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American Labor Policy

A Critical Appraisal of the National Labor Relations Act

Editor

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CHAPTER 4

THE COLLECTIVE BARGAINING PROCESS

THEODORE J. ST. ANTOINE*

A half century after the passage of the Wagner Act[1] the right to bargain collectively remains a glowing but imperfectly realized promise for American workers. In recent years even the theoretical dimensions of the right have been markedly compressed. Yet collective bargaining was conceived in the widespread belief that both the cause of industrial peace and the welfare of the individual employee would be promoted if workers were given a genuine voice in determining their employment conditions.[2] Why has the process apparently lost so much appeal? Does it still hold hope for the future?

In this paper I shall review briefly the major policy choices confronting the early formulators of collective bargaining law, trace some of the more important doctrinal and practical developments over the intervening decades, and ruminate a bit about where we should go from here.

I. Bargaining in Good Faith

Right at the outset Congress faced the question of whether a formal duty to bargain should be imposed on employers. There were influential voices on both sides of the issue. Although Senator Wagner's original "labor disputes bill" of 1934 did not speak explicitly of an obligation to "bargain collectively," one provision would have made it an unfair labor practice "to fail to

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[1] 49 Stat 449 (1935) (codified as amended at 29 USC §151 (1982)).

[2] *See, e.g.*, 78 CONG. REC. 3443 (1934) *rerpinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 at 15 (1949) (remarks of Sen. Wagner); [hereinafter cited as LEG. HIST. NLRA], *id.* at 10351, 10559, *reprinted in* 1 LEG. HIST. NLRA, at 1117, 1122 (remarks of Sen. Walsh).

exert every reasonable effort to make and maintain agreements with [employees'] representatives."[3]

At the committee hearings Sumner Slichter of Harvard opposed this requirement as a "pious wish," declaring contemptuously: "You might almost enact that the lions and lambs shall not fail to exert every reasonable effort to lie down together."[4] But persons with more practical experience, both inside and outside of academia, insisted that failure to mandate collective bargaining would "omit . . . the very guts"[5] of the organizational process, and that it was "exceedingly important" to provide that employers must "make an earnest effort"[6] to reach an agreement with unions representing their employees. This group included Lloyd K. Garrison, Dean of the Wisconsin Law School and former Chairman of the old National Labor Relations Board; William M. Leiserson, then Chairman of the Petroleum Labor Policy Board; and Francis Biddle, Chairman of the old NLRB.[7] Their views prevailed. Section 8(5) was added to the Wagner-Connery bill in 1935, making it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees."[8] The same language appeared in the National Labor Relations Act as finally adopted and has remained unchanged ever since.[9]

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[3] S. Rep. No. 2926, 73d Cong., 2d Sess. (1934), *reprinted in* Leg. Hist. NLRA, *supra* note 2, at 3.

[4] *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Education and Labor,* 73d Cong., 2d Sess. 59 (1934), *reprinted in* Leg. Hist. NLRA, *supra* note 2, at 89. Dr. Slichter's opinion carried enough weight that the bill as reported from committee omitted the language he criticized. S. Rep. No. 2926, 73d Cong., 2d Sess. (1934), as reported, *reprinted in* Leg. Hist. NLRA, *supra* note 2, at 1070.

[5] *National Labor Relations Board: Hearings on S. 1958 Before Senate Comm. on Education and Labor,* 74th Cong., 1st Sess. 137 (1935), *reprinted in* Leg. Hist. NLRA, *supra* note 2, at 1517 (statement of Lloyd K. Garrison).

[6] *To Create a National Labor Board: Hearings on S. 1958 Before the Senate Comm. on Education and Labor,* 73d Cong., 2d Sess. 234 (1934), *reprinted in* Leg. Hist. NLRA, *supra* note 2, at 264 (statement of William M. Leiserson).

[7] *See supra* notes 5–6; *Labor Disputes Act: Hearings on H.R. supra 6288 Before the House Comm. on Labor,* 74th Cong., 1st sess. 175 (1935), *reprinted in* Leg. Hist. NLRA, *supra* note 2, at 2649 (statement of Francis Biddle); *National Labor Relations Board: Hearings on S. 1958 Before Senate Comm. on Education and Labor,* 74th Cong., 1st Sess. 79–80 (1935), *reprinted in* Leg. Hist. NLRA *supra* note 2, at 1455–56 (statement of Francis Biddle).

[8] S. Rep. No. 1958, 74th Cong., 1st Sess. (1935), as reported, *reprinted in* Leg. Hist. NLRA, *supra* note 2, at 2290; H.R. Rep. No. 7978, 74th Cong., 1st Sess. (1935), *reprinted in* Leg. Hist. NLRA, *supra* note 2, at 2862. *See also* S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935), *reprinted in* Leg. Hist. NLRA, *supra* note 2, at 2312; H. R. Rep. No. 1147, 74th Cong., 1st Sess. 20 (1935), *reprinted in* Leg. Hist. NLRA, *supra* note 2, at 3069.

[9] 49 Stat 449, 453 (1935) (codified as amended at 29 USC §158(a)(5) (1982)). *See generally* Cox, *The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401 (1958); Duvin, *The*

The debate has never ended on the wisdom of what Congress did, or indeed on exactly what it was that had been done. The two principal congressional architects of the legislation differed considerably over its meaning. The Act's sponsor, Senator Wagner, thought it would obligate an employer to "negotiate in good faith" and "make every reasonable effort to reach an agreement."[10] Senator Walsh, the Chairman of the Senate Labor Committee, felt instead that the parties would merely be required to get together, to meet and confer. "The bill," said he, "does not go beyond the office door."[11] In 1950 the powerful voices of Archibald Cox and John Dunlop spoke out to insist that the Wagner Act was concerned only with "*organization for bargaining*—not with the scope of the ensuing negotiations."[12] They lamented that the NLRB, with judicial endorsement, had undertaken the task of "defining the scope of collective bargaining."[13] As late as 1961 a distinguished labor study group headed by Clark Kerr labeled the bargaining requirement "unrealistic," commenting that the "provisions designed to bring 'good faith' have become a tactical weapon used in many situations as a means of harassment."[14]

Meanwhile, in 1947, the Taft-Hartley amendments finally defined collective bargaining. In addition to subjecting unions as well as employers to the duty to bargain, Congress added a new section, Section 8(d)[15] to the NLRA, declaring that to "bargain

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Duty to Bargain: Law in Search of Policy, 64 COLUM. L. REV. 248, 252–53 (1964); Fleming, *The Obligation to Bargain in Good Faith,* 47 VA. L. REV. 988 (1961); Gross, Cullen, & Hanslowe, *Good Faith in Labor Negotiations: Test and Remedies,* 53 CORNELL L. REV. 1009 (1968); Latham, *Legislative Purpose and Administrative Policy Under the National Labor Relations Act,* 4 GEO. WASH. L. REV. 433 (1936); Murphy, *Impasse and the Duty to Bargain in Good Faith,* 39 U. PITT. L. REV. 1 (1977); Smith, *The Evolution of the "Duty to Bargain" Concept in American Law,* 39 MICH. L. REV. 1065, 1084–86 (1941).

[10] 79 CONG. REC. 7571 (1935), *reprinted in* LEG. HIST. NLRA, *supra* note 2, at 2336 (remarks of Sen. Wagner, citing Houde Eng'g Corp., 1 NLRB (old) 35 (1934)).

[11] 79 CONG. REC. 7659 (1935), *reprinted in* LEG. HIST. NLRB, *supra* note 2, at 2373 (remarks of Sen. Walsh).

[12] Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board,* 63 HARV. L. REV. 389, 394 (1950) (emphasis in the original).

[13] *Id.* at 397.

[14] LABOR STUDY GROUP, COMM. FOR ECONOMIC DEVELOPMENT, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 82 (1961). The members of the Study Group, besides Chairman Clark Kerr, were Douglas V. Brown, David L. Cole, John T. Dunlop, William Y. Elliot, Albert Rees, Robert M. Solow, Philip Taft, and George W. Taylor.

[15] 61 Stat 136, 142–43 (1947) (codified as amended at 29 USC §158(d)(1976)), *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 [hereinafter cited as LEG. HIST. LMRA], at 8 (1948). At the same time §8(b)(3) made it a reciprocal duty of unions to bargain collectively with employers, and §8(5) was renumbered as §8(a)(5). 29 USC §158 (a)(5), (b)(3)(1982).

collectively" meant the "mutual obligation" of employer and union to confer "in good faith" with respect to "wages, hours, and other terms and conditions of employment." Section 8(d) also took pains to state that no party would be under a compulsion to "agree to a proposal" or make any "concession." There is probably no principle of national labor policy about which the Supreme Court has been so emphatic and so consistent over the years as this "free opportunity for negotiation";[16] the Labor Board may not "sit in judgment upon the substantive terms of collective bargaining agreements."[17]

Inevitably there will be tension when a government agency that is totally precluded from intruding upon or assessing the parties' ultimate bargain must nonetheless determine in many cases whether the negotiations were carried on in "good faith," that is, with a "*bona fide* intent" to adjust differences and "to reach an agreement if agreement is possible."[18] Apart from examining such obvious procedural factors as the parties' willingness to have duly authorized representatives meet and confer at reasonable times and places, how can the NLRB inquire into "good faith" without looking at what proposals and counterproposals are made during the course of bargaining? And how can taking such a look avoid tipping the scales in favor of some types of contract provisions and against others? The problem becomes especially acute, as we shall discuss shortly,[19] when the NLRB proceeds to tell the parties that they must bargain about certain subjects, and need not bargain about others.

Section 8(d)'s definitional provision contains essentially two elements, the "how" of bargaining—"in good faith"—and the "what" of bargaining—"wages, hours, and other terms and conditions of employment." In practice these elements sometimes merge. Occasionally, an employer's substantive proposals have been treated as evidence of bad faith, especially when combined with other conduct such as delaying tactics. So classified were an

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[16] NLRB v. Jones & Laughlin Steel Corp., 301 US 1, 45, 1 LRRM 703 (1937).

[17] NLRB v. American Nat'l Ins. Co., 343 US 395, 404, 30 LRRM 2147 (1952). *See also* NLRB v. Insurance Agents, 361 US 477, 487, 45 LRRM 2705 (1960); H.K. Porter Co. v. NLRB, 397 US 99, 108, 73 LRRM 2561 (1970) ("freedom of contract" as fundamental policy of NLRA).

[18] Atlas Mills, 3 NLRB 10, 21, 1 LRRM 60 (1937); NLRB v. Highland Park Mfg. Co., 110 F2d 632, 637, 6 LRRM 786 (CA 4, 1940). *See also* National Licorice Co. v. NLRB, 309 US 350, 358, 6 LRRM 674 (1940) (accepting good-faith requirements under original Wagner Act).

[19] *See infra* Part II.

insistence on an "open shop" and absolute employer control over wage rates,[20] and an offer of little or no wage increase during a period of double-digit inflation.[21] Besides the classic case of a bad-faith refusal to bargain, which involves a subjective state of mind (the lack of *bona fide* intent), the Board and the courts have also held that there may be certain *per se* refusals to bargain, regardless of a party's good faith or bad faith. The theory in such instances is that in effect there has been no bargaining at all, or at least insufficient bargaining to satisfy the obligation to persist to the point of "impasse" or deadlock in the negotiations. The party's frame of mind is thus immaterial. Examples of *per se* violations include a party's taking unilateral action without prior negotiations concerning a matter, like wages or hours, on which bargaining is required,[22] or, conversely, a party's insisting on negotiations concerning a matter on which bargaining is *not* required.[23]

More typically, a finding of a refusal to bargain in good faith is based on the "totality of conduct" exhibited by a party.[24] Perhaps the most celebrated and controversial decision on the subject is *General Electric Co.*,[25] often referred to as the "Boulwarism" case. Lemuel R. Boulware was a vice president of GE who in the late 1940s devised a new three-step bargaining strategy.[26] It consisted of a systematic research program to determine what benefits employees wanted and what the company could afford; the preparation of a "fair and firm" offer for presentation to the union with no room for change unless the company had overlooked critical facts; and a massive communications campaign to convince the employees and the public

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[20] NLRB v. Wright Motors, Inc., 603 F2d 604, 102 LRRM 2021 (CA 7, 1979).

[21] K-Mart Corp. v. NLRB, 626 F2d 704, 105 LRRM 2431 (CA 9, 1980).

[22] NLRB v. Katz, 369 US 736, 50 LRRM 2177 (1962); *cf.* NLRB v. Crompton-Highland Mills, Inc., 337 US 217, 24 LRRM 2088 (1949) (unilateral action as manifestation of bad faith).

[23] NLRB v. Wooster Div. of Borg-Warner Corp., 356 US 342, 42 LRRM 2034 (1958); *see infra* Part II.

[24] *See* General Elec. Co., 150 NLRB 192, 193, 196, 57 LRRM 1491 (1964), *enforced,* 418 F2d 736, 72 LRRM 2530 (CA 2, 1969), *cert. denied,* 397 US 965 (1970). The general approach of looking at the "whole complex" of a party's activities to determine their legitimacy under the NLRA may be derived from NLRB v. Virginia Elec. & Power Co., 314 US 469, 477–78, 9 LRRM 405 (1941).

[25] *Supra* note 24.

[26] *See generally* H. Northrup, BOULWAREISM (1964); Cooper, *Boulwareism and the Duty to Bargain in Good Faith,* 20 RUTGERS L. REV. 653 (1966); Note, *Boulwareism and Good Faith Collective Bargaining,* 63 MICH. L. REV. 1473 (1965).

that GE would "do right voluntarily," without the need for union intervention. The Board, supported by a divided Second Circuit, found this procedure as employed in these particular circumstances at odds with the "shared process" of collective bargaining mandated by the NLRA. More specifically, the Board held that GE had failed to bargain in good faith through (1) its failure to furnish information requested by the union, (2) its attempts to deal separately with locals while engaged in national negotiations, (3) its presentation of an accident insurance proposal on a take-it-or-leave-it basis, and (4) its overall approach to and conduct of bargaining.[27]

Although the trial examiner treated GE's proposal of its insurance plan on a take-it-or-leave-it basis as a separate violation, the Board majority declared it was simply indicative of the company's overall bad faith.[28] Nevertheless, the scrupulously balanced treatise produced by the American Bar Association's Section of Labor and Employment Law is surely correct in summing up the majority's attitude toward the bargaining obligation: "The duty refers to a *bilateral* procedure whereby the employer and the bargaining representative *jointly* attempt to set wages and working conditions for the employees."[29] If *General Electric* did not outlaw take-it-or-leave-it bargaining as such (and I conclude it did not), it clearly did not place its imprimatur on the technique either.

However hard it may be to identify "good faith" and to classify such particular tactics as "take-it-or-leave-it" bargaining, there has been considerable evidence over the years that the statutory duty to bargain has had a positive practical effect. One survey in the 1960s, for example, revealed that successful bargaining relationships were eventually established in 75 percent of the cases sampled that went through to a final Board order, and in 90 percent of the cases that were voluntarily adjusted after the issuance of a complaint.[30] Although a recalcitrant offender can drag its heels with relative impunity, because a Board order to

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[27] General Elec. Co., *supra* note 24, at 193.

[28] *Id.* at 196.

[29] American Bar Association, Section of Labor and Employment Law, THE DEVELOPING LABOR LAW 2d ed. 574 (C. Morris. ed., 1983) (emphasis in the original) [hereinafter cited as DEVELOPING LABOR LAW].

[30] P. ROSS, THE GOVERNMENT AS A SOURCE OF UNION POWER 180–230 (1965); *see also* McCulloch, *The Development of Administrative Remedies,* 14 LAB. L.J. 339, 348 (1963) (then NLRB Chairman discussing effectiveness of Board remedies).

bargain operates only prospectively and ordinarily does not furnish any monetary relief,[31] the happy reality during most of the past half century is that the vast majority of American employers and unions bowed to the law's demands, cheerfully or otherwise. Unfortunately, the last decade has seen an ominous new pattern of unlawful employer behavior. Professor Paul Weiler estimates that about 10,000 employees were discharged in 1980 for their activities in representation campaigns; since 200,000 employees voted for unions that year, this meant that one out of every 20 union supporters paid for her allegiance with her job.[32] By my own calculations from Professor Weiler's figures, that represents about a sixfold increase in the rate of employer illegality during organizing drives since the mid-1950s.

Not surprisingly, a recent study by Professor William Cooke concerning union success in a sample of first-contract negotiations indicates that while agreements were reached in about 77 percent of all the cases in which the union had won an election, employer discrimination reduced the probability of a contract by nearly 44 percent, and a refusal to bargain reduced that probability by as much as 25 percent.[33] Despite these gloomy tidings, I retain my belief that a properly constructed and properly enforced law can reclaim the salutary role it played in the balmier labor relations climate of the 1950s and the 1960s. For the remainder of this paper I shall concentrate on the substantive area of collective bargaining law that I consider the most deficient: the regulation of the subject matter of negotiations.

II. The Subject Matter of Bargaining

If the House of Representatives had had its way, Section 8(d) of the NLRA, as added by the Taft-Hartley amendments, would have been much more specific, even definitive, in enumerating

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[31] *See* NLRB v. Food Store Employees Local 347 (Heck's Inc.), 417 US 1, 86 LRRM 2209 (1974); Ex-Cell-O Corp., 185 NLRB 107, 74 LRRM 1740 (1970); Tiidee Prods., Inc., 194 NLRB 1234, 79 LRRM 1175 (1972), *enforced,* 502 F2d 349, 86 LRRM 2093 (CA DC, 1974), *cert. denied,* 421 US 991 (1975).

[32] *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV. L. REV. 1769, 1780–81 (1983).

[33] Cooke, *The Failure to Negotiate First Contracts: Determinants and Policy Implications,* 38 IND. US. & LAB. REL. REV. 163, 164, 170, 174–75 (1985) (analyzing data from 118 elections in Indiana in 1979 and 1980).

the subjects of bargaining. In so doing the Act would have made clear, as the House Labor Committee put it, that a union had "no right to bargain with the employer about . . . how he shall manage his business. . . ."[34] The more general language that was finally adopted was seen as confirmation of the course that the Labor Board had been following.[35] That course was for the Board itself to define for employers and unions the "mandatory" subjects of bargaining, about which either party could be required to bargain at the behest of the other.[36]

If a topic is mandatory, moreover, a party may demand agreement on it as the price of any contract. Stated differently, negotiations could be carried to the point of impasse or stalemate on such an issue, and economic pressure could be brought to bear to back up the demands. Matters outside this charmed circle of mandatory subjects are merely "permissive." The parties may negotiate concerning such topics if both sides are willing, but neither party may insist on bargaining over them if the other party objects. These permissive subjects could not be the grounds for an impasse or breakdown in the negotiations.[37]

The Supreme Court was eventually called upon to appraise this scheme in *NLRB* v. *Wooster Division of Borg-Warner Corp.*[38] The facts of *Borg-Warner* were curiously atypical. An employer demanded that its collective bargaining agreement contain, *inter alia,* a clause requiring a vote of the employees by secret ballot before the union could go on strike. A majority of the Supreme Court held first that the "ballot" clause related to a matter of purely internal union concern, and was thus not a mandatory subject of bargaining. Then, in a step not logically necessitated by Section 8(d) and highly dubious as a matter of healthy industrial relations, the Court agreed with the Board that the

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[34] H. REP. NO. 245, 80th Cong., 1st Sess. 22–23 (1947), *reprinted in* LEG. HIST. LMRA, *supra* note 15, at 313–14.

[35] *See* Cox & Dunlop, *supra* note 12, at 400–401. *See also* post-1947 cases cited *infra* note 36.

[36] Inland Steel Co., 77 NLRB 1, 21 LRRM 1310 *enforced,* 170 F2d 247, 22 LRRM 2506 (CA 7, 1948), *cert. denied,* 336 US 960, (1949) (pensions); J.H. Allison & Co., 70 NLRB 377, 18 LRRM 1369 (1946), *enforced,* 165 F2d 766, 21 LRRM 2238 (CA 6), *cert. denied,* 335 US 814 (1948) (merit increases). For varying assessments of the Board's performance in defining what is mandatory, *compare* Modjeska, *Guess Who's Coming to the Bargaining Table,* 39 OHIO ST. L.J. 415 (1978), *with* Walther, *The Board's Place at the Bargaining Table,* 28 LAB. L.J. 131 (1977).

[37] *See generally* DEVELOPING LABOR LAW, *supra* note 29, at 761–64; R. Gorman, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 496–98 (1976).

[38] 356 US 342, 42 LRRM 2034 (1958).

employer's insistence on a "permissive" clause as a condition of agreement amounted in effect to an unlawful refusal to bargain on mandatory subjects.

At least two other approaches might have made more sense. The lead attorney for the company in *Borg-Warner* told me that he seriously considered arguing for the most straightforward solution, which would have been the obliteration of the whole mandatory-permissive distinction.[39] Under this approach, any topic put on the table by either party would have triggered the duty of good-faith negotiating. The other party, it should be emphasized, would never be obligated to agree, only to bargain. Why, after all, should a federal agency, rather than the parties themselves, determine whether a particular item is so important that it is worth a strike or a lockout? The subject matter of collective bargaining ought to be flexible rather than frozen into rigid molds by governmental fiat.[40] Indeed, does not *Borg-Warner* in a real sense cut against the parties' "freedom of contract," which lies at the core of national labor policy? Furthermore, the Board's doctrine encourages hypocrisy in negotiations. If a party deeply desires a concession on a permissive subject that may not legally be carried to impasse, it will be tempted to hang the bargaining up on a false issue that happens to enjoy official approbation as a mandatory topic. Candor would have been enhanced by a different rule, and unresolved disputes would have been recognized for what they ordinarily become in any case—matters to be decided by economic muscle.

Making all topics subject to the duty (and therefore the right) of good-faith bargaining would of course have won the case for the company in *Borg-Warner.* But it is readily understandable why the employer there shrank from such strong medicine. Ordinarily it would be the union, not the employer, that would profit the most from an expanded range of negotiations. The right to force good-faith bargaining on any topic would enable the union to demand bargaining over those most sensitive of

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[39] Conversation with James C. Davis, Esq., of Cleveland, Ohio (*circa* 1960).

[40] Contemporaneous criticisms of *Borg-Warner* along these lines were expressed by Cox, *Labor Decisions of the Supreme Court at the October Term, 1957,* 44 VA. L. REV. 1057, 1083–86 (1958); Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process,* NYU TWELFTH ANNUAL CONFERENCE ON LABOR 39, 46–51 (1959); Note, *The Impact of the Borg-Warner Case on Collective Bargaining,* 43 MINN. L. REV. 1225, 1233–36 (1959); Note, *Bargaining on Nonmandatory Topics Constitutes Refusal to Bargain,* 11 STAN. L. REV. 188, 193 (1958).

issues, basic business decisions now classified as managerial prerogatives. Borg-Warner's counsel was much too sophisticated not to be aware of all this. His position was that having to bargain to an impasse over a business decision would not be the worst thing that could happen to an employer. Much worse is to be told, after the fact, that a business decision unilaterally implemented without prior negotiation with the union involved a mandatory subject of bargaining, and that the unilateral change therefore constituted an unfair labor practice which must now be undone at some substantial expense to the company.[41] Such indeed was the ill fortune of numerous employers during the 1960s, when the Board significantly enlarged the scope of required bargaining.[42] The wiser course might well have been to end the confusion and uncertainty by treating all lawful subjects as mandatory. But that was the road not taken.

A second, more modest approach would also have allowed the employer in *Borg-Warner* to prevail. That was the position adopted by Justice Harlan and three other Justices,[43] who would have retained the mandatory-permissive distinction, but with a difference. Either party would still be required to bargain to an impasse about mandatory subjects but not about permissive subjects, as is the case under existing law. At the same time, however, either party under the Harlan formulation could persist in pursuing any lawful demand, regardless of how the Board might categorize it, and could refuse to contract absent agreement on that item. In short, Justice Harlan read Section 8(d) of the NLRA to mean exactly what it says, and only that: A party is obligated to bargain about wages, hours, and other employment terms, but an insistence on bargaining about more is not the equivalent of a refusal to bargain about a mandatory subject. A union, for example, could dismiss out of hand an employer's demand for a secret-ballot strike vote procedure, but the

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[41] *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 US 203, 57 LRRM 2609 (1964); American Needle & Novelty Co., 206 NLRB 534, 84 LRRM 1526 (1973) (rejecting management's unilateral decisions and requiring that the issues be resolved by collective bargaining). In the exercise of its discretion, however, the Board might not order a financially troubled employer to restore the status quo ante. *E.g.*, Renton News Record, 136 NLRB 1294, 49 LRRM 1972 (1962).

[42] One of the reasons Borg-Warner counsel Davis leaned toward the elimination of the mandatory-permissive distinction was his anticipation of this trend.

[43] NLRB v. Wooster Div. of Borg-Warner Corp. *supra* note 38, at 350–51 (Frankfurter, J., concurring in part and dissenting in part; Harlan, J., joined by Clark, J., and Whittaker, J., concurring in part and dissenting in part).

employer would not commit an unfair labor practice if it remained adamant.

Either of those two approaches would probably have comported better with the realities of collective bargaining than does the law as now propounded. If it is too late in the day to press for fundamental changes, except through unlikely legislation, at least a recognition of past missteps may help us chart a sounder future course.

III. Management's Rights vs. Employees' Jobs

Under Section 8(d) of the amended NLRA the mandatory subjects of bargaining are wages, hours, and other conditions of employment.[44] It is now well established that wages include compensation in almost every conceivable form, from straight hourly earnings[45] through the most complex pension plan.[46] Hours cover not only the total number of hours in a day or a week, but also the times of particular shifts,[47] the scheduling of overtime,[48] and the like. Working conditions plainly encompass such physical aspects of the job as heat and cold, dirt and noise, lighting, safety hazards, and other assorted stresses and strains.[49] But over the last two decades, the most controversial

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[44] *See* text accompanying note 15 *supra.* A further distinction depends on the *persons* for whose immediate benefit the contract terms are being negotiated. Only current members of the bargaining unit are "employees" entitled under the NLRA to be represented by the union in collective bargaining. Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 US 157, 78 LRRM 2974 (1972) (retirees or pensioners not employees). But the benefits to be accorded persons outside the unit may still be mandatory subjects of bargaining if they "vitally affect" the employment conditions of unit employees. *Compare* Teamsters Local 24 v. Oliver, 358 US 283, 43 LRRM 2374 (1959) (rental rates of owner-drivers in trucking industry were a mandatory subject because of integral relationship to wage structure of covered employee-drivers), *with* Pittsburgh Plate Glass Co., *supra* (health insurance of retired workers was not a mandatory subject of bargaining). The fairly stringent "vitally affects" test only applies to nonunit persons or their benefits, and not to matters directly involving bargaining-unit employees. Ford Motor Co., v. NLRB, 441 US 488, 101 LRRM 2222 (1979) (prices charged by third-party concessionaire in plant cafeteria and vending machines were mandatory subject; "triviality" argument rejected).

[45] Gray Line, Inc., 209 NLRB 88, 85 LRRM 1328 (1974), *enforced in part,* 512 F2d 992, 89 LRRM 2192 (CA DC, 1975).

[46] Inland Steel Co., *supra* note 36, noted in 43 ILL. L. REV. 713 (1948) and 58 YALE L.J. 803 (1949).

[47] Timken Roller Bearing Co, 70 NLRB 500, 18 LRRM 1370 (1946), *enforcement denied on other grounds,* 161 F2d 949, 20 LRRM 2204 (CA 6, 1947); *see also* Meat Cutters Local 189 v. Jewel Tea Co., 381 US 676, 691, 59 LRRM 2376 (1965).

[48] Colonial Press, Inc., 204 NLRB 852, 860–61, 83 LRRM 1648 (1973).

[49] *E.g.,* NLRB v. Gulf Power Co, 384 F2d 822, 66 LRRM 2501 (CA 5, 1967) (safety rules).

issue concerning the duty to bargain has been the extent to which employers must negotiate about managerial decisions that result in a shrinkage of job opportunities for employees. Under the *Borg-Warner* rubric, the crucial question is whether a subject is classified as a condition of employment or as a management right.[50]

For a long time the Board held that in the absence of antiunion animus, employers were not required to bargain over decisions to subcontract, relocate operations, or introduce technological improvements. The only obligation was to negotiate regarding the *effects* of such decisions on the employees displaced. Layoff schedules, severance pay, and transfer rights were thus bargainable, but the basic decision to discontinue or change an operation was not.[51] Under the so-called Kennedy-Johnson Board, however, a whole range of managerial decisions were reclassified as mandatory subjects of bargaining. These included decisions to terminate a department and subcontract its work,[52] decisions to consolidate operations through automation,[53] and decisions to close one plant of a multi-plant enterprise.[54] The key seems to have been whether the employer's action would result in a "significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit."[55]

In *Fibreboard Paper Products Corp.* v. *NLRB*,[56] the Supreme Court gave limited approval to this shift of direction. The Court sustained a bargaining order issued when a manufacturer wished to subcontract out its maintenance work within a plant. The Court emphasized that the subcontracting did not alter the company's "basic operation" or require any "capital investment."[57] It simply involved a replacement of one group of employees with another group to do the same work in the same place under the same general supervision. Bargaining would not

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[50] *See* NLRB v. Wooster Div. of Borg-Warner Corp., *supra* note 38 at 349–50 (1958).

[51] *E.g.*, Brown-Dunkin Co., 125 NLRB 1379, 45 LRRM 1256 (1959), *enforced*, 287 F2d 17, 47 LRRM 2551 (CA 10, 1961); Brown-McLaren Mfg. Co., 34 NLRB 984, 9 LRRM 50 (1941).

[52] Town & Country Mfg. Co., 136 NLRB 1022, 49 LRRM 1918 (1962), *enforced*, 316 F2d 846, 53 LRRM 2054 (CA 5, 1963).

[53] Renton News Record, *supra* note 41.

[54] Ozark Trailers, Inc., 161 NLRB 561, 564, 63 LRRM 1264 (1966).

[55] Westinghouse Elec. Corp., 150 NLRB 1574, 1576, 58 LRRM 1257 (1965).

[56] 379 US 203, 57 LRRM 2609 (1964).

[57] *Id.* at 213.

"significantly abridge" the employer's "freedom to manage the business."[58]

One court of appeals, elaborating on this rationale, held that there was no duty to bargain about subcontracting involving a "change in the capital structure."[59] Other courts of appeal, in cases of partial shutdowns and relocations, attempted to balance such factors as the severity of any adverse impact on unit jobs, the extent and urgency of the employer's economic need, and the likelihood that bargaining would be productive.[60] This approach had the attraction of maximizing fairness in individual situations, but it could often lead to uncertainty and unpredictability.

The Supreme Court revisited the issue in *First National Maintenance Corp.* v. *NLRB*,[61] with rather puzzling results. The Court held that a maintenance firm did not have to bargain when it decided to terminate an unprofitable contract to provide janitorial services to a nursing home. The Court first stated broadly that an employer has no duty to bargain about a decision "to shut down part of its business purely for economic reasons."[62] It then pointed out that in this particular case the operation was not being moved elsewhere and the laid-off employees were not going to be replaced. The employer's dispute with the nursing

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[58] *Id.* An unusually influential separate concurrence by Justice Stewart, joined by Justices Douglas and Harlan, limited *Fibreboard* to its facts and emphasized that the Court was not deciding that "subcontracting decisions are as a general matter subject to [the] duty [to bargain]." 379 US at 218. Specifically, *Fibreboard* did not involve one of the "managerial decisions . . . which lie at the core of entrepreneurial control." *Id.* at 223.

[59] NLRB v. Adams Dairy Co., Inc., 350 F2d 108, 111, 60 LRRM 2084 (CA 8, 1965), *cert. denied*, 382 US 1011 (1966). *See also* Automobile Workers Local 864 v. NLRB (General Motors Corp.), 470 F2d 422, 81 LRRM 2439 (CA DC, 1972) (manufacturer's "sale" of dealership); NLRB v. Transmarine Navigation Corp., 380 F2d 933, 65 LRRM 2861 (CA 9, 1967) (relocation); NLRB v. Royal Plating & Polishing Co., 350 F2d 191, 60 LRRM 2033 (CA 3, 1965) (plant shutdown).

[60] NLRB v. Production Molded Plastics, Inc., 604 F2d 451, 102 LRRM 2040 (CA 6, 1979) and Brockway Motor Trucks v. NLRB, 582 F2d 720, 99 LRRM 2013 (CA 3, 1978) (closing one of several plants); Garment Workers v. NLRB (McLoughlin Mfg. Corp.), 463 F2d 907, 80 LRRM 2716 (CA DC, 1972) (relocation). *See generally* Goetz, *The Duty to Bargain About Changes in Operations*, 1964 DUKE L.J. 1; Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance: *The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); Heinsz, *The Partial-Closing Conundrum: The Duty of Employers and Unions to Bargain in Good Faith*, 1981 DUKE L.J. 71; Schwartz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 FORDHAM L. REV. 81 (1979); Comment, *Duty to Bargain About Termination of Operations*, 92 HARV. L. REV. 768 (1979); Note, *Partial Closings: The Scope of an Employer's Duty to Bargain*, 61 B.U.L. REV. 735 (1981).

[61] 452 US 666, 107 LRRM 2705 (1981).

[62] *Id.* at 686. The Court stated, however, that there was "no doubt" the employer had an obligation to bargain about the "results or effects" of its decision to halt the operation. *Id.*

home concerned the size of a management fee over which the union had no control, and because the union had only recently been certified there was no disruption of an ongoing relationship.[63] The decision thus left unanswered important questions regarding the more typical instance of a partial closing or the removal of a plant to a new location.[64]

The majority in *First National Maintenance* purported to apply a balancing test in reaching its conclusion. Stressing that employers must be free from the "constraints" of collective bargaining when that is necessary for running a profitable business, the Court declared that in conflicts between employees' job security and management's interest in "the scope and direction of the enterprise," negotiations 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."[65] The proposed subject of negotiation must be "amenable to resolution through the bargaining process."[66] In dissent, Justices Brennan and Marshall argued forcibly that the majority's test failed to take into account "the legitimate employment interests of the workers and their union."[67] Furthermore, even if the union had no control over the management fee involved in the case, sufficient wage concessions might have enabled the employer to receive a satisfactory percentage return on its investment.

In *Otis Elevator Co.*[68] the NLRB gave *First National Maintenance* a broad reading, placing no weight on the possible limiting effect of the latter's peculiar facts. An employer's decision to terminate its research and development functions at a facility in New Jersey and to relocate and consolidate those functions at another facility in Connecticut was held not to be a mandatory subject of bargaining. Although there were three separate opinions, the Board plurality emphasized that the employer's decision "did not turn upon labor costs" but rather "turned upon a fundamental change in the nature and direction of the business."[69] The

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[63] *Id.* at 687–88.

[64] The Court expressly reserved the questions of bargaining over plant relocations and sales. *Id.* at 686 n. 22.

[65] *Id.* at 677–79.

[66] *Id.* at 678.

[67] *Id.* at 689.

[68] 269 NLRB 891, 115 LRRM 1281 (1984).

[69] *Id.* at 892, 115 LRRM at 1282–83.

decision was thus not "amenable to bargaining," regardless of its "effect on employees [or] a union's ability to offer alternatives."[70]

Otis Elevator was not mandated by *First National Maintenance,* but it was an entirely defensible extension of the Supreme Court majority's rationale. At the same time the Reagan Board's approach represents almost the polar opposite of the Kennedy-Johnson Board's emphasis on "employment security" in the bargaining unit.[71] In my opinion either position is supportable under the language and history of the statute, which fairly leaves the issue for resolution as a matter of sound industrial policy. We should remember that at the time of the Taft-Hartley debates, a determined effort was made to spell out explicitly the subjects of bargaining, and that effort was defeated.[72] NLRB Chairman Paul Herzog advised the Senate Labor Committee that the scope of bargaining might "vary with changes in industrial structure and practice," and recommended that the task of defining the range of bargaining should remain with the Board, subject to judicial review.[73] In enacting Section 8(d) Congress adopted that approach.[74]

We are so used to speaking of the mandatory subjects of bargaining as embracing wages, hours, and "working conditions" that we tend to forget that Section 8(d) does not say that. It speaks of "other terms and conditions of employment." Moreover, the theoretically almost infinitely expansible "terms" was an addition to the phrase, "wages, hours of employment, or other conditions of employment," which has always appeared in Section 9(a)[75] of the NLRA, dealing with a majority union's power of exclusive representation for purposes of collective bargaining. When Congress has desired to treat "working condi-

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[70] *Id. See also* Gar Wood-Detroit Truck Equip., Inc., 274 NLRB No. 23, 118 LRRM 1417 (1985); Hawthorn Mellody, Inc., 275 NLRB No. 55, 119 LRRM 1079 (1985).

[71] *See* text accompanying note 55 *supra.*

[72] *See* text accompanying notes 15–16 *supra.*

[73] *Hearings on S. 55 and S.J. Res. 22 Before Senate Comm. on Labor and Public Welfare,* 80th Cong., 1st Sess. 1914 (1947). *Cf.* Ford Motor Co. v. NLRB, 441 US 488, 101 LRRM 2222 (1979) (current industrial practices as general guideline for mandatory subjects of bargaining).

[74] *See* H.R. REP. NO. 245, 80th Cong., 1st Sess. 71 (1947) (minority report), *reprinted in* LEG. HIST. LRMA, *supra* note 15, at 362; H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 34–35 (1947), *reprinted in* LEG. HIST. LMRA, *supra* note 15, at 538–39; First National Maintenance Corp. v. NLRB, *supra* note 61 at 675 & n.14; Fibreboard Paper Prods. Corp. v. NLRB, *supra* note 56 at 219 n.2 (Stewart, J., concurring).

[75] 49 Stat 453 (1935) (codified as amended at 29 USC §159(a)(1982)).

tions" as such it has known how to do so.[76] I do not wish to press this point too far. The Supreme Court, speaking through Justice Brennan, has accepted the notion that Section 8(d) "does establish a limitation," and that it "includes only issues which settle an aspect of the relationship between the employer and employees."[77] And it is especially doubtful that the Taft-Hartley Congress harbored any intention of making a union "an equal partner in the running of the business enterprise."[78]

Nevertheless, I am satisfied that at least there is ample legislative justification for the standard which the Kennedy-Johnson Board was apparently evolving, namely, that negotiations are mandatory when managerial decisions affecting unit work may jeopardize employees' job security.[79]

The policy question in these situations is how to reconcile management's interest in running its own business as it sees fit with the workers' claim to a voice in shaping their industrial lives. Before I set forth my own views on how such a reconciliation may be effectuated, one further important technical distinction must be understood. Whether a particular item is a mandatory subject of bargaining may arise in two quite different contexts. First, the union may be seeking a certain provision, either as part of a new labor contract that is open for negotiation or as an addition to an existing agreement in midterm. Second, an employer may wish to make a unilateral change in its operations, either in the absence of or in the face of a current collective agreement, without first having to bargain with the union about the matter.

In both of these contexts the Supreme Court has seemed to assume, with little or no analysis, that the scope or ambit of mandatory subjects is the same.[80] That is to say, if the item in question is one about which the union could demand bargaining, then generically it is the sort of matter that an employer may not unilaterally change at any time without prior notice to the union and good-faith efforts to negotiate an agreement con-

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[76] *See, e.g.*, §6(d) of the Fair Labor Standards Act, 77 Stat 56 (codified at 29 USC §206(d) (1982) (Equal Pay Act).

[77] Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., *supra* note 44.

[78] First Nat'l Maintenance Corp. v. NLRB, *supra* note 61 at 676.

[79] An employer seems to have no duty to bargain about a decision to go out of business completely, even if it is for antiunion reasons. *See* Textile Workers v. Darlington Mfg. Co., 380 US 263, 267 n.5, 58 LRRM 2657 (1965).

[80] Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., *supra* note 44 at 185–88.

cerning it. This doctrine is susceptible to several refinements depending on the terms of the existing agreement, the extent of precontract discussions, and the scope of any union waivers or management rights clauses.[81] For our purposes, however, the important point is that in determining the range of mandatory subjects of bargaining, we are not merely deciding what the parties are obligated to deal with at the time a contract is initially negotiated or subsequently amended. To a significant degree we are also deciding what limits shall be imposed on the employer's freedom and business flexibility during the two or three years of the contract's life. What principles and practical considerations should govern this determination?

IV. Collective Bargaining in Operation

Imposing a duty to bargain about managerial decisions such as plant removals, technological innovation, and subcontracting or "outsourcing" would obviously delay transactions, reduce business adaptability, and perhaps interfere with the confidentiality of negotiations with third parties. In some instances bargaining would be doomed in advance as a futile exercise. Nonetheless,

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[81] *See, e.g.*, LeRoy Mach. Co., 147 NLRB 1431, 56 LRRM 1369 (1964) (waiver through management-rights clause); Proctor Mfg. Corp., 131 NLRB 1166, 1169, 48 LRRM 1222 (1961); Jacobs Mfg. Co., 94 NLRB 1214 (1951), *enforced*, 196 F2d 680 (CA 2, 1952). *See also* R. Gorman, *supra* note 37, at 466–80 (on waiver). *Cf.* NLRB v. C & C Plywood Corp., 385 US 421, 64 LRRM 2065 (1967).

The most fascinating recent decision on an employer's power to make unilateral changes during the term of a contract is Automobile Workers v. NLRB (Milwaukee Spring), 756 F2d 175 (CA DC, 1985). The court of appeals, per Edwards J., held that where a labor contract contained a broad management-rights clause and no work-preservation clause, an employer did not violate §8(a)(5) by its decision to relocate operations at a nonunion plant in order to increase return on investment. The move was sanctioned either by the management-rights clause or by implied management-reserved rights. (The relocation decision was bargained to impasse with the union, but that seems immaterial under the court's theory.) Much more significant than the particular holding in *Milwaukee Spring*, however, was the court's novel treatment of the "zipper" clause, whereby each party waived all further bargaining rights. In effect, the court equated this with a "maintenance of standards" clause, precluding the employer from instituting any unilateral changes during the term of the contract (except under a management-rights theory), regardless of whether it had bargained to impasse. While perhaps startling at first blush, this conclusion seems eminently sound. If not otherwise authorized (by a union's express or implied waiver) to make midterm unilateral changes in a bargainable item, an employer would first have to bargain to impasse over the matter. But, if by a zipper clause the employer has relinquished the capacity to fulfill the condition precedent to the change, it could never make the change without the union's consent. Hereafter, presumably, employers will seek zipper clauses in which only the union, and not management, waives the right to demand bargaining.

the closer we move toward recognizing that employees may have something akin to a property interest in their jobs,[82] the more evident it may become that not even the employer's legitimate regard for profit-making or the public's justified concern for a productive eonomy should totally override the workers' claim to a voice in the decisions of ongoing enterprises that will directly affect their future employment opportunities. A moral value is arguably at stake in determining whether employees may be treated as pawns in management decisions.[83]

On a crasser, tactical level, a leading management attorney of my acquaintance once said that long before the Supreme Court's decision on in-plant subcontracting, he *"Fibreboarded"* the unions he dealt with simply as a matter of sound personnel relations. Indeed, ignoring technical distinctions between mandatory and permissive topics seems characteristic of mature bargaining relationships. Retirement benefit levels of retired workers may be nonmandatory,[84] but they are of intense concern to the United Automobile Workers. So the union and the major auto manufacturers negotiate about them routinely.

From the workers' perspective, the opportunity to bargain before a decision is made could be crucial. Unions will lose considerable leverage in bargaining about even the effects of a business change if the employer can present them with a *fait accompli* in the change itself. Oftentimes negotiations may benefit both parties by producing a less drastic solution than a shutdown or a relocation. For example, one of the most dramatic moments during the 1982 Ford-UAW negotiations occurred when a union representative from the plant level and his opposite number from the management side agreed that not once had the two of them failed to find a way to adjust operations so as to keep work within the shop and not have it contracted out.

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[82] *See e.g.*, Association of the Bar of the City of New York, Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 RECORD ASS'N BAR CITY N.Y. 170 (1981); *Symposium, Individual Rights in the Workplace: the Employment-at-Will Issue*, 16 U. MICH. J.L. REF. 199 (1983); C. Bakaly & J. Grossman, MODERN LAW OF EMPLOYMENT CONTRACTS (1983); H. Perritt, THE LAW OF WRONGFUL DISMISSAL (1984); St. Antoine, *The Twilight of Employment at Will? An Update*, in FIRST ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE 1 (W. Dolson ed., 1985); W. Holloway & M. Leech, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES (1985). *Cf.* F. Meyers, THE OWNERSHIP OF JOBS (1964).

[83] *See.* N. Chamberlain, THE UNION CHALLENGE TO MANAGEMENT CONTROL 8–9 (1948).

[84] *See supra* note 44.

At the very least, bargaining may serve a therapeutic purpose. As the Supreme Court stated in *Fibreboard,* in words that might sound platitudinous but for the grim historical reality behind them, the NLRA "was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife."[85]

Despite these advantages of collective bargaining, neither organized labor nor collective bargaining has ever enjoyed full acceptance in this country. Unions are feared by many employers and distrusted by much of the public.[86] Their support today even among workers is lower than at any time during the past half century. For several years they have lost over 50 percent of all the representation elections conducted by the Board, and their membership has shrunk to less than one-fifth of private nonagricultural employment, not even half the proportionate strength of unions in most of Western Europe.[87]

There is keen irony here. Ours is the most conservative, least ideological of all labor movements, traditionally committed to the capitalistic system and to the principle that management should have the primary responsibility for managing.[88] Yet employers will pay millions of dollars to experts in "union avoidance" in order to maintain their nonunion status.[89] In part this resistance is attributable to the highly decentralized character of American industrial relations. Because of this decentralization, an employer typically must confront a union on a one-to-one basis, without the protective shield of an association to negotiate on behalf of all or substantially all the firms in a particular industry, as is true in Western Europe. In part the resistance to union organization here may result, among both employers and workers, from ingrained American attitudes of rugged individualism and the ideal of the classless society.[90]

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[85] Fibreboard Paper Prods. Corp. v. NLRB, *supra* note 56 at 211.

[86] Opinion polls in the 1970s showed that there was no other major institution in our society whose leadership so consistently lacked the confidence of the general public. Ladd, *The Polls: The Question of Confidence,* 40 PUB. OPINION Q. 544, 545 (1977).

[87] 1980 NLRB ANN. REP. 270–72 (1980). In 1954 over 38% of private nonagricultural employees were unionized. The figure fell to 30% by the mid-1960s and to 24% by 1980. R. Freeman & J. Medoff, WHAT DO UNIONS DO? 211–22 (1984). The union segment has apparently now dipped below 20%. 177 LAB. REL. REP. (BNA) 81 (Oct. 1, 1984).

[88] *See* LABOR AND AMERICAN POLITICS Rev. ed. 4–5 *passim* (C. Rehmus, D. McLaughlin, & F. Nesbitt eds., 1978).

[89] *See* Weiler, *supra* note 32, at 1776–86.

[90] *See* Bok, *Reflections on the Distinctive Character of American Labor Laws,* 84 HARV. L. REV. 1394, 1458–62 (1971).

In any event, it seems plain that aversion to unionism can hardly be supported by a dispassionate analysis of the actual impact of collective bargaining in this country. Indeed, for many years labor economists wrangled over whether *any* significant economic effect could be demonstrated. Today, however, there is an emerging consensus. Unionism cannot be proven to have brought about any substantial redistribution of wealth as between labor and capital. It has achieved a wage level that is roughly 10 to 20 percent higher for union workers,[91] but that differential is largely offset by increased efficiency and greater productivity in unionized firms. Furthermore, unions have not been an initiating cause of inflation in the post-World War II period, although they may have hampered efforts to combat it.[92]

For many observers of the labor scene, the major achievement of collective bargaining has not been economic at all. It has been the creation of the grievance and arbitration system, the formalized procedure whereby labor and management may resolve disputes arising during the term of a collective agreement, either by voluntary settlements between the parties themselves or by reference to an impartial outsider, without resort to economic force or court litigation.[93] The mere existence of a grievance and arbitration system helps to eradicate such former abuses as favoritism, arbitrary or ill-informed decisionmaking, and outright discrimination in the workplace.

My conclusion from all this is that collective bargaining has promoted both industrial peace and broader worker participation in the governance of the shop, while simultaneously stimulating higher productivity and causing only modest dislocations in the economy generally. At the same time I believe that the full potential of collective bargaining has not been tapped. Because law serves such an important legitimating function in our society, collective bargaining may have been seriously undermined when the courts began to cut back the scope of

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[91] Freeman & Medoff, *The Impact of Collective Bargaining: Illusion or Reality?* U.S. INDUSTRIAL RELATIONS, 1950–1980: A CRITICAL ASSESSMENT 50–56 (J. Stieber, R. McKersie, & D. Mills eds., 1981) [hereinafter cited as U.S. INDUS. REL.]. *See also* A. Rees, The Economics of Trade Unions 2d ed. 74, 89–90 (1977).

[92] Mitchell, *Collective Bargaining and the Economy,* U.S. INDUS. REL., *supra* note 91, at 25–26, 33–35.

[93] *See, e.g.,* D. Bok & J. Dunlop, LABOR AND THE AMERICAN COMMUNITY 463–65 (1970); A. Rees, *supra* note 91, at 187; Freeman & Medoff, *The Two Faces of Unionism,* PUB. INTEREST, Fall 1979, at 69, 70.

mandatory bargaining to exclude managerial decisions even though they might have a substantial effect on employees' job security.

Far better, it seems to me, would have been an open-ended mandate that lets the parties themselves decide what their vital interests are. The only exclusions from compulsory bargaining that I would readily admit are matters going to the very existence or identity of the negotiating parties, such as the membership of a corporation's board of directors, and perhaps the integrity of their internal structure and procedures. Those limitations would preserve the holding in *Borg-Warner*,[94] which adopted the mandatory-permissive dichotomy in the first place. Ironically, the legal duty to bargain is now more hindrance than help to a well-entrenched union. Without it, the union could demand bargaining on anything it wished; with it, bargaining is by leave of the employer on everything outside the prescribed list of "wages, hours, and other terms and conditions of employment."

A thoughtful, more conventional solution has been proposed by Professor Michael Harper. He would exclude from the scope of mandatory bargaining only "product market decisions," which he defines as "all decisions to determine what products are created and sold, in what quantities, for which markets, and at what prices."[95] He bases this principle on a "social policy allowing consumers, and only consumers, to influence management's product market decisions."[96] There is much merit in Professor Harper's thesis, and he demonstrates its feasibility and conformity to precedent in a variety of contexts. Nonetheless, as he seems to recognize, it may unduly circumscribe bargaining for a class of employees that will become increasingly significant in the post-industrial world—artists and artisans, educators, entertainers, and customer service personnel generally—in short, all those employees "whose identity and behavior . . . define the product."[97] Thus, Professor Harper would not make safety rules a mandatory topic for professional football players, or the scantiness of costume for cocktail waitresses.[98] The logic here

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[94] *See* text accompanying note 38 *supra*. Under my test, however, First Nat'l Maintenance Corp. v. NLRB, *supra* note 61 (termination of maintenance at nursing home), would have to be overruled or treated as a sport.

[95] Harper, *supra* note 60, at 1463.

[96] *Id.*

[97] *Id.* at 1467–68.

[98] *Id.* at 1466.

may be impeccable, but it leads one to question the soundness of the premise which so exalts consumer interests over employee interests.[99]

My own argument for a more sweeping and wide-open duty to bargain is grounded in two considerations, one a matter of economics and industrial relations policy, and the other a matter of social policy, if not of ethics. I shall deal with them in turn.

V. Participative Management: Economics, Ethics, and Social Policy

During the late 1960s American management became alarmed by signs of growing alienation, even militancy, on the part of workers. Although this unrest was much exaggerated, it fueled an effort by many companies to enhance the quality of work life (QWL) by increasing employee participation in job-centered decisionmaking. The interest in such programs was intensified during the 1970s by glowing accounts of the capacity of Japanese industry to improve both the quantity and quality of production by fostering an almost filial relationship between employee and employer. Altogether, it is estimated that one-third of the companies in the *Fortune 500* have established programs in participative management.[100] Furthermore, in certain countries, such as Sweden and West Germany, worker participation is guaranteed by statute.[101] More and more studies attest that it is

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[99] Professor Harper's proposal for a product market principle might also have the theoretical advantage of providing a rational basis for distinguishing between union-employer activity that is and is not subject to the antitrust laws. But the Supreme Court has apparently rejected the notion of such a sharp labor market-product market dichotomy; even an agreement concerning wages may violate the Sherman Act if "predatory intent" is present; Mine Workers v. Pennington, 381 US 657, 59 LRRM 2369 (1965), *on remand sub nom.* Lewis v. Pennington, 257 F Supp 815, 62 LRRM 2604 (ED Tenn 1966), *aff'd in part, rev'd in part,* 400 F2d 806, 69 LRRM 2280 (CA 6), *cert. denied,* 393 US 983 (1968); Smitty Baker Coal Co. v. Mine Workers 620 F2d 416 (CA 4, 1980), *cert. denied,* 449 US 870 (1981). *See generally* Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption,* 81 COLUM. L. REV. 459 (1981); Leslie, *Principles of Labor Antitrust,* 66 VA. L. REV. 1183 (1980); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law,* 62 VA. L. REV. 603, 610 (1976). If predatory intent is indeed the key to a union-employer antitrust violation, then of course the particular subject matter of the agreement is not a crucial factor.

[100] Wallace & Driscoll, *Social Issues in Collective Bargaining,* in U.S. INDUS. REL., *supra* note 91, at 199, 241.

[101] Berqvist, *Worker Participation in Decisions Within Undertakings in Sweden,* 5 COMP. LAB. L. 65 (1982); Richardi, *Worker Participation in Decisions Within Undertakings in the Federal Republic of Germany,* 5 COMP. LAB. L. 23, 29–31 (1982).

simply smart business to heed the voice of the individual employee and to give him or her a stake in the successful operation of the enterprise.[102] The worker on the production line will spot flaws that have escaped the eye of the keenest industrial engineer.

Participative management or QWL programs have undoubtedly been used by some companies to counter the appeal of labor unions.[103] Nevertheless, several major international unions have become involved in such projects. As of 1980 General Motors and the UAW had programs under way in 50 separate plants;[104] I am told there are now programs in approximately 90 of 150 bargaining units. Some locations have registered remarkable gains in employee morale and performance. In addition, the contract signed in 1982 by Ford Motor Company and the UAW provided for "Mutual Growth Forums," at both national and local levels, consisting of joint union-management committees for the "advance discussion of certain business developments of material interest and significance to the union, the employees, and the company."[105] This past year GM's new Saturn project and the UAW extended the concept of shared decisionmaking far beyond the conventional limits of collective bargaining, with the company securing increased operational flexibility in return for guaranteed job security.[106]

The anomaly is that many of these developments, evidently so beneficial to management, might well be classified as "permissive" subjects of bargaining by the Board or the courts. A union could not bring them to the bargaining table without the acquiescence of the employer. Of course, as long as the parties are cooperative, that is a moot point. But the law should be structured to deal with the case where regulation is necessary, not where it is superfluous. Even on so-called managerial decisions, such as revising the layout of a trim department in an auto

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[102] Wallace & Driscoll, *supra* note 100, at 238, 241. For varying appraisals *see* Goodman, *Quality of Work Life Projects in the 1980s*, 31 LAB. L.J. 487 (1980); Locke & Schweiger, *Participating in Decision-Making: One More Look*, in 1 RESEARCH IN ORGANIZATION BEHAVIOR 271 (B. Staw ed., 1979); Merrifield, *Worker Participation in Decisions Within Undertakings*, 5 COMP. LAB. L. 1 (1982); Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367 (1980); *Workers' Participation in Management: An International Comparision*, 18 INDUS. REL. 247 (1979).

[103] Wallace & Driscoll, *supra* note 100, at 242–51,

[104] *Id.* at 245.

[105] SOLIDARITY, Mar. 1982, at 8.

[106] 119 LAB. REL. REP. (BNA) 275–76 (Aug. 5, 1985).

assembly plant, the workers' input has often proved valuable.[107] The law ought not insulate an employer from bargaining merely because it rejects that lesson.

One worrisome objection to my prescription is that it may unduly restrict a company's autonomy after a contract has been agreed upon. If an item is a mandatory subject of bargaining, the employer is not only obligated to negotiate when a contract is executed but may also be precluded from instituting a unilateral change during the life of the agreement.[108] This result would be opposed by those who believe that once an employer has fulfilled its duty to bargain and has signed a contract, it should be entitled to treat all contract terms as settled.[109] Unless restricted by some particular provision, a company should be entirely free, under this view, to act unilaterally without further bargaining. Two answers can be given to this objection. First, an employer can preserve its autonomy by securing a suitably broad "management rights" clause as part of the initial settlement. Second, even if the employer must bargain, there is no obligation to agree. After a good-faith effort has been put forth, and the negotiations carried to impasse, the employer may proceed to make the changes it desires. The union and the employees would have had their say, and the law requires no more.

The period of bargaining may be short if the circumstances warrant. I have examined nine contested Board cases during the 1970s in which an employer instituted unilateral changes after bargaining "to impasse." Elapsed times from the employer's initial notification of an impending change or first meeting with the union to the implementation of the change ranged from three weeks to six months. Three cases took three weeks; five took between four and eight weeks; and one took six months. The median was six and one-half weeks, which in the usual situation would hardly seem very onerous. More empirical data on the practical effect of such delays would plainly be desirable.

A quarter century ago a classic study on industrial relations concluded: "An important result of the American system of collective bargaining is the sense of participation that it imparts

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[107] Wallace & Driscoll, *supra* note 100, at 246.

[108] *See* text accompanying notes 80–81 *supra*.

[109] *Cf.* Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1116–20 (1950) (labor contract should be construed as requiring continuance of major terms of employment existing at time agreement was executed; differing management and union views are discussed).

to workers."[110] For me, in the end, the issue may come down to this sort of social or humane value. It is good to know that giving the individual a voice in the shaping and operation of his or her job may be enlightened industrial relations and may enhance efficiency and productivity. But I think there is considerably more at stake than simply economic concerns. My emphasis on noneconomic factors is neither novel nor quixotic. A generation ago a hard-headed labor expert, Neil Chamberlain, declared that "the workers' struggle for increasing participation in business decisions . . . is highly charged with an ethical content . . . . [L]egal and economic arguments, technological and political considerations must give way before widely held moral convictions."[111]

It is primarily work that defines a man or woman. Thus, studies have found that "most, if not all, working people tend to describe themselves in terms of the work groups or organizations to which they belong. The question 'Who are you?' often elicits an organizationally related response. . . . Occupational role is usually a part of this response for all classes: 'I'm a steelworker,' or 'I'm a lawyer.' "[112] Leisure-time activities, however pleasurable in themselves, can seldom rise to such a level of significance. If it is also true, as the underlying premise of the Wagner Act proclaims, that collective action on the part of employees best ensures "equality of bargaining power"[113] with employers, then in setting the metes and bounds of mandatory negotiations we are engaged in far more than a pragmatic exercise in industrial relations policy. We are performing a task of profound moral consequence. We may be, in substantial effect, determining the capacity of American workers for fullest self-realization—for finding out, in this one life they have to live, who they really are.

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[110] S. Slichter, J. Healy, & E.R. Livernash, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 960 (1960).

[111] N. Chamberlain, *supra* note 83, at 8–9.

[112] SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE, WORK IN AMERICA 6 (1973). *Cf.* S. Terkel, WORKING 177 (1974) (quoting an auto worker on his love-hate relationship with the car: "I think of a certain area of proudness. . . . I put my labor in it.").

[113] NLRA §1, 49 Stat 449 (1935) (codified as amended at 29 USC §151 (1982)). *See also* 78 CONG. REC. 3443 (1934) ("Genuine collective bargaining is the only way to attain equality of bargaining power.") (remarks of Sen. Wagner), *reprinted in* LEG. HIST. NLRA, *supra* note 2, at 15.