] If the

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29-37 and accompanying text.

8. *See infra* notes 24-37 and accompanying text.

9. *See generally supra* Special Project Note, *Future Cooperative Efforts*; *infra* Special Project Note, *Hybrid Employees*, at notes 5-7 and accompanying text.

10. The congressional conception of the duty to bargain involved something more than the mere meeting of an employer with the representatives of his employees; the employer must have "an open mind and sincere desire to reach an agreement [and] a sincere effort must be made to reach a common ground." Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1414 (1958) (quoting in part from NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 885 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941)). In order to preserve the openness of the bargaining arrangement, the founders of the Act wanted to maintain a flexible approach for the determination of bargainable subjects. "The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors." H.R. REP. No. 245, MINORITY REPORT, 80th Cong., 1st Sess. 71 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 355, 362 (1948) [hereinafter LMRA HIST.].

11. *Borg-Warner*, 356 U.S. at 348-50; *see infra* notes 41-49 and accompanying text.

12. *See* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-98 (1960). Bargaining to impasse allows each side to use the economic weapons (*e.g.*, strike and lockout) each possesses under the NLRA. The Court in *Insurance Agents'* held that the union's use of a work slowdown to apply economic pressure did not violate the union's obligation to bargain in good faith. *Id.* at 495-96; *see* NLRA § 8(b)(3), 29 U.S.C. 158(b)(3) (1982) (stating that the refusal by the union to bargain in good faith is an unfair labor practice).

The concept of "impasse" refers to the inability of the parties to reach an agreement after participating in good faith bargaining. Once an employer has bargained to impasse, it legally may make unilateral changes in working conditions based upon its last offer to the union. NLRB v. Katz, 369 U.S. 736, 741-42 (1962). Factors the National Labor Relations Board may consider when determining whether an impasse has been reached include the parties' good faith, the length of the negotiations, the parties' bargaining history, and the nature of the issue about which the parties are unable to agree. *See generally* 1 C. MORRIS, THE DEVELOPING LABOR LAW 634-39 (2d ed. 1983).

Court determines the subject is nonmandatory, or permissive, both parties must agree to discuss the subject.[13] Thus, management may use its own discretion when acting within permissive areas, without having to give any consideration to employee interests.[14] Given that the Court bas designated certain subjects as nonmandatory issues within the scheme of legislatively compelled collective bargaining, the degree of public protection and regulation of the employer-employee relationship rests on the content given to the mandatory-permissive dichotomy.[15]

Characterizing a subject as mandatory or permissive entails balancing the interests of both management and labor to determine the breadth of national labor policy. For example, the Supreme Court's most recent application of the mandatory-permissive distinction, *First National Maintenance Corp. v. NLRB*,[16] upheld an employer's contention that certain entrepreneurial decisions should not be subject to mandatory bargaining even though such decisions may terminate employees' jobs. The union argued that any decision to alter economically an employer's business may result in the loss of jobs and is, therefore, literally a matter that affects "terms and conditions of employment." According to the union, such a decision is, by definition, within the duty to bargain as mandated by section 8(d) of the NLRA, and should be negotiated in good faith.[17] The Court balanced the need to protect employee interests with the need to protect an employer's ability to make economic decisions without employee input over matters that are intimately tied to the operation of an efficient and marketable enterprise.[18] By labeling the employer's decision as permissive, the Court established a strong presumption in favor of an employer's freedom to make the necessary, economically motivated decisions to run a profitable business.

In light of this precedent, the question arises why General Motors permitted the UAW to participate in its entrepreneurial decision aimed at remaining in the subcompact car market through the Saturn project. Clearly, both General Motors and the UAW realized, through a long history of good faith bargaining, that their respective goals were not

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13. It is "lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without." *Borg-Warner*, 356 U.S. at 349.

14. An employer who declines to bargain over a permissive issue must be careful not to infringe upon the right of its nonunion employees. The employer may not refuse to bargain in order to discredit the union. *Cf.* Textile Workers' Union v. Darlington Mfg. Co., 380 U.S. 263 (1965) (finding an unfair labor practice when the employer closed the plant solely to avoid unionization).

15. *See* Note, *Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination*, 97 HARV. L. REV. 475, 478 (1983).

16. 452 U.S. 666 (1981); *see also infra* notes 63-75 and accompanying text.

17. *First Nat'l Maintenance*, 452 U.S. at 677.

18. *Id.* at 679.

necessarily divergent. For example, management and labor realized the necessity of reaching an agreement that would allow income generated by the depreciation of the plant to be reinvested in the plant itself, and not in the opening of other plants in foreign countries. Thus, General Motors and the UAW ignored the mandatory-permissive distinction for the Saturn agreement and acted as equal partners attempting to establish a profitable business venture.

This Special Project Note focuses on the status of the labor-management relationship resulting from cooperative, concessions-type bargaining and analyzes how, if at all, such a relationship may affect the future of our present national labor policy. Part II outlines the social policies behind the NLRA by briefly examining the legislative history of sections 8(a)(5) and 8(d). Part III traces the judicial response to the NLRA and the effect the judiciary has had on the evolution of American labor law. Part IV presents a hypothetical situation and compares the effectiveness of three different bargaining environments in resolving the problem. Finally, Part V concludes that labor-management cooperation is a realistic approach to the collective bargaining process and breaks down the adversarial barriers inherent in our present bargaining system.

II. LEGISLATIVE INTENT

The NLRA of 1935, the Wagner Act, was a response to the industrial strife of the 1930s and was designed to stabilize and protect "the social order of American capitalism."[19] Congress viewed this industrial anarchy as a result of the economic inequality between management and labor.[20] The Act promoted employee participation in managing the workplace by establishing employees' rights to form or join labor unions, to engage in collective bargaining, and to partake in concerted activity.[21] Congress believed that contract law would mediate the antagonistic interests of labor and management while maintaining the freedom of the private enterprise.[22] Therefore, much of the NLRA fo-

19. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 275 (1978).

20. *See Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 34-43 (1935), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, at 1373, 1410-19 (1949) [hereinafter NLRA HIST.] (statement of Sen. Wagner).

21. NLRA § 7, 29 U.S.C. § 157 (1982). These rights are commonly referred to as § 7 rights.

22. The NLRA purposefully does not provide for public regulation of contract terms. In fact, § 8(d) expressly states that the Board may not require parties to agree to any contract term. NLRA § 8(d), 29 U.S.C. § 158(d) (1982). *See* Friedman, *Keeping Big Issues off the Table: The Supreme Court on Entrepreneurial Discretion and the Duty to Bargain*, 37 ME. L. REV. 223, 224 (1985).

cuses on the procedures for establishing efficient collective bargaining.[23]

In order to effectuate equality in bargaining, the Wagner Act contained section 8(5),[24] the provision now codified as section 8(a)(5). Section 8(a)(5) of the Act made an employer's refusal to bargain with the representative of its employees an unfair labor practice.[25] This provision codified the duty of employers to make a bona fide effort to reach an agreement with their employees, and gave substance to the employees' guaranteed right to bargain collectively.[26] Section 8(a)(5) brought the employer to the bargaining table ready to discuss issues in good faith, but did not proscribe the guidance needed to determine the breadth of the employer's obligation to bargain.[27]

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23. The preamble to the NLRA expresses Congress' belief in the need for equal bargaining:

> The denial by *some* employers of the right of employees to organize and the refusal by *some* employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. . . .
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing the wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> Experience has proven that protection by law of the rights of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

NLRA, ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1982)) (words in italics were added by the LMRA (Taft-Hartley Amendments), ch. 120, 61 Stat. 136 (1947)).

24. NLRA § 8(5), 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 158(a)(5) (1982) (as amended)).

25. *Id.* The section states: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to section 9(a) [current version at 29 U.S.C. § 159(a)] of this title." *Id.* Section 9(a) of the NLRA codifies the principle that a representative selected by a majority of employees in a bargaining unit is the exclusive representative of all of the employees. NLRA § 9(a), 29 U.S.C. § 159(a) (1982). A bargaining unit is a group of employees that possesses sufficiently similar interests (*e.g.*, functional coherence, collective bargaining history, commonality of interests, and employment desires) to constitute a unit for bargaining purposes. *See generally* 1 C. MORRIS, *supra* note 12, at 413-17.

26. The legislative history of the NLRA is replete with references to the necessity of establishing a genuine effort in bargaining. *See, e.g.*, 79 CONG. REC. 7571 (1935), *reprinted in* 2 NLRA HIST., *supra* note 20, at 2336. Senator Wagner remarked:

> The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met. But the right of workers to bargain collectively through representatives of their own choosing must be matched by the correlative duty of employers to recognize and deal in good faith with these representatives. The Government itself is held up to ridicule when the elections which it supervises are rendered illusory by failure to acknowledge their results.

Id.

27. *Id.* at 2373. Senator Walsh, Chairman of the Senate Labor Committee, also observed:

Concern arose over the vagueness of section 8(a)(5) because the NLRA granted authority to the National Labor Relations Board (the Board) to regulate employer interference with employees' statutory rights,[28] without authorizing the Board to police the subject matter of the collective bargaining contracts. Congress responded to the need for further definition of the duty to bargain with the 1947 amendments to the NLRA, often referred to as the Taft-Hartley Amendments.[29] In section 8(d) Congress attempted to designate the subjects that would be the most important topics in the collective bargaining process. Congress rejected the House proposal for section 8(d), which would have broken down collective bargaining into five categories.[30] Instead, Congress opted for a more general and flexible statement requiring collective bargaining over "wages, hours, and other terms and conditions of employment."[31]

Sections 8(a)(5) and 8(d) generally have been read together as a flexible standard capable of adapting to the requirements of future labor-management relations.[32] Congress deliberately chose to keep the limiting language of section 8(d) open ended in hopes of increasing the use of collective bargaining. This choice reemphasized the original in-

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When employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.

Id.

28. NLRA § 8(a), 29 U.S.C. § 158(a) (1982).

29. LMRA § 101, 29 U.S.C. § 141 (1982). Section 8(5) remained substantially the same; only the section designation was altered. Additionally, the LMRA drafted a corresponding duty to bargain for unions in § 8(a)(3). "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees. . . ." NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3) (1982).

30. The House bill categorized the five topics of bargaining as:

(i) Wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947), *reprinted in* 1 LMRA HIST., *supra* note 10, at 158, 166-67.

31. LMRA § 8(d), 29 U.S.C. § 158(d) (1982); *see supra* note 7 for relevant text of this section.

32. The legislative history of the LMRA discussed the need for such flexibility:

What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment.

H.R. REP. No. 245, MINORITY REPORT, 80th Cong., 1st Sess. 71 (1947), *reprinted in* 1 LMRA HIST., *supra* note 10, at 355, 362.

tent of the NLRA that all issues of importance to the labor-management relationship be sifted through the mediatory procedures of collective bargaining.

Commentators have noted the difficulty in identifying and articulating the objectives of the NLRA.[33] A pervasive theme throughout the Act, however, is the congressional desire to promote a peaceful industrial democracy, which supports "actual liberty of contract,"[34] by narrowing the inequality of bargaining power between employers and their workers.[35] Encouraging labor and management to bargain about those issues which in turn will bolster the economy, serves the public interest. From a policy standpoint, therefore, the phrase "other terms and conditions of employment" must be intended to promote affirmative bargaining behavior, not to limit the scope of the bargaining itself. Restricting the subjects discussed at the bargaining table, before determining whether those subjects legitimately affect the employer-employee relationship, does not encourage industrial democracy. Indeed, limiting the negotiable subjects to those which do not necessitate employer discretion runs counter to the NLRA's stated purpose of maintaining industrial peace by providing employees with a detailed system of collective bargaining for the purpose of enhancing their status in the workplace.[36] Restrictions on bargaining turn the desired flexible standard into "an

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33. Klare, *supra* note 19, at 281. *See generally* Friedman, *supra* note 22; George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667 (1985); Note, *Enforcing the NLRA: The Need for a Duty to Bargain over Partial Plant Closings*, 60 TEX. L. REV. 279 (1982).

34. NLRA § 1, 29 U.S.C. § 151 (1982).

35. *See* Klare, *supra* note 19, at 281. The author describes six possible statutory goals:

> 1. Industrial Peace: By encouraging collective bargaining, the Act aimed to subdue "strikes and other forms of industrial strife or unrest," because industrial warfare interfered with interstate commerce; that is, it was unhealthy in a business economy. . . .
>
> 2. Collective Bargaining: The Act sought to enhance collective bargaining for its own sake because of its presumed "mediating" or "therapeutic" impact on industrial conflict.
>
> 3. Bargaining Power: The Act aimed to promote "actual liberty of contract" by redressing the unequal balance of bargaining power between employers and employees.
>
> 4. Free Choice: The Act was intended to protect the free choice of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining.
>
> 5. Underconsumption: The Act was designed to promote economic recovery and to prevent future depressions by increasing the earnings and purchasing power of the workers.
>
> 6. Industrial Democracy: . . . Senator Wagner frequently sounded the industrial democracy theme in ringing notes, and scholars have subsequently seen in collective bargaining "the means of establishing industrial democracy, . . . the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."

Id. at 281-84 (quoting Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002 (1955)).

36. Note, *supra* note 33, at 301.

economic weapon for the dominant party"[37] and threaten the very existence of our labor policies. As the next section of this Special Project Note demonstrates, the judiciary, in giving some definition to the vagueness of section 8(d)'s "terms and conditions of employment," has fashioned its own scope of collective bargaining which has altered the evolution of labor relations that was envisioned by Congress in 1935 and in 1947.

III. JUDICIAL LEGISLATION

Though the NLRA designates the Board—an administrative agency designed to be aware of the changing attitudes of industrial practices—as the regulatory body to monitor the procedures of collective bargaining, the Act does not pronounce that the Board regulate the substantive terms of labor agreements.[38] Congress intended that the Board maintain the framework for discussion while market forces determine who controls the terms and conditions of employment.[39] The laissez-faire view of collective bargaining encapsulated in the NLRA establishes a statutory scheme that affirms and denies the power of the state to compel bargaining, while simultaneously valuing and limiting employee participation in industrial decisionmaking.[40]

A. NLRB v. Wooster Division of Borg-Warner Corp.

In 1958 the Supreme Court responded to the Act's inherent tension in *NLRB v. Wooster Division of Borg-Warner Corp.*[41] The Board had found specific managerial proposals to be per se violations of the employer's duty to bargain with the certified International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America (International). Specifically, *Borg-Warner* concerned a charge that management had breached its duty to bargain by negotiating to im-

37. Note, *The Spring Has Sprung: The Fate of Plant Relocation as a Mandatory Subject of Bargaining*, 24 SAN DIEGO L. REV. 221, 224 (1987).

38. *See* NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). Chief Justice Vinson pointed out that

> [t]he National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement.

Id. at 401-02 (footnotes omitted).

39. *Id.* at 408-09 (stating that "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling . . . is an issue for determination across the bargaining table, not by the Board . . .").

40. Note, *supra* note 15, at 477.

41. 356 U.S. 342 (1958).

passe over two clauses. The first clause required a secret ballot vote of all employees, union and nonunion, on the company's last proposal before the union could strike.[42] The second clause recognized the union's local affiliate instead of International as the bargaining representative.[43] The Court distinguished between subjects specifically addressed by section 8(d) and all other matters by stating that the law allows a party to insist on section 8(d) issues as required subjects of bargaining and does not allow a party to insist on items that fall outside the scope of the resulting mandatory bargaining framework.[44] In affirming the Board's decision, the Court held that while the employer had bargained in good faith over all elements of the contract proposal, the employer's insistence on these nonmandatory issues, items outside of "wages, hours, and other terms and conditions of employment," as preconditions to any agreement upon the mandatory subjects specified in section 8(d) constituted a refusal to bargain.[45] As a practical matter, the Court's approach conditioned the scope of bargaining on the definition given to "mandatory" and "permissive" subjects. More importantly, the Court established a precedent for significant judicial and administrative involvement in determining the subjects discussed in the bargaining process.

Justice Harlan's separate opinion in *Borg-Warner*[46] provides insightful commentary on the potential impact of the majority's approach. Justice Harlan believed the majority's opinion was "incompatible with th[e] basic philosophy of the original labor Act."[47] He stated that the legislative history of sections 8(a)(5) and 8(d) demonstrated that Congress did not intend the Board to regulate the substantive aspects of the bargaining process, but rather intended to assure the parties to a proposed collective bargaining agreement the

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42. *Id.* at 345-46.

43. *Id.* at 345.

44. *Id.* at 349.

45. *Id.* Justice Burton reasoned:

> The duty [to bargain] is limited to [wages, hours, and other terms and conditions of employment], and within that area neither party is legally obligated to yield. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.
>
> The company's good faith has met the requirements of the statute as to subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. . . . This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement.

Id. at 349 (citations and footnote omitted).

46. *Id.* at 351 (Harlan, J., concurring in part, dissenting in part).

47. *Id.*

greatest degree of freedom in their negotiations.[48] The fundamental problem with the majority's opinion, according to Justice Harlan, was that it could impede the development of the collective bargaining system by assuming that section 8(d)'s vague language provides sufficient guidelines for courts to make the mandatory-permissive distinction.[49]

B. Fibreboard Paper Products Corp. v. NLRB

The Board and courts of appeals applied the *Borg-Warner* majority's approach to many issues in subsequent decisions. Generally, these duty to bargain cases focused on whether the alleged violation of the NLRA was relevant to the terms and conditions of employment.[50] Until the Supreme Court's 1964 decision in *Fibreboard Paper Products Corp. v. NLRB*,[51] the courts gave very little attention to the mandatory-permissive status of employer rights based on ownership or entrepreneurial discretion. At issue in *Fibreboard* was whether an employer's economically motivated decision to subcontract a portion of its maintenance work previously performed by bargaining employees of the company was a mandatory subject of bargaining. Although the employer made the decision solely to reduce labor costs, the Court affirmed the Board's finding of a section 8(a)(5) violation.[52] The Court held that the contracting out of work is "plainly" a condition of employment[53] and acknowledged that issues relating to job security should be mandatory subjects of bargaining in order to promote the NLRA's "fundamental purpose" of encouraging peaceful settlement of industrial disputes.[54] Despite having liberally endorsed a broad construction of the duty to bargain, the Court made a deliberate effort to limit its decision to the

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48. *Id.* at 356.

49. *Id.* at 359; *see also* Friedman, *supra* note 22, at 240-43.

50. *See, e.g.*, NLRB v. Independent Stave Co., 591 F.2d 443 (8th Cir.) (concluding that grievance procedures are a mandatory subject of bargaining), *cert. denied*, 444 U.S. 829 (1979); United Elec. Workers v. NLRB, 409 F.2d 150, 156-57 (D.C. Cir. 1969) (deciding that arbitrations are a mandatory subject of bargaining); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968) (holding that workloads are a mandatory subject of bargaining); NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967) (finding that plant safety is a mandatory subject of bargaining); NLRB v. Frontier Homes Corp., 371 F.2d 974 (8tb Cir. 1967) (ruling that layoffs are a mandatory subject of bargaining).

51. 379 U.S. 203 (1964).

52. *Id.* at 209.

53. *Id.* at 210.

54. *Id.* at 210-11. The Court stated:

> A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.

Id. at 210.

specific type of contracting involved in *Fibreboard* in which an employer replaced its own set of employees with another set to perform identical tasks under similar conditions of employment.[55] Additionally, the Court stated that the holding would have been different had the employer's decision involved a major capital investment or change in basic operations.[56] Thus, the majority opinion's definitional approach—simply saying that subcontracting is a condition of employment because employees' jobs may be lost—did not offer much guidance for distinguishing between mandatory and permissive subjects in cases involving other types of economically motivated business decisions.[57]

Disturbed by the breadth of the majority opinion, Justice Stewart wrote an influential concurrence that sought to define the limits of the *Fibreboard* decision.[58] Justice Stewart clearly believed that management's decisions "which lie at the core of entrepreneurial control" ought to be protected by limitations on the employer's duty to bargain.[59] Under Justice Stewart's analysis, managerial decisions that have a direct impact on employees' working conditions but are "fundamental to the basic direction of the corporate enterprise" are excluded from the mandatory-permissive distinction.[60]

C. First National Maintenance Corp. v. NLRB

While admitting in a footnote[61] in *Fibreboard* that the framers of the original NLRA might not have intended the courts to get involved

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55. *Id.* at 215.

56. *Id.* at 213.

57. *See* George, *supra* note 33, at 676.

58. *Fibreboard*, 379 U.S. at 217 (Stewart, J., concurring).

59. *Id.* at 223. Justice Stewart stated:

> Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures . . . may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative. . . . Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such *managerial* decisions, which lie at the *core of entrepreneurial control.* Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.

Id. (emphasis added).

60. *Id.* Justice Stewart's analysis may be summarized by the following passage:

> If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

Id.; see also George, *supra* note 33, at 678 (dividing management decisions in Justice Stewart's concurrence into three categories).

61. *Fibreboard*, 379 U.S. at 219 n.2 (Stewart, J., concurring).

in defining the duty to bargain, Justice Stewart mused that this view could no longer prevail because too many decisions were based on a contrary assumption.[62] Carrying on this tradition of judicial legislation, the Supreme Court in 1981 espoused the modern judicial view of the limits of mandatory bargaining in *First National Maintenance Corp. v. NLRB*.[63] At issue in *First National Maintenance* was an employer's duty to bargain over its decision to terminate part of its business for economic reasons.[64] First National Maintenance (FNM) provided housekeeping and maintenance services to commercial customers in exchange for labor costs plus a set fee. One of its customers was Greenpark Care Center, a nursing home, for whom FNM had thirty-five employees providing maintenance. As a result of a financial dispute between Greenpark and FNM,[65] the maintenance services were terminated and the thirty-five FNM employees were laid off. A newly elected union,[66] representing the terminated employees, charged FNM with violating sections 8(d) and 8(a)(5) for refusing to bargain in good faith about the partial closure decision.[67] Both the administrative law judge and the Board found FNM guilty of an unfair labor practice.[68]

In reversing the Board's holding, the Supreme Court did not defer to the Board's interpretation of the scope of section 8(d).[69] The majority opinion adopted Justice Stewart's analysis in *Fibreboard* as a foundation for constructing a restrictive view of mandatory bargaining, moving further away from merely construing the relevancy of the subject in question to the "terms and conditions of employment." *First National Maintenance*, according to the majority, concerned a decision based solely on the profitability of a contract without regard to continued employment.[70] In order to determine the employer's bargaining obligation concerning these types of decisions, the Court applied a

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62. *Id.; see* Friedman, *supra* note 22, at 251.

63. 452 U.S. 666 (1981).

64. *Cf.* Textile Workers' Union v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965) (stating that "so far as the Lahor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases, but . . . [not] to close part of a business no matter what the reason").

65. *First Nat'l Maintenance*, 452 U.S. at 669.

66. *Id.* The union won an election on March 31, 1977, and attempted to engage in negotiations with FNM on July 12. *Id.*

67. *Id.* at 670.

68. 242 N.L.R.B. 462 (1979), *enforced*, 627 F.2d 596 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981).

69. Two years prior to *First National Maintenance*, the Court discussed at length, in Ford Motor Co. v. NLRB, 441 U.S. 488 (1979), the "considerable deference" due the Board under the NLRA in its determination of mandatory bargaining subjects. *Id.* at 495-98.

70. *First Nat'l Maintenance*, 452 U.S. at 677. The majority characterized the case as involving a "management decision . . . that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern . . . wholly apart from the employment relationship." *Id.*

balancing approach whereby bargaining over a subject is mandatory only if the benefits for labor-management relations outweigh the employer's need to make decisions freely.[71] The Court focused on the union's lack of control over the disputed fee for maintenance services. Balancing the opposing interests, the Court determined that an employer's need for unencumbered decisionmaking over whether to close down a portion of the business for economic reasons outweighed any benefits from union participation in the decision.[72] This conclusion was based on the speculative belief that had the union met with management, the union would not have been able to offer concessions that Greenpark had a duty to consider.[73] Such negotiations by the union only would have delayed the inevitable loss of jobs.[74] Therefore, the Court reasoned that collective bargaining over a partial closure decision was of little value when compared to an employer's prerogative in entrepreneurial decisionmaking. The Court, in essence, created a per se rule against requiring bargaining in this situation.[75]

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71. *Id.* at 679. The Court explained:

> [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

Id.

72. *Id.* at 686. The Court held that "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely of economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *Id.* (footnote omitted).

73. *Id.* at 687-88.

74. *Id.* at 681.

75. The Court in *First National Maintenance* focused on whether labor had a statutory right to bargain with management over the *decision* to close operations in part. Generally, the employer must bargain with its employees about the *effects* of this decision on employee benefits. Effects bargaining usually is required when a managerial decision could have an adverse impact on employees' job security. Thus, any management action that may result in layoffs will call for bargaining over the "effects" of the decision, even though the decision itself does not have to be subjected to the bargaining process. *Id.* at 681-82; *see, e.g.*, Fraser & Johnston Co., 189 N.L.R.B. 142 (1971), *enforced*, 469 F.2d 1259 (9th Cir. 1972).

Additionally, *First National Maintenance* settled a split in the circuits over the bargaining obligation of partial closing decisions. Several circuits had found that partial closures were purely part of the entrepreneurial decisionmaking process. *See, e.g.*, Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1039 (8th Cir. 1976) (dicta); NLRB v. Thompson Transp. Co., 406 F.2d 698, 703 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 939 (9th Cir. 1967); NLRB v. Adams Dairy, 350 F.2d 108, 113 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). Other circuits had maintained a rebuttable presumption that a partial closure required bargaining. *See, e.g.*, ABC Trans-National Transp., Inc. v. NLRB, 642 F.2d 675 (2d Cir. 1981); Equitable Gas Co. v. NLRB, 637 F.2d 980 (3d Cir. 1981); Brockway Motor Trucks, Div. of Mack Trucks, Inc. v. NLRB, 582 F.2d 720 (3d Cir. 1978).

D. *After* First National Maintenance

The Supreme Court carefully restricted its holding in *First National Maintenance* to economically motivated partial closure decisions, and expressly declined to apply its conclusions to other decisions such as plant relocations.[76] The Court has yet to deal directly with the issue of plant relocations. A line of Board decisions since *First National Maintenance*, however, has relied on its narrow holding to authorize mandatory bargaining regarding relocation decisions without applying the *First National Maintenance* balancing test.[77] In 1984 the Board departed from this line of decisions in *Otis Elevator II*[78] by attempting to apply the *First National Maintenance* balancing test. *Otis Elevator II* concerned an employer's decision to replace outmoded equipment and duplicative work by consolidating facilities. The Board reasoned that Otis Elevator's decision to relocate did not require mandatory bargaining because the employer's decision was not based on an attempt to reduce labor costs and did not invoke section 8(d).[79] The Board suggested that a management decision could be viewed as either a change in the nature of the business, and therefore purely economic, or as a decision based solely on labor costs. For bargaining to be required under this approach, labor costs must be the sole consideration in the management decision.[80] While the Board stated that the *First National Maintenance* test would apply to Otis Elevator's decision, on balance, Otis Elevator's relocation decision was purely economic and, thus, was not the type of business decision that must be negotiated under the

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76. *First Nat'l Maintenance*, 452 U.S. at 686 n.22 (stating that "[i]n this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts").

77. *See* Bob's Big Boy Family Restaurants, 264 N.L.R.B. 1369 (1982) (concluding that the employer unlawfully refused to bargain about its decision to shut down a shrimp processing operation and contract out that work to another company); Carbonex Coal Co., 262 N.L.R.B. 1306 (1982) (holding that an employer unlawfully failed to bargain about its decision to transfer unit work); Whitehall Packing Co., 257 N.L.R.B. 193 (1981) (finding that an employer unlawfully failed to bargain with the union concerning its decision to relocate work to an "alter ego" company); *see also* George, *supra* note 33, at 681-82.

78. 269 N.L.R.B. 891 (1984).

79. *Id.* at 892-93. "Whatever the merits of the [relocation] decision, so long as it does not turn on labor costs, Sec. 8(d) of the Act does not apply." *Id.* at 892 n.3.

80. *Id.* at 892-93 (holding that "[t]he critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives" (emphasis in original)). The Board's analysis seems to provide only minimal guidance because many management decisions may legitimately involve both a fundamental change in the business and labor cost concerns. For further application of the *Otis Elevator II* analysis, see Columbia City Freight Lines, Inc., 271 N.L.R.B. 12 (1984). *See also* George, *supra* note 33, at 681-95.

NLRA.[81] More recently, in the *Milwaukee Spring* decisions,[82] the Board ignored the mandatory-permissive distinction altogether, preferring instead to focus on the parties' failure to utilize the arbitration remedies provided for in their contract.[83] These recent cases illustrate that since the inception of the *First National Maintenance* test, the Board has yet to balance the benefits to labor-management relations with an employer's need for unencumbered decisionmaking on a case-by-case basis. The following section compares managerial and labor interests within various negotiating frameworks to ascertain whether collective bargaining, as conceived by the framers of the NLRA and as perceived by the Supreme Court, actually can balance the inequality of bargaining power inherent in private enterprise and broaden the scope of employee participation in business decisions.

IV. Comparing the Alternatives

The Court in *First National Maintenance* assumed that little could be gained from collective bargaining, in terms of enhancing the labor-management relationship, when an employer is contemplating shutting down part of its operations for economic reasons. As Justice Brennan argued in dissent,[84] the Court's analysis may be criticized further for balancing entrepreneurial freedom against a process, labor-management relations, rather than against a genuine employee interest in workplace management.[85] For this reason, judges possess broad discretion in determining which subjects are core entrepreneurial decisions and which subjects are permissive items of bargaining. The mandatory-permissive distinction, initially elaborated to encourage bargaining,[86] now serves as a means of restricting collective negotiation because the flexibility of the phrase "terms and conditions of employment" hardens as the list of permissive issues grows.

The desire to protect an employer's incidents of ownership, as well as to promote an economically healthy industrial environment, has molded the framework for determining the status of bargaining subjects within the compelled negotiation process into a set of per se rules rather than a balancing test. The Saturn project represents an attempt

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81. 269 N.L.R.B. at 892-93.

82. United Auto Workers v. NLRB, 765 F.2d 175 (D.C. Cir. 1985); Milwaukee Spring II, 268 N.L.R.B. 601 (1984); Milwaukee Spring I, 265 N.L.R.B. 206 (1982).

83. Note, *supra* note 37, at 230-37.

84. *First Nat'l Maintenance*, 452 U.S. at 689 (Brennan, J., dissenting). Justice Brennan wrote: "I cannot agree with this test, because it takes into account only the interests of *management*; it fails to consider the legitimate employment interests of the workers and their union." *Id.* (emphasis in original).

85. Friedman, *supra* note 22, at 259.

86. *See supra* note 45 and accompanying text.

by both General Motors and the UAW to resist categorizing various subjects of bargaining in order to capitalize on the ability of employees to participate affirmatively in workplace decisions. Thus, the cooperative effort to organize the Saturn project abandons the traditional adversarial attitudes by ignoring the mandatory-permissive distinction in hopes of preserving the flexibility necessary to allow the labor-management relationship to adapt to the specific needs of the subcompact car market. Such an agreement forces a reevaluation of existing labor policy by questioning whether the present legal framework, constructed with acknowledged deference towards the preservation of core entrepreneurial decisions, can provide gnidance in the future.

To illustrate why the Saturn agreement has been characterized as "the longest step yet taken [by management] toward full partnership with labor in every phase of planning and production,"[87] this Special Project Note will analyze a hypothetical situation under three different collective bargaining frameworks. These frameworks are: (1) a hyperbolic scheme in which all permissive bargaining subjects are mandatory; (2) the current balancing test as elaborated by the Supreme Court in *First National Maintenance*; and (3) a labor-management cooperative venture. The hypothetical concerns Company Z, a large domestic producer of goods for an international market. Company Z believes that, to maximize its competitiveness, it must shut down one of its many facilities and move the facility's machinery to another plant operating in a state with lower labor costs. The proposed closure of the company's facility will result in layoffs of many employees represented by a union.[88]

A. Mandatory Bargaining

By eliminating the mandatory-permissive distinction, Company Z's business decision to relocate its facility in order to enhance profitability would be, by definition, a mandatory subject of bargaining. This decision, as well as any other managerial judgments, would have to be negotiated through concessions-type bargaining until an impasse occurs. The lack of restrictions placed on bargainable subjects makes collective bargaining a vehicle by which employees may play a truly active role in

87. Schlossberg & Fetter, *supra* note 3, at 602 (quoting Raskin, *A Sour Note in Industry's New Harmony*, N.Y. Times, Feb. 10, 1986, at A23, col. 1).

88. The Board recently faced a similar factual scenario in the *Milwaukee Spring* cases. *See supra* note 82. By using a contract modification analysis, the Board avoided determining whether the relocation of work from a unionized facility and the reassignment of work to nonbargaining unit employees within the same facility is a mandatory subject of bargaining. For further comparative analysis based upon this hypothetical example, see Note, *Worker Participation: Industrial Democracy and Management Prerogative in the Federal Republic of Germany, Sweden and the United States*, 8 HASTINGS INT'L & COMP. L. REV. 93, 133 (1984). *See generally infra* Special Project Note, *Comparative Analysis.*

determining workplace conditions. The question remains, however, whether a mandatory scheme actually would encourage bargaining.

Widening the scope of bargaining to subject all issues to negotiation directly contradicts the philosophical position of the Supreme Court. By creating a framework in which both labor and management are compelled to come to the bargaining table prepared not only to discuss but also to negotiate every issue, collective bargaining, as a means of ameliorating industrial differences, becomes the focus of attention—and is pushed to its limits as a result.[89] One positive aspect of this situation is that instead of resolving issues surrounding the mandatory-permissive distinction through litigation, management and labor could use their respective bargaining powers to gain concessions from each other on various items of importance.[90] Opening up the channels of communication also would allow for a more honest sharing of information and options, and perhaps lead to a truer presentation of both sides' demands. Society as a whole would benefit from an increase in worker participation in the operation of the workplace because the resulting, more democratic industrial relationship would encourage a more productive negotiation process.[91]

A number of potential problems, however, are associated with a bargaining framework which dictates that every item is a mandatory subject of bargaining. Because each side is able to wield its respective economic influences[92] over a broader range of issues, bargaining could become more complex and more time consuming.[93] Also, management or the union may attempt to undermine the other's integrity by insisting on concessions that negate the other's traditional functions. Overall, the enterprise itself could suffer the most because of management's inability to make quick entrepreneurial decisions.[94]

Applying an entirely mandatory scheme to Company Z's decision prior to its execution[95] could affect greatly the company's outlook on the situation. If the company is compelled to discuss the closing of the facility and its relocation with the union, a bargain might be struck en-

89. *See* Delaney & Sockell, *The Scope of Bargaining: Who Wins When Fewer Issues Are Mandatory Bargaining Subjects*, 11 LAB. STUD. J. 101, 106 (1986).

90. *See id.* at 107-09.

91. *Id.* at 110.

92. In the case of management, concessions may be drawn from the union representatives through the implementation of a lockout. The union, depending on the situation, may choose to strike to force the issue. In either case, such actions would most certainly disrupt production or increase the price of products. *Id.* at 112.

93. *Id.*

94. *See id.* at 113.

95. Such decisional bargaining is in direct contrast to effects bargaining, which directs management to bargain with the union after the business decision has been made over any incidental issues that may arise as a result. *See supra* note 75.

abling the plant to remain operational. The basis for the agreement would be an understanding that the union would lower its labor costs in exchange for greater job security. Whether or not such an agreement could be reached, and also be economically feasible, depends on whether the negotiations are cooperative and realistic.[96] At a minimum, every possible alternative would be examined before the company actually could close the facility.

B. A Balancing Test

By explicitly limiting the holding in *First National Maintenance* to a partial closure decision, the Court did not determine whether a decision to shut down completely and relocate a facility is a mandatory or permissive subject of bargaining.[97] Rather, the Court maintained that the negotiability of such a decision, or of any issue for that matter, would depend on weighing various factors regarding the interested parties involved. Under this test, therefore, a balance must be struck between the burden collective bargaining places on Company Z's managerial capabilities and the benefits that compelled negotiation bestows on the "establishment and maintenance of industrial peace."[98] The application of the mandatory-permissive distinction is, in theory, the means by which this balance in labor-management relations is preserved.

Underlying the *First National Maintenance* standard are the beliefs that management must be able to act without the constraints of collective bargaining in certain situations and that the bargaining process cannot resolve every decision.[99] In order to determine if a particular item is capable of being resolved by collective bargaining,[100] a court must examine industrial practices with a cautious eye and analyze the effect of the decision on management's ability to operate a profitable business. If the threat to industrial freedom outweighs the benefit of subjecting the issue to the bargaining process, the decision, according to current labor policy, is not a subject about which management should be compelled to bargain.

Company Z's decision to relocate, when evaluated under the *First National Maintenance* approach, probably would not be an appropriate subject for mandatory bargaining. In balancing the interests of the respective parties, a court probably would conclude that the issues in this

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96. Delaney & Sockell, *supra* note 89, at 112-13.

97. *See supra* note 76 and accompanying text.

98. *First Nat'l Maintenance*, 452 U.S. at 674 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)).

99. *Id.* at 678.

100. *Id.* at 680.

case are similar to those decided by the Supreme Court in *First National Maintenance.* Both the decision to relocate and the decision to close part of the business could be characterized as an exercise of management's private obligation to operate an economically profitable plant. Although these decisions would have a significant effect on continued employment,[101] a court might hold that the company's relocation decision is motivated by a desire to effect a change in the direction of the business unrelated to employment.[102] Consequently, a court would defer to the managerial prerogative if presented with this situation because the union's participation in the decision would yield only a minimal benefit.[103]

C. *Labor-Management Cooperation*

Company Z may choose to include the union as a partner in its decisionmaking process and ignore the mandatory-permissive distinction altogether. In contrast to the adversarial structure created by this distinction, cooperation provides a more open and respectful labor management bargaining relationship. If, however, the company makes the conscious policy choice to cooperate with the union in locating its facility in an area of the country where it may prosper both from an economic and human relations standpoint,[104] both parties must decide how cooperative their relationship will be given the current labor policy. Perhaps the most insightful means by which to understand and solve this dilemma is to appreciate the precedent General Motors and the UAW have set with their cooperative orchestration of the Saturn agreement[105].

The memorandum of understanding developed between General Motors and the UAW has been labeled an unprecedented experiment in terms of total participation, contribution, and commitment by all people involved.[106] General Motors and the UAW have set out as partners to establish a flexible bargaining relationship that will find "practical ways to solve real problems in order to maximize employment opportunity and preserve an important U.S. manufacturing base."[107] In order to

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101. *Id.* at 679.

102. *Id.* at 677. As a matter of course, most management decisions could be characterized as being motivated by "purely economic" interests, as opposed to employment-related interests.

103. *Id.* at 686.

104. Schlossberg & Fetter, *supra* note 3, at 615.

105. The Saturn Corporation is a wholly-owned subsidiary of General Motors.

106. Address by James L. Lewandowski, Vice President, Human Resources, Saturn Corp., The American Society of Personnel Administrators Mid-South Conference, Nashville, Tenn. (Oct. 29, 1987) [hereinafter Lewandowski Address].

107. Schlossberg & Fetter, *supra* note 3, at 615 (quoting E. Hartwig, *The Collective Bargaining Process*, Address Before Conference on the Labor Board at Mid-Century, Washington, D.C.

gain a competitive edge in the subcompact car market, General Motors has chosen to treat the UAW as an asset, not a liability,[108] and to capitalize on the individual strengths of each party by integrating the union into the traditional management decisionmaking structure. Union representatives participate in the decisionmaking process on issues that once were closely guarded management prerogatives, including the level of investment, product design, supplier selection, and manufacturing and marketing strategy.[109] Consequently, this organizational structure establishes a nonadversarial climate that will allow the General Motors-UAW relationship to grow stronger in the future.[110]

The General Motors-UAW cooperative agreement was the product of collective bargaining "based not on an obsolete ideological, adversarial mind set,"[111] but rather on a utilitarian, participatory scheme that respected the individual worker's dignity and the general public's changing needs. Thus, the Saturn pact is exceptional in going beyond what traditionally has been perceived as appropriate bargaining procedure. Although the Supreme Court has yet to decide the relocation issue, it probably would be a permissive bargaining subject. Technically, General Motors was obligated only to bargain with the UAW about the possible effects the relocation decision would have on employees who already were represented by the union.[112] Instead of bargaining about the effects of this decision as it related to their existing contractual relationship, General Motors and the UAW collaborated on the new Saturn agreement by bargaining over the decision itself.[113] The bargaining

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(Oct. 4, 1985)).

108. The NLRB released a statement that summarized the goals and consequences of the Saturn agreement as follows:

> In the case of the Saturn Project, the evidence clearly indicated that the venture, whether or not it is successful, will have an impact on current GM small-car manufacturing facilities, and consequently on the job security of GM employees represented by the UAW. Both GM and UAW recognized this potential and therefore bargained with each other about the effects of the Saturn project on current employees represented by UAW. One result of that bargaining was the agreement to give such employees an opportunity to transfer to the Saturn facility. UAW sought this agreement for the benefit of the employees it represented, while GM sought this agreement in order to provide the Saturn Corporation with an immediate source of employees skilled in automobile manufacturing.

NLRB General Counsel Orders Dismissal of Charges Regarding UAW-GM Saturn Pact, Daily Lab. Rep. (BNA) No. 107, at A-4 (June 4, 1986) (LEXIS, Labor library, DLABRT file).

109. Lewandowski Address, *supra* note 106, at 10.

110. *See* Schlossberg & Fetter, *supra* note 3, at 615.

111. *Id.* (quoting E. Hartwig, *supra* note 107).

112. *See generally supra* note 75.

113. Letter from Rossie D. Alston, Jr. Attorney for the National Right to Work Legal Defense Foundation, to Rosemary Collyer, General Counsel, Division of Advice for the NLRB (July 16, 1986) (discussing the NLRB's Division of Advice's justifications for refusing to issue a complaint in the Saturn case) (copy on file with the *Vanderbilt Law Review*). Counsel for the charging party, Alston, contended that General Motors and the UAW had no right or prerogative to bargain

relationship established by this agreement is revolutionary because employees are participants in the enterprise rather than simply laborers in the production process.[114] In this cooperative setting, the distinctions drawn between mandatory and permissive bargaining subjects, originally developed to encourage fruitful collective bargaining, have not only become hazy but also, from a practical perspective, have become meaningless because the demarcations between the goals of both labor and management purposefully have been removed.

Following the path forged by the Saturn agreement would seem to be a precarious endeavor because, though the signs point toward the familiar destination of a profitable enterprise, the surroundings appear nontraditional and, therefore, foreboding. If Company Z chooses to include the union in its decisionmaking process, the defined structure of the collective bargaining process will have to be replaced by consensus-type bargaining, which focuses discussion on the perceived problems in the future relationship, not on the bargaining status of the individual issues.[115] The aim of such a cooperative effort would be to enhance the stability of the enterprise by meshing entrepreneurial innovation and job security. In this setting, and in light of the developments in today's competitive world market, the judicially perceived need for the public protection of industrial freedom, from which the mandatory classification originated, would appear to be antiquated, indeed, even detrimental. In order for a labor-management cooperative venture to be successful, however, both parties must be willing participants who are committed to seeing the project through to its designed end. If for some reason the willingness of the parties should wane in the midst of their cooperative effort, perhaps the more familiar mandatory-permissive bargaining surroundings could serve as a useful gnide by which to appease the resulting antagonistic bargaining relationship.

V. CONCLUSION

The framers of the NLRA envisioned collective bargaining as an organic system of procedures aimed at resolving the friction that is seemingly inherent in the workplace. The Act was designed to be a pacifying framework for achieving peace in an antagonistic, potentially violent, societal relationship. In order to allow this bargaining system to

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over a totally new agreement "unless and until a representative complement of the employees [had been] actually hired." *Id.* at 4. Additionally, Alston maintained that Division of Advice's finding that the Saturn agreement was composed of the "fruits" of effects bargaining was "to render meaningless all of tbe legal underpinnings of . . . Section 8(a)(2)." Letter, *supra* at 5; *see supra* note 75. *See generally supra* Special Project Note, *Future Cooperative Efforts.*

114. Schlossberg & Fetter, *supra* note 3, at 615.

115. *Id.* at 611.

operate as a vital mediating tool, the framers purposefully refrained from enacting any rigid guidelines that might restrict communication. The Act embodies a policy view that flexible public control of compelled bargaining will ensure that individual employers and their employees have the freedom necessary to tailor the collective bargaining process to the particular needs of their industry.

The Court did not judicially impose the mandatory-permissive distinction to constrain the scope of bargaining. Rather, the Court wanted to encourage bargaining by declaring that certain subjects are so integral to the employer-employee working relationship that they must be negotiated to impasse and cannot be avoided through subversive bargaining. As the courts decide which issues are mandatory and which are permissive, however, the scope of permissive bargaining grows in the name of entrepreneurial protection, and the flexibility and effectiveness of the collective bargaining process decrease dramatically.

Cooperative efforts such as the Saturn agreement are private responses to the traditionally adversarial, autocratic labor-management relationship. The pressures of foreign competition are challenging the management philosophies of our domestic industries. Including union representatives in management's decisionmaking structure is an innovative means by which to optimize the individual strengths of a company. Within this cooperative setting, the courts should not draw an artificial distinction between different subjects of bargaining in an attempt to protect the interests involved.[116] The Saturn project and ventures like it capitalize on the similarities and differences of both labor's and management's perspective to increase the profitability of the enterprise. Thus, the General Motors-UAW cooperative relationship demonstrates that industrial democracy, the heralded goal of collective bargaining, not only fosters industrial peace but also promotes economic prosperity.

Thomas T. Crouch

116. *Id.*