University of Michigan Journal of Law Reform

Volume 23

1989

A Primer on Power Balancing Under the National Labor Relations Act

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If there is no struggle there is no progress. Those who profess to favor freedom and yet deprecate agitation, are men who want crops without plowing up the ground; they want rain without thunder and lightning. They want the ocean without the awful roar of its many waters.

This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will. . . . Men may not get all that they pay for in this world, but they certainly pay for all they get.

—Frederick Douglass

Conflict between employees and employers is inevitable. Labor historians can trace labor power confrontations as far back as 1619 in the Jamestown colony. W. Cahn, A Pictorial History of American Labor 60 (1972) (citing records of the Virginia Company dated July 21, 1619). Unions are a natural response to the needs of employees to counter the power response by the employer. Unions are not, as many conservative writers would like to believe, conspiracies of the left or extensions of organized crime. They are merely organizations, arising from the course of events, designed to serve a purpose or fill a need akin to other business, trade, fraternal, or educational organizations. Unions are dynamic and diversified. Robert Hoxie observed:

[The union program, taking it with all its mutations and contradictions, comprehends nothing less than all the various economic, political, ethical and social viewpoints and modes of action of a vast and heterogeneous complex of working class groups, molded by diverse environments and acted upon by diverse motives; it expresses nothing less than the ideals, aspirations, hopes, and fears, modes of thinking and action of all these working groups. In short, if we can think of unionism as such, it must be as one of the most complex, heterogeneous and protean of modern social phenomena.

R. Hoxie, Trade Unionism in the United States 35 (1936). Given this nature, the union is also one of the most vulnerable to destabilization.
The scope of the legislative policy behind the National Labor Relations Act\(^2\) (NLRA or Act) has been the subject of almost continuous debate for over fifty years. The unranked policy goals of the Act include: (1) the reduction in disruptions to interstate commerce caused by industrial conflict between employers and labor organizations, (2) the encouragement of the collective bargaining process, (3) the encouragement of industrial democracy, and (4) the facilitation of employer-employee conflict resolution.\(^3\) Additional economic goals arguably include the

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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 by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of 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 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 proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

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

Id.; see also A. Cox, LAW AND THE NATIONAL LABOR POLICY (1960); C. Gregory & H.
wage-push effect of increased wages on consumer demand in a recession economy and the attendant economic stimulation of depressed industries.\textsuperscript{4} The mechanisms to achieve these policy considerations involve the legislative establishment of a balance of power between employees and employers.\textsuperscript{5}

With the recognition that there can be no freedom of contract unless there is freedom to contract, the NLRA established statutory rights designed to facilitate the creation of institutional structures to organize and represent employees.\textsuperscript{6} Individual bar-

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5. Reduction of conflict through the use of power balancing mechanisms is not novel now nor was it at the enactment of the NLRA. Early common law and statutes were ill-suited to construct systems of remedies beyond those for protection from physical coercion. The property and liberty for which employees seek protection, while necessarily including protection from physical coercion, also includes protection from economic coercion. As an early English jurist noted, "necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." Vernon v. Bethell, 2 Eden 110, 113, 28 Eng. Rep. 838, 839 (1762).

The lack of a legal forum to redress conflict occasioned by economic coercion, or, in many cases, a legal forum actively against labor interests is well documented in labor history. Control of historical court bias against labor organizations was part of the rationale for the Act. \textit{See Policy Statements at} 29 U.S.C. § 101 (1982); \textit{see also} Anti-Injunction (Norris-LaGuardia) Act of 1932, 29 U.S.C. §§ 101-15 (1982). The result of unredressed conflict led to labor confrontations of unusual intensity and violence. Among the more notorious power imbalances in labor history were the use of yellow dog contracts (requiring, as a condition of employment, that an employee would have no contact with union organizers) and labor injunctions.


Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may
gains were replaced by the collective bargain, thereby facilitating a measure of group protection from economic coercion. The articulation and enforcement of unfair labor practices allowed many employer-employee labor union conflicts to be overseen in impartial forums.

be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title [§ 8(a)(3) of the Act].

In H. K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970), the Court stated:

The object of this Act was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.

7. American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921). [Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.

Id. at 209.


National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee’s power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees . . . . Thus only the union may contract the employee’s terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them.

8. For an articulation of unfair practices, see National Labor Relations Act, § 8(a)-(b), 29 U.S.C. § 158(a)-(b) (1982). Other rights are enforced through systems of private ordering established in collectively-bargained grievance and arbitration forums.

The Act does not include the violation of contract terms as an unfair labor practice. An early version of the Labor Management Relations Act contained an 8(a)(6) provision making it an unfair labor practice “to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration . . . .” S. 1126, 80th Cong., 1st Sess. 13, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 111 (1948). Section 8(b)(5) contained a similar provision applicable to labor organizations. Id. at 16, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 114 (1948). Both provisions were struck from the final Act. This does not imply that the Board and the courts are precluded from examining contract language, only that such inquiries depend upon unfair labor practice provisions or contract enforcement through the Labor-Management Relations Act, § 301, 29 U.S.C. § 185 (1982). NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); see also J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). The “Steelworkers Trilogy” held that arbitration, as a private ordered dispute resolution forum, is shown great deference. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) (determination of arbitrability is a proper function of the arbitrator); United Steelworkers v. War-
The exercise of power under the NLRA can be viewed in three interrelated contexts. First, express statutory limitations or approval are placed upon identified power exercises. Second, a class of power exercises are channeled through the mediating effects of the collective bargaining process in the form of mandatory bargaining items. Collaterally, the mandatory-permissive bargaining item dichotomy created by the United States Supreme Court's interpretation of section 8(d) defines an area of power exercises that is not channeled through the potential mediating effects of the collective bargaining process. The Act protects this area from responsive power exercises through the 8(a)(5) and 8(b)(3) good faith bargaining obligation. Third, the NLRA was built upon an existing employer-employee relation-


9. Principal among these are the statutory restrictions on secondary activity, hot cargo clauses, picketing, and the permanent replacement of economic and sympathy strikers. See infra notes 143-195 and accompanying text. See generally Atleson, Reflections on Labor, Power and Society, 44 Md. L. Rev. 841 (1985).


For the 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, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or . . . sixty days prior to the time it is proposed to make such termination or modification; (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute . . . ; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

11. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); see also Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978). In practical terms, identifying the mandatory subjects of bargaining is crucial, for such matters must be dis-
ship based on custom and common law. It embraces a private ordered preference for dispute resolution within the NLRA framework. Consequently, custom and common-law based articulations of respective rights and duties related to contract interpretation, employee discipline, freedom of expression, privacy considerations, protection of property rights, and other related matters, create areas of employer-employee power exercises. It is important, however, to recognize the dispute resolution forum's role in approving or disapproving power exercises, within these three contexts, based upon the elusive concept of serving public purpose or public policy.

The focus of this Article is twofold. First, it addresses the substantive power control mechanisms established and regulated by the National Labor Relations Board (Board) and the courts. Second, it examines the power balancing methodology embraced by these dispute resolution forums. This Article takes the position that power balancing analysis designed to achieve the NLRA's multidimensional policies is a more fruitful endeavor than the analysis of economic efficiency or a partisan approach subject to political considerations.

At first glance, such a position hardly raises significant questions. Recently, however, the “Law and Economics” advocates have taken a more aggressive posture. They attach a narrowly bounded economic efficiency policy rationale to the NLRA as a threshold consideration in determining the legal propriety of particular power exercises within the ambit of labor-manage-

12. See infra notes 57-62 and accompanying text.
13. All organizations have rules; law is a subset of the broader category of working rules in society. According to Professor John Commons:

Law was looked upon, not as the working rules of a going concern adopted by the participants in a world of limited resources according to the principle of scarcity, but as a mechanical unfolding of ideal concepts of liberty, justice and law. The individual was the unit, liberty the goal and law the mechanism. Yet every concern must have its working rules which are its laws. These spring from authority, custom, habit, initiative, or what not. They are the common law, the statute law, the equity jurisprudence of the concern. The state, the business concern and the cultural concern are alike in their dependence on these working rules, the difference being mainly in the kind of sanctions, whether physical, economic, or moral, which they can bring to bear in enforcing the rules. And the declarations and enforcement of the rules create a complete outfit of rights, duties, liberties and exposures of each member occupying each position in the particular concern.

J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 332-33 (1924). For an interesting discussion of working rules vis-à-vis contract rules in the collective bargaining setting, see Feller, supra note 8, at 774-804.
14. See infra notes 43-48 and accompanying text.
ment confrontations.\textsuperscript{15} For example, the Board's recent treatment of power exercises in Harter Equipment,\textsuperscript{16} Clear Pine Mouldings,\textsuperscript{17} and Otis Elevator\textsuperscript{18} suggests a need to reexamine


16. 280 N.L.R.B. 597 (1986). In \textit{Harter Equipment}, the Board was asked to determine if the hiring of temporary replacements after an offensive employer lockout harmed protected employee rights. This is a classic case of the employer imposing a cost of non-compliance upon the employees for exercising their organizational and bargaining rights. It presents a common balancing of interests problem under the NLRA. It should be noted that a strike had not been called. The employees were ready and willing to continue their labor, and although the contract had expired, the parties were still at the bargaining table. Balancing the employees' statutory rights against an employer's prerogative to continue operations on its own unilateral terms, the Board held that using temporary replacements during an offensive lockout had "a comparatively slight adverse effect on protected employee rights." \textit{Id.} at 600. The Board almost reverently approached the employer's prerogative and power to continue operations using ostensibly temporary replacements. One can view the Board's methodological approach as highly suspect in light of labor history and NLRA policy. "We reject the argument that the Board should require more proof of an employer's legitimate purpose in such a case or should engage in balancing employer interests against employee rights to determine whether the Act has been violated, even in the absence of independent proof of unlawful employer motivation." \textit{Id.; see also} International Bhd. of Boilermakers, Local 88 v. NLRB, 858 F.2d 756 (D.C. Cir. 1988). \textit{Compare infra note 162} (evidentiary burden imposed upon employer in replacement of sympathy striker cases) with \textit{infra note 191} (evidentiary burden in reinstatement denial of economic replacements). In effect, the employer, solely in command of the information necessary to sustain its position, is not to be questioned in a timely manner, but simply accepted at its word. See generally Meltzer, \textit{Lockouts: Licit and Illicit}, in N.Y.U. 16TH CONF. ON LABOR 19 (1963); Meltzer, \textit{Lockouts Under the LMRA: New Shadows on an Old Terrain}, 28 U. Chi. L. Rev. 614 (1961); Meltzer, \textit{Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act}, 24 U. Chi. L. Rev. 70 (1956); Oberer, \textit{Lockouts and the Law: The Impact of American Shipbuilding and Brown Food}, 51 Cornell L.Q. 193 (1966).

17. 268 N.L.R.B. 1044 (1984). The Board was asked to address the issue of protected vis-à-vis unprotected strike conduct. In a 2-2 decision, with the concurring opinion decided narrowly, the Dotson Board chose to recast the decision as a stinging indictment on labor's principal power source—the strike weapon. Although easily sustainable on more narrow grounds, the Board denied the reinstatement, allowing the employer unfettered use of its discipline and discharge power against strikers engaged in the employer's definition of "strike misconduct." The language in the decision goes far beyond the denial of reinstatement for the commission of unlawful or even tortious acts. The Board instead chose an easier standard for employers to justify discipline and discharge, and created a trap for unsophisticated employees:

[W]e reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts . . . . [and adopt] the following objective test for determining whether verbal threats by strikers directed at 

employees justify an employer's refusal to reinstate: 

"W[hether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

\textit{Id.} at 1046 (emphasis supplied, footnote omitted).

Thus, heated "fighting words" that "reasonably tend" to invoke response but are short of criminal or tortious conduct, may be unprotected. Compare this with the standard used to assess employer interference with employee rights. Harter Equip. Inc., 280 N.L.R.B. at 600. Does not the offensive lockout of employees who are ready, willing, and able to work "reasonably tend to coerce or intimidate employees in the exercise of rights
the fundamental issues in power balancing and the interdependency of power exercises with the protection of rights under the NLRA.\textsuperscript{19} Casting issues in narrow economic bounds disserves the

protected under the Act'? Apparently, the Board places great stock in the identity of the speaker to assess the coercive impact of the communications. See, e.g., Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982) (misrepresentations will no longer be the basis for overturning representation elections).

A second point is equally striking. Under Clear Pine Mouldings and the command-obedience structure, employers, rather than the state, are the vicarious protectors of employee rights, even removed in time and place from the job. One wonders who is the actual party of interest—the employer, protecting one of his factors of production, or the "intimidated" employee.

The NLRA does not preempt state criminal and public safety laws. Criminal actions may be brought against participants in labor confrontations. Moreover, time, place, and manner restrictions are available as a civil remedy to protect property interests and public safety. See, e.g., International Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1940).

In Clear Pine Mouldings, the Board continues its reverence for employer positioning with a second general proposition regarding alleged strike misconduct. The Board will no longer balance the "severity of the employer's unfair labor practices that provoked the strike against the gravity of the striker's misconduct." 268 N.L.R.B. at 1047 (footnote omitted). This analysis not only allows the employer to define the propriety of conduct but arguably allows an employer to "set up" employees and thereby profit from its initial wrong. See generally Note, Reinstatement of Unfair Labor Practice Strikers Who Engage in Strike-Related Misconduct: Repudiation of the Thayer Doctrine by Clear Pine Mouldings, 8 INDUS. REL. L.J. 226 (1986) (authored by Renauer). The Board may be backing away from the literal reach of this position. See Catalytic, Inc., 275 N.L.R.B. 97 (1985); MGM Grand Hotel, 275 N.L.R.B. 1015 (1985); National Council of Young Israel, 276 N.L.R.B. 1123 (1985); see also Richmond Recording Corp. v. NLRB, 836 F.2d 289 (7th Cir. 1987). This direction is perhaps further solidified with Member Dotson no longer on the Board as of December 1987.

18. 269 N.L.R.B. 891 (1984). In Otis Elevator, the Board limited the category of mandatory bargaining items in regard to employer movements of bargaining unit work to a narrow labor cost basis:

Included within Section 8(d), however, in accordance with the teachings of Fibreboard, are all decisions which turn upon a reduction of labor costs. This is true whether the decision may be characterized as subcontracting, reorganization, consolidation, or relocation, if the decision in fact turns on \textit{direct} modification of labor costs and not a change in the basic direction or nature of the enterprise.

\textit{Id.} at 893 (emphasis added).

Whether this narrow focus will be adopted by the subsequent members of the Board is questionable. Nevertheless, it raises the crucial question of issue definition and verification because employers can easily tailor business judgment rationales to exploit the current Board's narrow views. The Board seemingly places great confidence in the legitimacy of employer issue definition, ignoring labor history and the policy of the Act. See Arrow Automotive Indus. v. NLRB 853 F.2d 223 (4th Cir. 1988); Local 2179, United Steelworkers v. NLRB, 822 F.2d 559 (5th Cir. 1987); Shell Ray Mining, Inc., 286 N.L.R.B. No. 41, 1987-1988 NLRB Dec. (CCH)\textsuperscript{¶} 19,054 (Sept. 30, 1987). See generally Zimarowski, \textit{The Viability of the Collective Bargaining Process: Corporate Transformations as Unchanneled Bargaining Power}, 3 HOFSRA LAB. L.J. 137 (1986).

19. The NLRB has been admonished by the Court for attempting to dictate the substance of the collective bargaining agreement to the parties. The Court addressed the
analysis by writing out larger noneconomic interests. Additionally, even if a balance is articulated, as Justice Brennan argued in his *First National Maintenance* dissent, the analysis must include substantive components, not merely conclusionary statements. It is not enough to state, for example, that the employer’s interest in maintaining operational continuity outweighs the employees’ collective rights.

The balancing analysis embraces *two tiers* of inquiry; one tier is largely conceptual, the other practical. The first tier examines the scope and methodological approaches to the balancing analysis. Embracing the policies of the NLRA, it commands the inclusion of both noneconomic and economic interests in the analysis. But interest articulations do not fully explain the end product of the analysis—how one set of interests is enhanced over those of another. This how inquiry is the second tier of the analysis. Power exercises are the currency that is controlled to the detriment or benefit of the interests articulated. These power exercises must be substantively articulated, their interdependency recognized and weighed in furtherance of NLRA policy through the balancing analysis.

Part II of this Article addresses the first tier of the balancing analysis and provides a policy perspective on the NLRA. It articulates the methodological differences between a power context approach and the economic efficiency approach. Part II, argues that focusing narrowly on the economics ignores the richness related issue of the lockout as a channeled cost of noncompliance in American Ship Building Co. v. NLRB, 380 U.S. 300 (1965):

"[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. It has sought to introduce some standard of properly ‘balanced’ bargaining power, or some new distinction of justifiable and unjustifiable, proper and ‘abusive’ economic weapons into . . . the Act . . . . We have expressed our belief that this amounts to the Board’s entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."


As argued in this Article, however, the Board does dictate the substance of collective bargaining agreements and influences the power exercises of the parties through the mandatory-permissive bargaining item dichotomy, the balancing process, and the articulation of rights and duties under the Act. To state otherwise is to ignore reality in favor of pristine views of the labor management relationship. Unless, or until, the Congress drafts more comprehensive legislation, this power balancing is a function of the dispute resolution forums. Indeed, it is their functional duty.

and complexity of the employment relationship. Moreover, the balancing of interests approach used in legal analysis is significantly different from, and preferable to, the cost-benefit analysis generally used in the economic context. Part II also expands upon the concept of power within the NLRA framework and its impact on the traditional custom-/common law-based employee-employer relationship.

Part III of this Article addresses the second tier of the balancing analysis. It continues the theme that fulfillment of NLRA policies are best achieved through an examination of power exercises placed in an overall balancing of interests context. Substantive power exercises, drawn from both the NLRA and common law sources, are represented in the familiar T-chart format. Substantive power sources, however, are situational and dynamic. The power balancing approach commands, and this section provides, an examination of substantive power sources in the bargaining, employer discipline and discharge, and express power control contexts of the NLRA.

Building from the balancing articulations and the substantive sources of power, the courts and the Board have developed methodological shorthands to represent various interest calculations. Such approaches involve not only the question of which power exercises to control but also suggest the order in which the interests should be protected. Regardless of the shorthand adopted, the tribunal makes a threshold determination regarding the propriety of the power exercise in the overall context of the policies of the NLRA. The concluding section of this Article argues that proper interest/power balancing must draw from the broad analytical base developed throughout the Article. Hence, the utility of a primer on power balancing.

21. As argued throughout this Article, following an institutional methodology requires an articulation of the descriptive components of the legal balancing of interests embracing a broad interdisciplinary base. The T-Chart offers a convenient format for descriptive comparative treatment and a focal point for public policy debate.

22. The “test” used in judicial decision making embraces a classification of interests and determines outcome through the allocation of burdens of proof and persuasion. See Harper, Union Waiver of Employee Rights Under the NLRA, (Pts I & II), 4 INDUST. REL. L.J. 335, 680 (1981); see also Oberer, The Scien ter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails, 52 CORNELL L.Q. 491 (1967).
I. THE FIRST TIER: SCOPE AND METHODOLOGICAL ISSUES

A. The NLRA: An Institutionalist Perspective

One of the unspoken but inherently interesting questions in any public policy analysis is the methodological approach embraced by the body-politic decision maker. Every participant in a decision-making process carries intellectual baggage that colors the analysis. Human directed processes can never be completely bias free; but with an understanding of the methodological issues, the process can be structured to mitigate the intrusion of unwarranted bias. Methodological issues have particular importance in the areas of labor law and labor relations. Few areas of law so actively embrace virtually all areas of society's working rules. In addition, few areas of law are so strongly influenced by unarticulated notions of class relationships, polemic economic and liberty valuations, structural conflicts between political organizations and societal structures, and authoritarian private organizations and relationships.

Labor law, because it has a significant impact on the domestic economy, would seem to be a fertile area for Law and Economics proponents to ply their particular methodological trade. The legal literature is beginning to reflect this perspective. More importantly, many current Board decisions fit within this perspective. The Law and Economics proponents argue that the para-

24. The employment relationship is central to most members of society. From this they draw identity and, in large part, a political, social, and economic value system. See infra notes 42-44.
25. The Law and Economics proponents are not necessarily a cohesive group, as is evident from the contrasting writings in the field. The major Law and Economics proponents, Posner, supra note 15, and Epstein, supra note 5, adopt the "Chicago School" approach of neoclassical economics to their law and economics analysis. Because they are both prolific and influential, they require a response. See Liebhafsky, Price Theory as Jurisprudence: Law and Economics, Chicago Style, 10 J. Econ. Issues 23 (1976).

Among the distinguishing characteristics of the "Chicago School" proponents are: (1) a "polar position among economists as advocates of an individualistic market economy"; (2) the placement of great emphasis upon the usefulness and relevance of neoclassical economic (price) theory; (3) the equation of actual and ideal markets; (4) the application of price theory in every societal transaction; and (5) the placement of great emphasis upon the econometric testing of hypotheses. Liebhafsky, supra, at 41 n.2, (citing Miller, On the Chicago School of Economics, 70 J. Political Economy 64-70 (1962)).
mount statutory purpose behind the NLRA is simply efficiency. Based on Richard Posner’s general proposition that “the ultimate question for decision in many lawsuits is what allocation of resources would maximize economic efficiency,” the decision making process is guided by the market value of the various parties’ interests. As a result, Law and Economics proponents argue, a decision should maximize the economic efficiency of the parties.

Perhaps the most discussed foundational proposition from Law and Economics proponents is the Coase Theorem. According to Professor Coase, assuming that a free market governs all behavior and that no transaction costs exist, all transactions will reach economic efficiency exclusively via bargaining transactions. Within this view, the presence or absence of legal rules and entitlements are unimportant at best, or at worst, interfere with market forces. Although having a certain appeal, the methodological implications of adopting such a proposition as the paramount tenet of legal decision making are significant.

Applying the talisman of economic efficiency to legal policy analysis can result in significant distortions of reality. The hallmark of the neoclassical economic models is predictive realism. To predict obviates the need to explain, but predictive realism emanates from mathematically testable, principally linear and static models. The models are intentionally (and preferably) of a highly simplified structure. The bases of these predictive models are, first, a set of universal laws or truths (e.g., a free market bargaining model always attains economic efficiency) and, second, antecedent conditions or “the set of assumptions under which [the] theory is expected to be valid.” To provide

28. Id. at 491.
30. Liebafsky, supra note 25, at 26; Kelman, supra note 29, at 673-75.
the necessary mathematical rigor, the models must contain empirical content that can be statistically confirmed. Because they assume discordant metaphysical criteria out of the analysis, however, their subjectively selected universal truths and antecedent conditions are virtually incapable of falsification. As a result, the methodology is subjective—it assumes away discordant information and biases the results, while steadfastly proclaiming an adherence to objectivity and a logical positivist methodology.

Economics, of course, does play a role. But the economic methodology, as practiced by the Law and Economics proponents from the Chicago School, has severe methodological limitations. Consider, for example, the terms "cost-benefit analysis" (in economics) and "balancing of interests" (in the judicial process). A cost-benefit study is "a statement of the quantitative judgments of the economist making the study that preferences are to be maximized and price is a measure of social value" following a set of universal principles and antecedent conditions. It is, under close scrutiny, merely a narrow piece of evidence which fits into a larger analysis—a legal balancing of interests. As a piece of subjectively based evidence, it should be treated as any other polemic proposition in the legal analysis. To grant the law and economic propositions greater weight under the guise of scientific truth is methodologically unsound, and disserves the analysis.

Employment and occupation have a far greater significance than mere economic subsistence. They mold and in turn are

40. Liebhafsky, supra note 32, at 623.

This position has been implicitly attacked by the Law and Economics approach espoused by the Chicago School rendering complex societal interactions subordinate to a myopic economic efficiency methodology. See, e.g., R. Posner, supra note 27; Coase, supra note 31. For an application of these theoretical arguments to the collective bargaining process see, Schwab, supra note 15. Cf. Kelman, supra note 29; Liebhafsky, supra note 26; Liebhafsky, supra note 32; see also Zimarowski, Public Purpose, Law, and Economics: J. R. Commons and the Institutional Paradigm Revisited, 90 W. VA. L. REV. 387 (1988).
molded by various institutions and by society at large.\textsuperscript{42} Through the elusive concept of the public good or public purpose, the legal and social support for employment and occupational reward is that the collective's "classification of activities in the body politic [is] deemed to be of value to the rest of the public rather than a classification of individuals."\textsuperscript{43} Through the

\begin{quote}
42. Employment and occupation influence the value structure of the individuals. This means progress toward political democracy and related concepts of justice as well as industrial democracy can be enhanced or constrained by institutional rules.

Individuals . . . learn the custom of language, of cooperation with other individuals, of working towards common ends, of negotiations to eliminate conflicts of interest, of subordination to the working rules of the many concerns of which they are members. They meet each other, not as physiological bodies moved by glands, nor as "globules of desire" moved by pain and pleasure, similar to the forces of physical and animal nature, but as prepared more or less by habit, induced by the pressure of custom, to engage in those highly artificial transactions created by the collective human will.

\textsc{J. Commons, Institutional Economics: Its Place in Political Economy} 73-74 (1934) (footnote omitted).

Production . . . involves, not only the making of goods to gratify existing wants, but also the creation and guidance of demand, the whole process of bargaining and negotiation by which the terms of division are settled, and the underlying function of defining and enforcing rights of person and property, which determines to just what extent business can be parasitic and still remain legal. And in a more fundamental way still, the individual is so molded in body, mind, and character by his economic activities and relations, stimuli and disabilities, freedoms and servitudes, that industry can truly be said to make the men and women who work in it, no less truly than the commodities it turns out for the market.

\textsc{J. Clark, Social Control of Business} 46-47 (1926).

43. \textsc{J. Commons, supra} note 13, at 328-29. One function of law is to provide inducements and restrictions on scarce resources to advance the public good. Legislative enactments are concerned with the long-term good of society, not necessarily the myopic goals and interests of individuals and employers. Professor John R. Commons, in his classic work \textsc{The Legal Foundations of Capitalism}, stated the proposition as:

The public is not any particular individual, it is a classification of activities in the body politic deemed to be of value to the rest of the public, rather than a classification of individuals. . . .

This [public purpose] is the process of classification and recategorization according to the purposes of the ruling authorities, a process which has advanced with every change in economic evolution and every change in feelings and habits towards human beings, and which is but the proportioning and reproportioning of inducements to willing and unwilling persons, according to what is believed to be the degree of desired reciprocity between them. For classification is the selection of a certain factor, deemed to be a limiting factor, and enlarging the field of that factor by restraining the field of other limiting factors, in order to accomplish what is deemed to be the largest total result from all. . . . Thus, when the hoped-for welfare of women or children comes to be believed to be a limiting factor in the national economy, their hours of labor are reduced or their minimum wages raised, by imposing new duties on employers or parents, under the belief that merely this new apportionment of freedom or collective power, regardless of other changes in the quantity of labor, or of national resources, or of individual efficiency, will increase the national welfare. So with all other legisla-
private ordering mechanism, private activities deemed to be of benefit to the public at large are encouraged. Not all private activities are given blanket approval. The public infrastructure provides inducement to private wealth producers "according to beliefs in the public value, with the intention of reapportioning the national economy and thus enlarging the commonwealth." What is of "value" to the public necessarily includes many poorly defined intangible interests, and often requires the accommodation of equally supportable but inherently conflicting interests. Such interests include individual liberty and freedom, private property rights, the role of institutions, and economic and social status. A proper decision methodology, adopting the balancing of interests perspective, must be broad based.

To draw a contrast to the methodology embraced by the Law and Economics proponents, who draw from the neoclassical economists, one might examine another methodology—that of the institutional economists. The institutionalist methodology focuses "upon a holistic and evolutionary view of the structure-behavior-performance of the economy . . . in a system of general interdependence or cumulative causation." Embracing the institutional methodology mitigates problems of self-validated universal truths, linearity, and simplistic modeling. Using the familiar case study approach, institutionalists seek to construct a

tive and judicial decisions which determine Freedom in one direction by imposing liability in the opposite direction.

It is often charged against legislation that the state does not create wealth—only private activity is wealth-producing. The charge is, of course, true. Legislation only classifies activities and proportions the inducements to wealth-producers. Individuals do the rest. But they may waste the commonwealth by bad proportioning, may enlarge it by good proportioning.

J. COMMONS, supra note 13, at 328-30.

44. Id. at 329.

45. The tension between defensible positions is inherent in legal decision taking the form of common-place balancing tests. Consistency and adherence to precedent, however, must be tempered with the recognition of a dynamic system evolving into more complex institutional structures and integrated markets. Nevertheless, failure to act in a given area is not without consequences. The difficulty in choosing which classification of activities enlarges the public good is readily apparent. The default or silence position in collective bargaining interpretation as well as the areas of employee discipline and testing are just such complex issues couched in industrial custom. Conceptually, the underlying conflict between "management rights" and "individual rights" suggests an examination of the 'balance' between these conflicting interests drawn from industrial custom, common law, and the policy of the NLRA. See Zimarowski, Interpreting Collective Bargaining Agreements: Silence, Ambiguity and NLRA Section 8(d), 10 INDUS. REL. L.J. 465 (1989).

46. See Dugger, supra note 34; Grossack & Loescher, Institutional and Mainstream Economics: Choice and Power as the Basis for a Synthesis, 14 J. ECON. ISSUES 925 (1980); Wilber & Harrison, supra note 37.

47. Wilber & Harrison, supra note 37, at 73.
pattern model, in contrast to the predictive model, which draws from a basis of facts rather than unassailable universal truths. In contrast to the neoclassical economists to whom prediction obviated the need for explanation, the institutionalists view understanding through pattern models as resulting in explanation.48


Professor Radzicki has taken a methodological argument to bridge the gap between economics and the analytical techniques involved in system dynamics. A similar bridging is necessary in law and economics. In this endeavor, he offers the following comparison:

Footnote Table I

<table>
<thead>
<tr>
<th>Neoclassical</th>
<th>Institutionalism</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. A common, objective model of explanation unites all Science in all disciplines.</td>
<td>1. A common model of explanation unites all institutionalists but not necessarily with other scientific disciplines.</td>
</tr>
<tr>
<td>2. Seek to construct predictive (hierarchical) models or theories.</td>
<td>2. Seek to construct pattern (concatenated) models or theories.</td>
</tr>
<tr>
<td>3. Hallmark of model or theory predictive realism obtained from a highly simplified structure</td>
<td>3. Hallmark of model or theory is understanding which is facilitated by descriptive realism in its structure or pattern.</td>
</tr>
<tr>
<td>4. Basis of predictive model is laws.</td>
<td>4. Basis of pattern model is facts.</td>
</tr>
<tr>
<td>5. prediction = explanation</td>
<td>5. understanding = explanation</td>
</tr>
<tr>
<td>6. Individual maximizing consumer or firm (theoretical) is unit of analysis.</td>
<td>6. Institution (actual) is unit of analysis</td>
</tr>
<tr>
<td>7. Psychological perspective is subjectivism or methodological individualism.</td>
<td>7. Psychological perspective is behaviorism</td>
</tr>
<tr>
<td>8. Individual preferences are determined by a man’s personal utility function.</td>
<td>8. Individual preferences are molded by the institutions in which a man lives, works and plays</td>
</tr>
<tr>
<td>9. Individual behavior is predicted, i.e., explained, when it is deduced from basic postulates and initial conditions. There are thus</td>
<td>9. Individual behavior is understood, i.e., explained, when it is documented and shown to fit into an institutional</td>
</tr>
</tbody>
</table>
The use of institutionalist models results not in prediction, but in understanding. From understanding, policymakers can explain societal interactions and select working rules to achieve elusive public policy goals. Thus, the richness of the system is reflected in the case study or pattern-modeling methodology. Institutionalist methodology focuses on causation, power, and con-

<table>
<thead>
<tr>
<th>Preconceived assumptions about behavior</th>
<th>Structure of behavioral norms. There are thus no preconceived assumptions about behavior</th>
</tr>
</thead>
<tbody>
<tr>
<td>Predictive model is tested empirically by comparing deductions (quantitative predictions) with observations. Emphasis is on statistical correlation.</td>
<td>Pattern model is tested empirically by comparing hypothesized institutional structures (qualitative patterns) with observations. Emphasis is on causation.</td>
</tr>
<tr>
<td>View is atomistic and static with analyses based on timeless universal laws.</td>
<td>View is holistic, systemic, and dynamic evolutionary.</td>
</tr>
<tr>
<td>An ideal typology is formed from a logical structure that can yield different deductive situations when its postulates are systematically varied.</td>
<td>Generalities from different pattern models are assembled into a real typology.</td>
</tr>
<tr>
<td>The construction of predictive model begins with general theoretical laws of human behavior.</td>
<td>Holistic theories employing general characteristics of human characteristics of human economic systems are the end result of the institutionalist method.</td>
</tr>
</tbody>
</table>

*Id.* at 494-95. As argued throughout this Article, because the legal system cannot ignore causation, power, conflict and a description and understanding of the relationships, the institutionalist methodology is to be preferred as it closely parallels the case study methodology used in legal analysis.

49. The working rules create both rights and duties enforceable and protected in the public or private ordered dispute resolution forums. Drawing from the writings of Professor Commons:

There is no right [liberty] without its corresponding duty, no effective or actual right-and-duty of individuals without both a correlative power and responsibility of officials to come to the aid of the right by enforcing the duty. Every right has two corresponding duties, the duty of the opposite person and the duty of officials to exercise the collective power upon that person. For, not only is there no right if there is no remedy but there is no remedy if there is no power to hold officials responsible. The violation of a positive right brings into existence at once, by "operation of law," a remedial "right of action" which is none else than the official duty of courts and executives to enforce the right.

J. Commons, supra note 13, at 363-64; see also the legal scholarship cited by Professor Commons, *id.* at 91 n.1. The standardization of expectations in organized society is achieved by the protection of rights and duties.
Conflict. The neoclassical methodology focuses on statistical significance. Identifying and understanding the broad factual bases of the pattern models in labor law is a complex task.

The creation of pattern models begins with a description of the relationship among societal members drawn from case studies and participant observations. In every conflict situation there are unequal distributions of physical, moral, and economic power. Individuals act through institutions which focus and direct the usage of power. The scope and uses of power are influenced by the nature of the institutions, and the manifestations of public policy in the form of legal and customary working rules and designated status. A common unit of comparative analysis between institutions exercising power is the "transaction." The commonplace notion of bargaining transactions posits an arm's-length transaction between two parties deemed equals before the law. Bargaining transactions enlarge the public good through the transfer of wealth by agreements arrived at through persuasion or coercion.

Professor Commons argues that the simple bargaining transaction model, myopically embraced by the Law and Economics proponents, does not describe the more complex interactions among societal members. Commons has modeled two additional transaction constructs: managerial transactions and rationing transactions. The "managerial transactions" are concerned with the production of wealth through the creation of command-obedience relationships. The law recognizes one party as a legal superior to the other, within certain limits, generally established by common law, statutes, or constitutions. Thus, the "rules" pertaining to the employment relationship, agency concepts, and fundamental organization law are created. The "rationing transaction" posits a relationship between legal

50. The writings of Professor Commons on power and transactions in the social order provide conceptual insight into the description necessary in the pattern models. See J. Commons, supra note 13, at 65-142; J. Commons, supra note 42, at 13-124; and Commons, The Problem of Correlating Law, Economics, and Ethics, 8 Wisc. L. Rev. 3, 5-12 (1932) [hereinafter Commons, Law, Economics, and Ethics].

51. See Wilber & Harrison, supra note 37. The early writings of Professor Commons, cited extensively throughout this article, contributed significant theoretical and practical insights to societal relationships. See J. Commons, supra note 13; J. Commons, supra note 42.

52. See supra note 50.

53. See J. Commons, supra note 42, at 59-64; Commons, Law, Economics, and Ethics, supra note 50, at 5-9.

54. See supra note 50.

55. See J. Commons, supra note 42, at 64-67; Commons, Law, Economics, and Ethics, supra note 50, at 9-11.
superiors and legal inferiors which apportion wealth and power. Supra note 42, at 67-69; Commons, Law, Economics, and Ethics, supra note 50, at 11-12.


58. See supra note 6.

59. See J. Commons, supra note 42, at 64-67; Commons, Law, Economics & Ethics, supra note 50, at 9-11. Managerial transactions appear in the formation of employment relationships. In a conceptually fascinating area, private authoritarian organizations, aided by the power of the legal order, are given the ability to command and discipline legally designated inferiors. At the same time, until the erosion of the employment-at-will doctrine, the inferior had little or no rights in the employment. See J. Commons, supra note 13, at 283-312; Commons, The Right to Work, 21 THE ARENA 131 (1899). In the creation of command-and-obedience relationships the social order strikes a balance between liberty interests and property interests.
racy” or “industrial due process.” This classification follows from the view that the democratic principle upon which the nation was founded should not be limited to the political arena, but should extend to the industrial arena. Decisions and value systems imposed in the workplace may be more important to the worker than decisions in legislative halls, and as such, “[d]emocratic principles demand that workers have a voice in the decisions that control their lives; human dignity requires that workers not be subject to oppressive conditions or arbitrary actions.”

The conflict between industrial democracy and the authoritarian institutional structure of industrial organizations as represented by the traditional command-obedience relationship between employer-employee, is readily apparent. Yet the actual breadth and scope of commitment to the ideal of industrial due process through the collective bargaining forum are subject to infrequent debate.

The power balancing function of the NLRA is theoretically designed to mitigate disruptions in interstate commerce and facilitate the growth of industrial democracy. The power function can be viewed as further limiting particular aspects of economic coercion. The power function also has significant spillover effects


61. Summers, Industrial Democracy, supra note 60, at 29.

62. In What Do Unions Do?, R. Freeman & J. Medoff augmented the traditional economic perspective on labor unions with an “exit-voice” perspective. Freeman and Medoff’s study attempted to integrate economic studies with behavioral concepts. The study, considered one of the most significant contributions to the industrial relations literature, spawned numerous symposiums and critiques. It challenges the position that unions do not add to the economy, but only take from it; therefore, it is in the public interest to limit union power. Professors Freeman and Medoff, however, raise an “exit-voice” face paralleling the concerns of industrial democracy. After summarizing a broad database, they conclude that, on the whole, unions contribute more positive aspects than negative to industrial relations. R. Freeman & J. Medoff, supra note 3 at 3-25, 94-110. See also Marshall, supra note 3; Summers, supra note 3. Nevertheless, the concept of industrial democracy provides the intellectual basis for restructuring the command-obedience relationship in statutory as well as common law evolution. This restructuring is exemplified by the erosion of the employment-at-will concept and the numerous statutes addressing employee health and safety, privacy, information access, pensions, etc. Moreover, this restructuring represents a recognition of the dynamic and evolutionary nature of our social order. The evolution to more complex and integrated markets as well as concentrations of economic power in private organizations, many exceeding the GNP of some nation states, suggests the need to reexamine many old command-obedience relationship rules constructed for less complex institutions and markets.
on the custom and common-law based command-obedience relationships. Conceptually, power can be viewed as a calculus of compliance vis-à-vis noncompliance, or:

\[
\text{Power of } A = \frac{\text{Costs to B of noncompliance (or disagreement) with A's terms}}{\text{Costs to B of compliance (or agreement) with A's terms}}.
\]

A's power will increase as B's cost of noncompliance increases or, conversely, as B's cost of compliance decreases. The costs can be either real or perceived and encompass both tangible and intangible concerns. Thus, the expression is not readily quantifiable and is broader in scope than mere economic utilitarianism. Moreover, power is always against some obstacle; it does not operate in a vacuum. Power, then, concedes nothing without a demand backed by countervailing power. Thus, to complete the expression:

\[
\text{Power of } B = \frac{\text{Costs to A of noncompliance (or disagreement) with B's terms}}{\text{Costs to B of compliance (or agreement) with B's terms}}.
\]

Generalizing, it is apparent that a party's power to impose significant costs of noncompliance on its opposition is directly related to its success at the bargaining table, the shop floor, or a public arena. The costs of noncompliance or power exercises in the multiple transactions operating under the NLRA, however, are not treated equally.

II. THE SECOND TIER: SUBSTANTIVE PRIVATE ORDERING AND THE POWER CONTEXT

The balancing process enhances or constrains a party's interest by controlling power—the ability to impose a cost of noncompliance upon its opponent. As argued earlier, these power


64. See supra note 1.
exercises embrace noneconomic as well as economic based factors and policy concerns. Simply inventorying the power exercises is, however, not enough. It should be recognized that the power exercises are not absolute, but are situational and dynamic. Power exercises produce actual and/or perceived costs of noncompliance—results or impacts.

Table I summarizes the sources of power in the labor and employer arsenals. Recognizing that employers and labor are not always in compliance with legal or ethical commands, Table I includes those weapons of questionable propriety.

<table>
<thead>
<tr>
<th>Table I</th>
<th>Sources of Power</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Employer</strong></td>
<td><strong>Labor</strong></td>
</tr>
<tr>
<td>1. Production Related</td>
<td>1. Work Stoppage Related</td>
</tr>
<tr>
<td>- ally/employer coordination</td>
<td>- absenteesim/turnover</td>
</tr>
<tr>
<td>- automation</td>
<td>- featherbedding</td>
</tr>
<tr>
<td>- leasing employees</td>
<td>- hiring hall</td>
</tr>
<tr>
<td>- mandatory overtime vis-à-vis new hires</td>
<td>- sabotage</td>
</tr>
<tr>
<td>- operation with supervisory/support personnel</td>
<td>- sit in</td>
</tr>
<tr>
<td>- reassign/reallocate production</td>
<td>- slowdowns/partial strikes</td>
</tr>
<tr>
<td>- replacement: permanent or temporary</td>
<td>- strike: economic or unfair labor practice</td>
</tr>
<tr>
<td>- stockpile goods</td>
<td>- whipsaw tactics</td>
</tr>
<tr>
<td>- subcontract work</td>
<td>- wildcat work stoppages</td>
</tr>
<tr>
<td>- substitution of part time for full time employees</td>
<td>- work to rule</td>
</tr>
<tr>
<td>- turn back orders</td>
<td></td>
</tr>
</tbody>
</table>

2. Command-Obedience Related

<table>
<thead>
<tr>
<th>Solidarity/Support Related</th>
</tr>
</thead>
<tbody>
<tr>
<td>- discharge/discipline: concerted-unconcerted distinctions</td>
</tr>
<tr>
<td>- intimidation of labor supporters/leaders</td>
</tr>
<tr>
<td>- boycotts: consumer; primary-secondary distinctions; hot cargo restrictions</td>
</tr>
<tr>
<td>- craft control: entry and progression</td>
</tr>
</tbody>
</table>

- involuntary transfers/reassignments
- lockouts: defensive/offensive distinctions
- manipulation of benefits/rewards structure
- propaganda/information control
- protection of property interests: state police powers; court orders
- reinstatement denial
- testing

3. Corporate Transformations
- alter ego transformations
- bankruptcy: liquidation; reorganization
- close/cease operations
- consolidate operations
- double breasted operations
- relocate operations
- sale of assets: successorship

4. NLRA & Judicial Construction
- concerted - unconcerted distinction
- contract enforcement: arbitration and section 301
- contract language and inter-

3. Union Transformations
- affiliations with larger organizational entities
- multiemployer/ coordinated bargaining

4. NLRA & Judicial Construction
- contract enforcement: arbitration and section 301
- exclusive representation
- organizational
The availability and significance of a legal remedy obviously has practical impact on the cost calculations and deterrent effects of specific employer-union power exercises. Additionally, it is a significant influence on the tactical selection of power sources to achieve the institutional interests of the parties. Rationally, however, the parties will tactically choose exercises of power in contravention of the Act’s remedial structure if the perceived burdens, factoring in economic costs, the value of delay, and the burden of legal process, are outweighed by the perceived benefits to the institution. Whether created through judicial construction or the economic environment, a party will exploit to its tactical advantage a perceived power constraint or weakness of an opponent. If a specific power exercise is denied, a party will shift to another power exercise, albeit perhaps a less timely and effective one, to achieve similar results and impacts. Power sources, whether from bargaining, managerial, or rationing transactions, are tactically mixed to produce impacts in furtherance of a party’s interests. The disagreement or noncompliance with a party’s demands has an appreciable and multidimensional cost aspect inducing a movement of position. It is therefore instructive to view controls on power exercises in the context of NLRA construction and policy.

66. See Summers, supra note 3, at 17.

67. Footnote Table II presents a generalized, non-linked (to specific power sources), representation of the basic costs that may be imposed upon a party through the exercise of power. Costs, like the power sources that generate them, are situational and dynamic. Their scope and effectiveness are linked and dependent upon both power sources and other legal and environmental mitigating factors. It should be noted that a cost to one party can be a benefit to the other. For example, the destruction of the union can be viewed as a cost to labor but as a benefit, indeed a desired outcome, for the employer. Table II, therefore, represents costs imposed upon a party from that party’s perspective. As such, many of the costs, if taken to extreme, are repugnant to the articulated policies of the Act. Sources of power, however, are situational and dynamic with impacts or costs varying over time and intensity by the presence or absence of mitigating factors. Table III adds a contextual dimension to enhance understanding of the balancing perspective by representing potential internal and external mitigation factors.
A. *Power Exercises in the Bargaining Context*

Section 8(d) of the NLRA channels "wages, hours, and other terms and conditions of employment" through the collective

<table>
<thead>
<tr>
<th>Footnote Table II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Potential Impacts or Costs</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>To Employer</th>
<th>To Labor</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Employer vis-à-vis Employees</strong></td>
<td><strong>1. Employee vis-à-vis Employer</strong></td>
</tr>
<tr>
<td>- erosion of authoritarian organizational structure/ restriction on managerial discretion</td>
<td>- destruction of collective bargaining relationship/evasion of contract terms</td>
</tr>
<tr>
<td>- loss of key production personnel</td>
<td>- destruction of industrial democracy/ organizational equity &amp; climate impaired</td>
</tr>
<tr>
<td>- reputation: recruitment, loyalty, trust, dependability difficulties</td>
<td>- loss of wages, benefits, insurance, seniority retirement</td>
</tr>
<tr>
<td>- viable labor union</td>
<td>- job loss: permanent replacement, interim work, underemployment</td>
</tr>
<tr>
<td>- viability of union impaired</td>
<td><strong>2. Employer vis-à-vis Public</strong></td>
</tr>
<tr>
<td>- lost production</td>
<td>- lost purchasing power: lower consumer purchases/ savings</td>
</tr>
<tr>
<td>- lost sales: competitive position/market share</td>
<td>- strain on public services: criminal/ mental health impacts</td>
</tr>
<tr>
<td>- reputation: dependability as supplier of goods and services</td>
<td>- supporting/service positions lost: e.g., school personnel, grocery clerks, etc.</td>
</tr>
<tr>
<td>- reputation: community sentiment/loss to tax base</td>
<td>- loss to tax base</td>
</tr>
<tr>
<td>- constraints on cash flow/ operating funds</td>
<td>- default on consumer loans/mortgages</td>
</tr>
<tr>
<td>- cost of credit: restraint on capital expenditures</td>
<td>- uncollectability of debts/loss of collateral</td>
</tr>
<tr>
<td>- stock price fluctuations/ takeover threats</td>
<td><strong>4. Remedies imposed under law</strong></td>
</tr>
<tr>
<td><strong>4. Remedies imposed under law</strong></td>
<td><strong>4. Remedies imposed under law</strong></td>
</tr>
</tbody>
</table>
bargaining dispute resolution process. The Court, in its seminal *Borg-Warner* decision, created a distinction between mandatory bargaining items channeled through the collective bargaining process, and permissive bargaining items left to the unilateral discretion of the parties. Conceptually, such distinct-

<table>
<thead>
<tr>
<th>Macro/External</th>
<th>Micro/Internal</th>
</tr>
</thead>
<tbody>
<tr>
<td>-area wage measures</td>
<td>-financial strength of firm</td>
</tr>
<tr>
<td>-area cost of living</td>
<td>-inelasticity of product demand</td>
</tr>
<tr>
<td>-community sentiment</td>
<td>-organizational climate: perceptions of organizational equity</td>
</tr>
<tr>
<td>-cost of credit</td>
<td>-labor skill level required</td>
</tr>
<tr>
<td>-legal/political climate</td>
<td>-management style and competence: production layout and design; product quality; planning and forecasts; working conditions</td>
</tr>
<tr>
<td>-technological innovation</td>
<td>-ratio of labor costs to total costs or production</td>
</tr>
<tr>
<td></td>
<td>-strength/solidarity of union</td>
</tr>
<tr>
<td></td>
<td>-supply of materials</td>
</tr>
<tr>
<td></td>
<td>-technological substitutes for labor</td>
</tr>
</tbody>
</table>

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68. See also supra note 10.

69. National Labor Relations Act, § 8(d), 29 U.S.C. 158(d) 1982. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) [hereinafter *Borg-Warner*]. Section 8(d) could be viewed as an articulation and expansion of existing labor law policy, but every statute can be read broadly or narrowly. Section 8(d) specifies good faith bargaining with respect to "wages, hours, and other terms and conditions of employment . . . or any question arising thereunder." There are two ways such language could be interpreted. First, as Justice Harlan's dissent in *Borg-Warner* forcefully argues, the language may be interpreted as merely descriptive of substantive matters open to discussion by the par-
tions could be viewed as protecting both parties from an unconscionable exercise of power interfering with wholly organizational issues. But the Board and the courts rejected the potentially narrow categorization provided by the unconscionableness concept, in favor of a broader permissive category drawn from both the traditional control of capital and the command-obedience relationship, thereby excluding a broader range of issues from the mandatory reach of the collective bargaining process.

As sections 8(d), 8(a)(5), and 8(b)(3) only require good faith bargaining and not agreement, such broad distinctions seem unnecessary under the Act. Moreover, because it is a violation of the duty to bargain in good faith to take a conflict over a permissive issue to impasse, the mandatory-permissive dichotomy not only defines the substance of bargaining, but enforces its determination by denying the use of power to induce not only agreement but even discussion to impasse under penalty of Board sanction.

Justice Harlan based his analysis upon the legislative history and policy of section 8(d), and recognizing the preemptive impact of a mandatory-permissive bargaining classification, argued that the “Board possessed no statutory authority to regulate the substantive scope of the bargaining process insofar as lawful demands of the parties were concerned.” Id. at 354 (Harlan, J. dissenting) (emphasis in original). The dissent argued that the policies of the Act demanded a retention of the legal-illegal distinction in bargaining items.

The second manner in which to view the language of section 8(d) is as words of limitation. Thus the majority in Borg-Warner held:

[...]

The second manner in which to view the language of section 8(d) is as words of limitation. Thus the majority in Borg-Warner held:

1. These provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to “wages, hours, and other terms and conditions of employment ...”. The duty is limited to those subjects, 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.

Id. at 349 (citation omitted). With this approach, the Borg-Warner Court created the poorly defined demarcation between mandatory and permissive bargaining items.

70. This was one rationale for the Borg-Warner decision. Id. at 349-50.
71. See supra note 18.
74. Id.; see also NLRB v. Katz, 369 U.S. 736, 743 (1962) (holding that a refusal to negotiate in fact of subject within § 8(d) is an unfair labor practice).
The distinction has a significant practical effect both in the negotiation stage and during the term of the agreement. Items deemed permissive by the Board require no good faith bargaining to impasse prior to unilateral action, nor is notice and information access, one basis of productive relationships, readily available. The notice and information distinctions between mandatory and permissive items should not be discounted lightly. Control over information and notice are significant weapons. By controlling information and timely notice a party can effectively preempt a significant and perhaps costly response from its opposition. The current Board has made significant distinctions between information access and notice requirements, based on the mandatory-permissive distinctions, with case trends suggesting a restrictive approach to information access on permissive items.

Historically, one function of law is to protect the weaker from improper exercises of power from the stronger. Weaker unions and weaker employers are denied access to the Board processes and are subject to arguably improper exercises of economic coercion undermining the mediating effects of the collective bargaining process. The ability to exploit the dichotomy will encourage the practice of deception in articulating issues. But see First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674-79 (1981):

The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business.

Id. at 678-79 (footnotes and citations omitted). Cf. J. Atleson, supra note 20, at 111-35; Litvin, supra note 20.

The issue of which collective bargaining clauses are permissive and which are mandatory is unsettled. Distinctions have been made on decision directed clauses (constraining the decision making process before unilateral final decision) vis-à-vis effects directed clauses (constraining the decision implementation after unilateral final decision). See Zimarowski, Employer Evasion of the Collective Bargaining Agreement: Policy Directions and the Reagan NLRB, 37 LAB. L.J. 50 (1986); see also Lone Star Steel Co. v. NLRB, 639 F.2d 545 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981).


76. To be meaningful, the notice must be given sufficiently in advance of any unilateral action. Notice, however, is power, and by controlling or limiting notice a party can foreclose an opponent from preparing an adequate response or from marshaling other forces for retaliation. Thus, it is in the interests of a party to attempt to limit notice to improve one's bargaining position and power. Such attempts to limit notice are inapposite to the policy of the Act, but, without the incentive of swift and adequate remedy, a party will maximize its individual power and position through limited notice and information access.

The mandatory-permissive dichotomy would be nothing more than an interesting anomaly in the law if not for the fact that a significant employer's cost of noncompliance has been defined as largely a permissive issue. A potent source of employer costs of noncompliance is the control over unit work. If such exercises of employer power are outside the mediating effects of the collective bargaining process, a structural imbalance of power is created whereby labor costs of noncompliance are channeled through the process, but employer power is left virtually unchecked. The result is a preemptive determination of substance by court and Board fiat, potentially rendering the collective bargaining process a shallow ritual devoid of major areas of employee concern and signaling the return to unchanneled economic coercion.

Contract language and interpretation issues are also rising in importance as employer-exercised power attempts to define and exploit the mandatory-permissive dichotomy. The Board's and courts' roles as substantive facilitators of the collective bargaining process expand beyond the mandatory-permissive preemptive determination to include the interpretation of specific contract language in the agreement as it relates to the contractual waiver of power exercises. The Board, approaching an almost literalist interpretation of the rights and duties of the parties

78. The control over unit work, inclusive of subcontracting, automation, consolidation, relocation, and closure, is a significant source of employer power. See supra Table I at 68. When exercised, this power obviously affects employees' expectations in continued employment. The union's strike weapon and its derivatives in slowdowns, soldiering, low productivity, and poor quality control restructure the relationship, and affect to some degree the contractual expectations of the employer. From a contract perspective, a central question in accommodating collective agreements with NLRA policy is whether particular unilateral actions constitute a "breach" of an agreement and what should be the appropriate remedy. See Summers, supra note 8, at 537-48. Most of the above unilateral employee responses are subject to the employer's "industrial common law" remedies of discipline or discharge if the particular activity is outside the ambit of section 7. See Feller, supra note 8, at 774-804; Finkin, Labor Law at Boz—A Theory of Meyers Industries, Inc. Sears, Roebuck & Co. and Bird Engineering, 71 Iowa L. Rev. 155 (1985); see also F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 650-707 (4th ed. 1985); infra notes 103-49.

79. The Act does not include the violation of contract terms as an unfair labor practice. An earlier version of the senate bill contained a § 8(a)(6) provision making it an unfair labor practice "to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration." S. 1126, 80th Cong., 1st Sess. 13, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 111 (1948). A § 8(b)(5) contained a similar provision applicable to labor organizations. Both provision were struck from the final Act. Id. at 109-11, 114. This does not imply that the Board and the courts are precluded from examining contract language, only that such inquiries are dependent upon unfair labor practice provisions or contract enforcement through § 301, 29 U.S.C. § 185 (1982). See supra note 8.
under the agreement, looks for express language in the collective bargaining agreement, to determine unfair labor practice and 8(d) issues. The courts, approaching similar interpretation issues through appellate review and enforcement of arbitration awards, through section 301, ensure that an arbitration decision draws its “essence” from the collective bargaining agreement.

Whether from the direction of unfair labor practices or the arbitration process, both sets of issues focus upon the rights of a party to unilaterally exercise power and restructure the collective bargaining relationship. Each tribunal initially examines the collective bargaining agreement for applicable contract language and, if language is found, defines the scope of the language. This process raises an equally significant but more subtle determination. With the structural power imbalance resulting from the mandatory-permissive bargaining item dichotomy and the limitations on effective union power responses, express language restricting significant power exercises, within this permissive classification, is becoming increasingly difficult to negotiate. Thus, the tribunals are required to address the impact of silence and ambiguity, a “default position,” in contract interpretation.

In an ongoing bargaining relationship, the party who commands the default position is in a superior bargaining posture.

80. NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967) (Board can interpret contract language if necessary to determine unfair labor practices).


82. See supra note 8.

83. See infra note 85. If the Board’s decision and an arbitrator’s decision conflict, the arbitrator’s decision must give way. International Longshoremen’s and Warehouseman’s Union, Local 32 v. Pacific Maritime Ass’n, 773 F.2d 1012 (9th Cir. 1985) (finding an unfair labor practice where an attempt to circumvent the Board’s processes through arbitration proceedings occurred), cert. denied, 476 U.S. 1158 (1986). Certain contract violations are also violative of the NLRA. In processing unfair labor practice charges which also constitute contract violations, the Board’s established policy is to suspend its proceedings to permit the claim to be put before an arbitration tribunal. United Technologies Corp., 268 N.L.R.B. 557 (1979); Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). If the party filing the charge is dissatisfied with the resulting arbitration award, it may petition the Board for review to determine if deferral to the arbitration award or reactivation of the unfair labor practice claim is warranted. Olin Corp., 268 N.L.R.B. 573 (1984); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). The Board’s deferral policy is controversial. See Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986) (holding that the Board cannot defer away its statutory obligation to protect statutory rights). See generally Peck, A Proposal to End NLRB Deferral to the Arbitration Process, 60 WASH. L. REV. 355 (1985).

84. See supra note 9.

85. See generally Farnsworth, Disputes over Omission in Contracts, 68 COLUM. L. REV. 860 (1968).
In this context, a party can prevail on a particular issue by inclusion of language favorable to its interests, and more importantly, by saying nothing or keeping negative language out. All institutions need operating rules, and bargaining over each and every rule would prove to be inefficient and would result in lengthy documents still incomplete as to every contingency.\(^\text{86}\) As such, it would be impossible to develop interpretation rules applicable to every confrontation in a complex labor-management relationship. Therefore, the inquiry must be sufficiently narrowed to embrace the significant issues of frustration or forfeiture of the underlying contractual expectations of the parties to the collective bargaining agreement.\(^\text{87}\)

\(^{86}\) In the commercial transaction area the default or silence position is partially settled through the use of statutory provisions in the Uniform Commercial Code (1987). See, e.g., U.C.C., Art. 2 (1987) (Sales). The U.C.C. also recognizes the complexity of terms during the contract formation stage in the so-called battle of the forms provision. U.C.C. § 2-207 and official comments (1978); see also C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977); supra note 13.

\(^{87}\) The concurring opinion by Justice Stewart in Fibreboard Paper Prod. v. NLRB, 379 U.S. 203 (1964), addressed the issue of frustration of the agreement by the subcontracting of unit work:

Analytically, this case is not far from that which would be presented if the employer had merely discharged all its employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company. While such a situation might well be considered a § 8(a)(3) violation upon a finding that the employer discriminated against the discharged employees because of their union affiliation, it would be equally possible to regard the employer's action as a unilateral act frustrating negotiation on the underlying questions of work scheduling and remuneration, and so an evasion of its duty to bargain on these questions, which are concededly subject to compulsory collective bargaining . . . . Insofar as the employer frustrated collective bargaining with respect to these concededly bargaining issues by its unilateral act of subcontracting this work, it can properly be found to have violated its statutory duty under § 8(a)(5).

379 U.S. at 224-25 (Stewart, J. concurring) (footnote omitted).

Employers' interests surface prominently in the Court's decision in First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981):

The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. . . . Nonetheless, in 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.
The command of the default position clearly affects the bargaining posture of the parties. The Board and court approaches to contract language invariably contain views as to the nature of the duties created between the parties in the collective bargaining "contract" and the relationship between employers and employees. The interpretations and case results often turn upon an unspoken conflict between the management reserved or residual rights theory, where management retains what it does not literally relinquish in bargaining drawing from traditional autocratic control of capital and the command-obedience relationships and the implied obligations theory.

The reading of management rights and no strike clauses focuses the conflict between management reserved rights theory and the implied obligations theory. The current Board and court approach seems to be overly rigid, suggesting a double standard of contract reading. When addressing the union's cost of non-

452 U.S. at 678-79 (footnotes and citations omitted). There are numerous critiques of the Court's purported balancing of interests, including a sharp dissent by Justice Brennan, 452 U.S. at 688-91; see also Litvin, supra note 20.

Employees also have interests and expectations in the employment relationship. Consider the Board's statement in Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966):

It is equally true, however, and ought not to be lost sight of, that an employer's decision to make a "major" change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood. ...

The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to arrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

161 N.L.R.B. at 566-67 (quoting Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964)).

The unilateral actions of employers and labor are often defended or prompted by "outside" events changing the circumstances under which the original agreement was consummated.


89. See J. Commons, supra note 42, at 64-67; Commons, Law, Economics & Ethics, supra note 50, at 9-11; see also supra note 62. See generally J. Commons, supra note 13, at 283-312; Commons, supra note 59.

90. According to implied obligations theory, an agreement, taken as a whole, creates specific contractual as well as derivative implied rights that can not be frustrated by the unilateral actions of one party. See generally F. Elkouri & E. Elkouri, supra note 78, at 457-585; P. Praslow & E. Peters, Arbitration and Collective Bargaining: Conflict Resolution in Labor Relations 43-46 (2d ed. 1983).
compliance, contract clauses and waiver of rights are read broadly with a default toward restriction of the cost of noncompliance.\textsuperscript{91} When addressing the restriction of management prerogatives, such clauses are read narrowly with a default toward granting management the right at issue.\textsuperscript{92} This observation belies arguments by employers that the NLRA unduly restricts their activities. Such an approach does not provide the proper accommodation necessary to do "justice between the employer, the union, and the employees, aid in the continuing relations of the parties, promote the statutory purposes of collective bargaining, and protect the social interest in labor peace."\textsuperscript{93}

If employers can walk away from negotiated contract terms without penalty, the collective bargaining agreement is but a cruel, empty promise. Silence and ambiguity of terms should be resolved to avoid contractual forfeiture. Simply put, why would any party willingly seek a contractual agreement that is binding only upon themselves? To do justice between labor unions and the employer, and to further the public good, dispute resolution forums must view the collective bargaining contract as a "special" contract negotiated in a power confrontation context. Achievement of the NLRA policies are better evaluated in terms of channeling costs of noncompliance through the process of collective bargaining.

If a collective bargaining agreement can be avoided by employers as a matter of legal construction, the very existence of the labor union as a vehicle of industrial democracy is called into question. If the labor organization has no real power to effect changes in the workplace and protect the security interests of the employees, union membership becomes a poor return. Additionally, labor unions lose their ability to control their membership. At both the union and nonunion level, the intangible concepts of loyalty, confidentiality, pride in workmanship, job satisfaction, and organizational justice are subsumed to a harsh,
authoritarian, economic calculus. A return to labor militancy or a hostile, subservient workforce may therefore become commonplace. The Board's and the courts' balancing of interests process is skewed in favor of the employer—not as a matter of statutory command but as a matter of judicial construction.

B. Employer's Discipline and Discharge Power

Employers have other potent sources of judicially protected power in addition to the control over unit work. The authoritarian organizational structure, coupled with extensive economic power, allows employers to impose costs of noncompliance upon employees to deter the exercise of job-related and nonjob-related activities. The "costs" imposed include various aspects of employee discipline and discharge. The power of discipline and discharge, drawn from outdated notions of at-will-employment in the traditional command-obedience relationship, creates a fundamental conflict with the granting of section 7 rights and the NLRA policy of furthering industrial democracy.

94. See supra note 43 and accompanying text.

95. Economic and organizational realities dictate that the power between labor and management will never be in absolute parity and that employees, even where they are stockholders, will never be equal partners in the operation of the organization. This does not mean, however, even absent legislative intervention, that progress toward industrial democracy and organizational justice cannot achieve a significant measure of success within the current economic reality.

96. See supra note 42. The concept of "whistleblowers" aptly illustrates that employer exercised power can be to the detriment of public safety, transferring these costs to society at large.

97. The employment-at-will doctrine is traceable to the writing of a single commentator. See H. Wood, Treatise on the Law of Master and Servant 272 (1877). Drawing from "Wood's Rule" early courts stated it more succinctly: "All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884) [emphasis supplied]. For a thorough treatment of the at-will-employment rule and the evolving theories signaling its demise, see LOPATKA & MARTIN, Developments in the Law of Wrongful Discharge, in Litigating Wrongful Discharge and Invasion of Privacy Claims (1986); see also Kornblau, Common Law Remedies for Wrongfully Discharged Employees, 9 INDUS. REL. L.J. 660 (1987).


Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.
In theory, section 7 restricts the employer's power to discipline and discharge employees who are engaging in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Conversely, the employer's ability to impose costs of noncompliance on employees is not restricted if the activity is outside the ambit of section 7 protection. This leaves open two fundamental questions: what is the scope of section 7 rights, and what is the applicable industrial discipline standard that balances the employer-employee power interests in furtherance of the policies of the NLRA?

Arguably, absent statutory or common-law restrictions upon at-will employment, the employer can exploit the command-obedience relationship and discipline or discharge for "good cause, for no cause, or even for cause morally wrong." Thus, the NLRA can be read narrowly to preserve the at-will employment rule and to limit the reach of section 7. But curiously, the NLRA expressly preserves the employer's prerogative to discipline and discharge using the term "for cause." Whether sec-

99. Id. 29 U.S.C. § 158(a)(1) (1982) provides: "It shall be an unfair labor practice for an employer - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(3) (1982) provides: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."


100. This is the case unless such activity would be in violation of existing law. See, e.g., Vincent v. Trend Western Technical Corp., 828 F.2d 563 (9th Cir. 1987). See generally Fick, Protecting Worker Complaints After Meyers Industries, 31 ST. LOUIS U. L.J. 823 (1987). The possibility of a wrongful discharge action should be considered. See LOPATKA & MARTIN, supra note 97.

101. See supra note 97.

102. 29 U.S.C. § 160(c) (1982). Section 10(c) of the NLRA reads in pertinent part: "No order of the Board shall require the reinstatement of any individual as an employee
tion 10(c)’s “for cause” is simply another articulation of the at-will employment rule or the much narrower concept evolved from collective bargaining or industrial jurisprudence is an open question.\textsuperscript{103} Thus, a coordination problem embracing larger issues of redundancy, preemption, and deferral arises.\textsuperscript{104} Is the proper balance of employer disciplinary power and NLRA policy concerns accomplished through sections 7, 8(a)(1), and 8(a)(3); through a collectively bargained grievance and arbitration procedure; through contract enforcement under section 301; or, in a curious turn of legal evolution, through state tort and contract wrongful discharge actions? The inquiry regarding section 7, as with the mandatory-permissive bargaining item dichotomy, is the interpretation of this statutory language in the context of the multiple policy rationales of the NLRA.

Although no clear lines of demarcation exist, actions within the ambit of section 7’s protected rights can be distilled from case law into a three part analysis. The three threshold elements are in the conjunctive, and therefore, the failure of any subpart renders the disciplinary or discharge action outside of section 7 and subject to the unilateral discretion of the employer. The employee’s activities, as a threshold matter, must: (1) be concerted, (2) be protected, and (3) have a proper objective or purpose.

If viewed along the continuum of individual activity, the Board’s and the courts’ treatment of “concerted activity” can be readily classified into five categories. First, “concerted” activities within the ambit of section 7 embrace the dictionary definition of actions involving two or more individuals acting as a group.\textsuperscript{105} Second, less controversial but open to evidentiary problems in practice, is the concept that “concerted” may include a single who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.”

103. “For cause” or “just cause” in industrial jurisprudence is much narrower than the traditional statement of the employment-at-will concept. See supra note 97. Although “cause” is a fluid term, it generally sustains a disciplinary action if the action was not arbitrary (governed by rule), capricious (consistency of application), nor discriminatory (treating like things in a like manner). Moreover, many labor arbitrators implicitly require the rudiments of procedural due process, progressive discipline, and recognition of seniority. See generally F. ELKOURI & E. ELKOURI, supra note 78 at 664-65.


individual acting to induce other individuals to join in a group action.\textsuperscript{106} These two classifications of concerted activity have generally met with approval by the Board and courts. The remaining three classifications embrace the concept of “constructive concerted activities” and have met, with one exception, resistance by the current Board and mixed results in the circuits. All three classifications involve an individual acting alone to redress a “group” concern.

The third classification embraces an individual protesting a contractual right grounded in the collective bargaining agreement. This issue was seemingly resolved by a five-to-four Court decision in \textit{NLRB v. City Disposal Systems, Inc.}\textsuperscript{107} In \textit{City Disposal}, the Court gave approval to the Interboro doctrine,\textsuperscript{108} holding that “[a] lone employee’s invocation of a right grounded in his collective bargaining agreement is, therefore, a concerted activity in a very real sense.”\textsuperscript{109} The employer is precluded from exercising its disciplinary and discharge power against the indi-

\textsuperscript{106} See, e.g., Mushroom Transp. Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964) (stating in dicta that a single employee’s action that is found to induce group activity is protected); Scientific-Atlanta, Inc., 278 N.L.R.B. 467 (1986) (holding that employee discussions with individual employees regarding employer policies to encourage union membership are protected).


\textsuperscript{108} Id. at 829-31. \textit{See also} Interboro Contractors, Inc., 157 N.L.R.B. 1295 (1966), enforced, 388 F.2d 495 (2d Cir. 1967) (individual’s assertion of a right grounded in a collective-bargaining agreement is concerted activity).

\textsuperscript{109} 465 U.S. at 832. The rationale in \textit{City Disposal} turns upon the view that an individual asserting a collective right of work-related interest is an extension of the group activity that originally produced that right albeit removed in time and place. \textit{Id.} at 832-33. Consider the policy rationale articulated by the Court:

\[\text{\textit{Id.} at 835.}\]

Such a view and the policy analysis by the Court would arguably permit other forms of individual activity asserting collective rights of work related interest—assertion of a statutory right, infra notes 119-22 and accompanying text, and the individual furtherance of a group concern, \textit{infra} notes 123-29 and accompanying text.
individual employee involved in concerted activity under section 8(a)(1).\textsuperscript{110}

The dissent in City Disposal correctly points out that the majority decision contributes little to the coordination problems of redundancy, deferral, and preemption among employee rights under federal labor law.\textsuperscript{111} The dissent's focus, however, is skewed as well. The Board is not enforcing a contract right, even though one may exist, but a statutory right and, as such, is engaging in a more fundamental endeavor. The Board is denying the employer the use of his discipline and discharge weapons to silence a protest made by an individual employee regarding an issue of concern to other workers. This is power balancing in its most fundamental form in the furtherance of NLRA policy concerns. The section 7 statutory right is the lowest common denominator in furthering NLRA policy. It should be noted that the dissent also fails to seriously address the coordination problem.

The fourth classification includes an individual protesting a right grounded in public policy articulations. Conceptually, this classification parallels the City Disposal rationale. An individual asserting a statutory right of work-related interest is an intended beneficiary of the group activity, in this case the body-politic, that originally produced the right.\textsuperscript{112} The current Board has been hostile and often collapsed in its analysis under the fourth classification.\textsuperscript{113} Curiously, this group activity parallels the most widely accepted and growing exception to the at-will employment rule under state tort law.\textsuperscript{114} As such, it may put employers in the peculiar position of arguing for concerted activity classifications in order to preempt state tort actions and to limit remedy exposure to backpay and reinstatement under the

\begin{footnotes}
\footnotetext[110]{See supra note 106.}
\footnotetext[111]{The dissent, written by Justice O'Connor, was joined by Chief Justice Burger, Justice Powell and Justice Rehnquist. Five-to-four decisions, however, given the changing composition of the Court, should be viewed with caution. 465 U.S. at 841-47.}
\footnotetext[112]{In Alleluia Cushion, 221 N.L.R.B. 999 (1975), the Board extended protection to individual workers protesting a work-related interest in violation of existing public policy as articulated in statutes. Alleluia Cushion was overruled by the Board in Meyers Industries (II), 281 N.L.R.B. 882 (1986), setting the stage for an interesting confrontation with state wrongful discharge actions. See supra note 104.}
\footnotetext[113]{See infra notes 123-29 and accompanying text.}
\footnotetext[114]{See LOPATKA & MARTIN, supra note 97, at 50-175. See generally Fick, supra note 100 (suggesting that the gaps in worker protection left by Meyers Industries may be filled by statutory and common-law remedies).}
\end{footnotes}
This further exemplifies the coordination problems in labor law.

The final classification embraces an individual acting in furtherance of a group concern. Although contract rights and statutory rights can be easily viewed as "group concerns," contract rights and statutory rights present easier procedural requirements than the broader and more elusive concept of group concerns. The Board, at least in its present tenure, has closed out protection for the individual acting in furtherance of "group concerns" by rejecting the Alleluia Cushion rationale in Meyers Industries II. In Meyers Industries II the Board adopted a literal definition of concerted activities focusing on "two or more acting in concert." Exercising their discretion in statutory interpretation, the Board has declined to protect these individual employees acting in furtherance of a group concern. Moreover, Meyers Industries II can also be read to preclude protection for individual employees protesting in furtherance of statutory rights as well.

In Meyers Industries II, the Board was careful not to expressly preclude all individual actions as beyond the "concerted" element in section 8(a)(1) actions but, from a disciplined or discharged employee's position the evidentiary burdens are significant. As a matter of procedure, the Board has created an implicit presumption that any individual action is, by definition,
unconcerted behavior with the sterile "form" of protest exalted over the "substance" of the protest. The nature of the "group concerns" is shifted, as one can argue it should be, to the second and third threshold elements of the analysis. However, this may create a "catch-22." The substance of the protest may not be addressed until the employee overcomes the problems generated by the individual form of protest.

As indicated above, satisfaction of the "concerted" element is one of three threshold requirements for denying the employer the prerogative to discipline or discharge for "good reason, for no reason, or for reason morally wrong." The second threshold element is the "protected" versus "unprotected" status of the employee's activities. As the Supreme Court indicated in City Disposal, an activity can be concerted but, by the nature of the employee's actions, be unprotected. The focus of the "protected" element is generally classified as a time, place, and manner issue.

Although this area contains a myriad of factual patterns, a continuum of behavior can be constructed. Drawing from the concept of industrial justice, employee behavior that is unprotected parallels the "for cause" or "just cause" discipline and discharges. If the activity in question is grounded in sound, properly administered personnel policy, then the discipline or discharge is allowable. Therefore, work-related behavior in violation of criminal statutes or specific NLRA policy anchors one end of the continuum and is clearly unprotected. Moving along the continuum, conduct approaching intentional torts would similarly be viewed as unprotected as would activity in contravention of existing contract provisions. Toward the other end of the continuum are employee protests presented in a

123. See supra note 97.
125. Rights granted in statutes are not absolute and must be analyzed in a factual context. Akin to the analysis of constitutional rights, a shorthand categorization is the analysis of time, place, and manner issues. Although passing under a variety of terminology, the analysis involves a balancing scheme and is at the heart of NLRA interpretation.
127. See, e.g., NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (holding the discharge of sit-down strikers proper because strike action was illegal).
"harsh" manner, using opprobrious language, protests presented in a "threatening" manner\textsuperscript{129} or the potentially unprotected and equally ill-defined acts of "disloyalty" and "insubordination."\textsuperscript{130} It is in these latter areas that autocratic work rules emanating from the command-obedience relationship of an earlier industrial era, upon which the NLRA was built, are incorporated into the analysis and must be accommodated with the policies of the NLRA.

The weighing of interests involves balancing the employee's section 7 rights to present worker concerns against the employer's power through discipline and discharge to further its self interest in operating its business. But are they in fact weighed at all? Adopting a narrow economic efficiency focus clearly tilts the balance in favor of employers while giving short shrift to other policy considerations. Recognizing the power balancing function of the NLRA, the Board and court construction of the balance of interests must incorporate the unsophisticated nature of employees\textsuperscript{131} and the recognition that authoritarian organizational structures have little or no interest in communicating with employees.\textsuperscript{132}

The final threshold element in section 7 analysis is the "objective" or "purpose" of the protest. In this area the Board and the


\textsuperscript{130} The terms "disloyalty" and "insubordination" are catch-all terms of art and, by themselves, convey little of the underlying fact pattern. In the industrial setting these terms of art are, at best, merely organizing points in developing just cause; at worst, they are smokescreens to hide inequitable employer activity. See supra notes 109-10.

\textsuperscript{131} Employees and labor organizations are often uninformed and may have limited access to proper procedural requirements under the Act. So as not to exalt form over substance, the Act should be interpreted with a recognition of the employees' limited information base and the unsophisticated manner of presentation. The authoritarian organizational structure also must be recognized as playing a significant role in employees' lives and livelihood. See supra note 44. Employees are conservative. They seek consistency of return in their investment of time, labor, and talent through job security. Wages at one time do not offset no wages at another time. Therefore, few employees will risk job security to air protests unless they are afforded protection from employer power exercises.

\textsuperscript{132} The business perspective is speculative. High profits at one time are offset by low profits at another time. The employer desires to maintain the ability to move and mix capital in furtherance of the better return. Self-interested private profit maximization is accomplished by preserving an authoritarian organizational structure and a command-obedience relationship. Because these institutions are the products of human directed actions, however, they are not based on rational behavior. Nor are many distributive and corrective industrial justice systems based on merit and equity. Rather, any attempt to impose standards upon or to raise a dissent against an authoritarian organization is met with opposition. The concept of industrial democracy is viewed as a threat to capital's control.
courts have liberally interpreted the "for mutual aid and protection" language. As such, work-related protests are clearly within the ambit of section 7. Additionally, and arguably furthering the ideal of industrial democracy, protests may be within section 7 even if the purported objective is outside the direct control of the employer, including such diverse concerns as political issues and union affairs. Akin to the protected/unprotected issues, employer discipline and discharge is allowed where the protest furthers an unlawful objective or is in violation of a contract restriction.

The concept of the "personal gripe," although exemplifying the interdependent nature of these elements, is perhaps the most troublesome area. The talisman raised is that of the chronic complainer. A personal gripe, by definition, furthers personal rather than group interests; is unconcerted; and, if presented in an unsophisticated and insubordinate manner, unprotected as well. A lack of any one of the section 7 elements will permit the exercise of discipline and discharge weapons; however, such a blanket hands-off policy is problematic.

In the workplace personal gripes are often linked to perceived inequities in the distributive and corrective industrial justice systems. As such, redressing these protests often inures to the benefit of the group as a whole even without its active approval or participation. If outside the reach of section 7, legitimate worker complaints can fail due to the unsophisticated nature of the employee presentation. Conversely, allowing unfettered discipline and discharge in these areas can have a chilling effect on future protests. The employer is not without a command-obe-dience sanction. "Just cause" or "for cause" drawn from 10(c) permits the discipline or discharge of chronic complainers not for their act of complaining but rather for the running afoul of time, place, and manner rules rooted in sound personnel policy and practice.

134. See, e.g., Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); Kaiser Engineers v. NLRB, 538 F.2d 1379 (9th Cir. 1976).
The concept of protected concerted activities turns on a fundamental disagreement between individual and group actions. The current Board and many circuits take a literal dictionary definition of "concerted." The result is a rather strange dichotomy in which actions, if taken individually, are subject to employer discipline and discharge while identical behavior engaged in by "at least two" would be within section 7 protections. Such an approach, as two preeminent labor law scholars have argued, ignores the legislative history and policies of the Act:

In terms of statutory construction, there are not two abstract and distinguishable categories of action—individual action for self interest and collective action for group interest—one which Congress chose not to protect and the other which Congress chose to protect, but rather a continuum of individual activity—of individuals choosing to speak and act on their own behalf, singly and in small and large groups. Thus, the narrow reading of the Act proceeds upon a false dichotomy, for at the core of the freedom of the individual to protest in a group necessarily lies the freedom of the individual to protest at all.

Assuming no "just cause" rationale rendering the protest unprotected, Professors Gorman and Finkin further argue that "[a]lthough the employer may refuse to entertain an employee's presentation, nothing in the Act suggests it should be permitted to discharge an employee for attempting to make that presentation." The focus of inquiry, therefore, should fall on the protected/unprotected nature of the protest or the time, place, and manner issues—an area requiring the substantive articulation of the power relationships and the components of the interest balance.

C. Express Power Controls

A major focus of the power balancing mechanisms of the NLRA addresses the scope and content of labor's costs of disagreement or noncompliance. "Congress," wrote the Court in

140. Gorman & Finkin, supra note 99, at 344.
141. Id. at 344-45 (citations omitted).
142. Id. at 357.
NLRB v. Insurance Agents' International Union, "has been rather specific when it has come to outlaw particular economic weapons on the part of unions." The previous two sections of this Article delineated the limits, carved out through judicial construction of the NLRA, upon the employer's control over unit work and its discipline and discharge power. At the outset, it is important to note a shift in judicial construction. Although the employer's costs of noncompliance are not channeled through the collective bargaining process nor initially subject to NLRA restrictions, virtually all such labor-exercised costs are initially and fundamentally channeled through the collective bargaining process, or restricted outright.

One can readily identify the power restrictions placed upon labor organizations by the Act. The right to strike is granted in section 13. The closed shop, hot cargo clauses, and featherbedding are restricted. The ability to engage in recognition and organizational picketing, secondary strike and picketing

144. See supra Part II.A. on the treatment of corporate transformations as permissive bargaining items.
145. See supra Part II.B. on the preservation of the discipline and discharge component of the tradition based command-obedience relationship.
146. Section 13 of the Act provides: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (1982).

The section does not ban the use of picketing outright but restricts its use if directed to the listed proscribed objectives. A proviso to 8(b)(7) provides that informational picketing "for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization" shall not be constrained by this section unless the picketing has the secondary effect of "induc[ing] any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services." See NLRB v. Local 3, International Bhd. of Elec. Workers, 317 F.2d 193 (2d Cir. 1963); Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 MINN. L. REV. 257, 262-70 (1959) [hereinafter Cox, The Landrum-Griffin Amendments; Cox, Strikes, Picketing and the Constitution, 4 VAND. L. REV. 574, 594-95 (1951); see also NLRB v. International Ass'n of Bridge Workers, 434 U.S. 335 (1978); Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975); National Labor Relations Act, § 8(b)(4)(C)-(D), 29 U.S.C. § 158(b)(4)(C)-(D) (1982). See generally Modjeska, Recognition Picketing Under the NLRA, 35 U. FLA. L. REV. 633 (1983).
activity, and secondary boycotts is similarly impaired by the Act. Limited jurisdictional reach and unit determination significantly impair labor's ability to organize and coordinate mutual and unified collective fronts. Mere listing, however, does not convey the complexity, nor the furtherance of legislative policy through judicial construction, of these power exercises. It is useful, therefore, to view these restrictions on labor's power exercises and their judicial construction in a power context juxtaposed against the previously discussed employer responses.

Labor's power function directly relates to its ability to impair the targeted employer's ability to remain economically viable. The employer considers all organizational resources and support structures in countering labor's actions. Labor's ability to impose costs of noncompliance upon the employer, however, cannot be viewed as limited to internal work stoppages, albeit labor's most significant locus of pressure, but must be viewed in an external support/pressure context as well. Similarly, employers utilize both internal and external responses. External responses extend the locus of the dispute to embrace consumers, other sympathetic employees, other, possibly neutral, employers (suppliers and distributors), ally employers, and other outside support personnel and replacement employees. The NLRA's treatment of power exercises in the internal and external contexts limits the scope of permissible power exercises in the labor arsenal thereby impacting its ability to counter or weather an employer's actions.

With exceptions, the NLRA does not render the traditional economic weapons available to labor per se illegal, but imposes


154. See supra notes 147-49.
limits on the use of such weapons when directed toward statutorily prohibited, predominately external, objectives. Both the policy and effect behind the Act's labor power controls are to rein in and internalize the dispute. This policy and effect also appears in the statutory limits on jurisdiction, unit determination, and the treatment of the mandatory-permissive bargaining item dichotomy. In this context, the dispute is localized, neutrals are ostensibly protected, and the labor confrontation is managed with a restricted, internal, field of play.\textsuperscript{155} External labor power exercises are countered, not necessarily by employer power responses, but by the power of the state allowing injunctive and monetary relief.\textsuperscript{156}

Predominant among the "reining in" provisions is section 8(b)(4)\textsuperscript{157} proscribing two types of conduct: (i) "to engage in, or to induce or encourage any individual employed by any person . . . in" [1] a strike or [2] refusal to use or otherwise handle

\textsuperscript{155} The fostering of collective bargaining and its mediating effects on industrial disputes is an identifiable NLRA policy goal. In internalizing the dispute, disruptions to interstate commerce are thereby contained, and, through limitations on power exercises, their intensity mitigated. But the concept of private ordering of disputes creates a policy dilemma. In channeling the dispute to collective bargaining, the Act must not only compel attendance and provide a remedy, but must deny other, potentially more efficient, means of achieving the individual party's goals. Private ordering only works efficiently if all power exercises are channeled through the collective-bargaining process or denied outright.

Success at the bargaining table is not the only employer goal. Although labor is dependent upon employer survival for its survival, the employer is not necessarily dependent upon the survival of the union. Regrettably, employers have never fully embraced the concept of collective bargaining and industrial democracy, viewing the destruction of employee collective representation as desirable. See Summers, supra note 3, at 15-18. Moreover, the remedial structure of the NLRA is inadequate to compel compliance; cease and desist orders tend to have little effect on recalcitrant organizations.

\textsuperscript{156} The Board views secondary activity and the similarly structured recognition and organizational picketing as having high priority and will attempt to complete its investigation within 72 hours. See generally National Labor Relations Act, § 10(l), 29 U.S.C. § 160(l) (1982). If substantial evidence is present, the Board can request that an injunction be issued. \textit{Id.}; see also San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541 (9th Cir. 1969) (evidentiary standard for 10(l) injunction). Monetary damage actions may also be available to the aggrieved employer. NLRA section 303, 29 U.S.C. § 187(b) (1982); see C & K Coal Co. v. United Mine Workers, 704 F.2d 690 (3d Cir. 1983) (holding that strike benefits paid to secondary strikers is proof that union supported activity); Sacramento Valley Nat'l Elec. Contractors Ass'n v. International Bhd. of Elec. Workers, 637 F. Supp. 1417 (E.D. Cal. 1986) (holding that section 303 requires a "but for" standard of proof in linking damage to unlawful motive/objective).

goods in commerce or, [3] refusal to perform services; or (ii) "to threaten, coerce, or restrain any person" where an object thereof is: (A) forcing an employer to join a labor or employer association or to enter into a "hot cargo" (section 8(e)) agreement; (B) forcing any neutral (secondary) person to cease doing business with any other person or forcing another employer to recognize an uncertified union; (C) forcing an employer to recognize or bargain with a union in defiance of another's certification; or (D) forcing any employer to assign particular work to one group of employees rather than another unless authorized by Board order or certification.

To accommodate the first amendment concerns of free speech, these express restrictions under section 8(b)(4) are tempered by provisos allowing two forms of external labor pressure support. First, sympathy strikes and the refusal to cross lawful picket lines are not rendered unlawful by section 8(b)(4). Second, truthfully advising the public, including consumers and other labor organizations, that products produced by the primary employer are distributed by a neutral (secondary) employer is protected so long as the publicity does not have the effect of forcing any neutral (secondary) person to cease doing business with any other person (section 8(b)(4)(B)).

160. Id.

Id.

Labor union representatives may lawfully follow a struck product to its distribution points and picket so long as the pickets are product specific and do not have an unlawful secondary objective. NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits), 377 U.S. 58 (1964); see also Catalytic, Inc. v. Monmouth & Ocean County Bldg. Trades Council, 829 F.2d 430 (3d Cir. 1987).

These allowable external pressure mechanisms, however, are not without difficulty in practice. Sympathy strikers are treated as economic strikers and can be permanently replaced. Moreover, contract restrictions and improper time, place, and manner issues can result in the activity being unprotected and subject to employer discipline and discharge. The publicity proviso is similarly not a panacea for labor. A balancing of employer property interests against the union right of information dissemination can impair labor's ability to effectively publicize the dispute. Second, the phrasing of the publicity can be such that it must cease doing business with the "neutral" and be unprotected. Finally, the time, place, and manner of distribution can run afoul of state public safety protections.


163. The statutory right to honor picket lines can be waived, rendering the activity unprotected and subject to employer discipline and discharge. See NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953); see also Indianapolis Power & Light Co., 273 N.L.R.B. 1715 (1985), rev'd and remanded sub nom. Local 1395, International Bhd. of Elec. Workers v. NLRB, 797 F.2d 1027 (D.C. Cir. 1986). Cf. Local 803, International Bhd. of Elec. Workers v. NLRB, 826 F.2d 1283 (3d Cir. 1987). In addition to the time, place, and manner issues of individual employee conduct rendering the activity unprotected, the picket line honored must have a lawful, protected status. Ignorance of the picket line status is no defense to employer discipline and discharge. American Tel. & Tel. Co., 231 N.L.R.B. 556 (1977).


165. See Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147 (1983); Hospital & Serv. Employees Union, Local 399 v. NLRB, 743 F.2d 1417 (9th Cir. 1984). This is particularly troublesome when the publicity is accompanied by picketing. See Bedding, Curtain & Drapery Workers Union Local 140, 164 N.L.R.B. 271 (1967), enforced, 390 F.2d 495 (2d Cir. 1968); Local 248 Meat & Allied Food Workers, 230 N.L.R.B. 189 (1977).

Courts have found the distinction between primary activities and the secondary activities of neutral employers particularly troublesome. The distinction between legal primary activity and illegal secondary activity, as the Court stated, is rarely "a glaringly bright line." Labor power exercises used against primary employers are proper, although the same weapons and tactics used against secondary, ostensibly neutral, employers may be an unfair labor practice. Thus, in a textbook case, it would be unlawful for a labor union to strike employer A for the purpose of forcing that employer to cease doing business with employer B. Likewise, it would be unlawful for the union to boycott employer A because employer A does business with employer B with whom the union has a dispute. But activity can be secondary even if the activity is directed against the primary employer. Activity is considered secondary if an objective, not necessarily the predominate one, is to force a cessation of, or change in, the business relationship between two independent entities. Thus, the focus of the inquiry is the labor union objective in exercising power. To aid in the determination, the Board has developed a "right to control" test. If the employer lacks control over the object or issue in dispute, the union activities will likely be viewed as secondary.

Secondary activity, however, rarely follows the simple definitional lines articulated above. In addition to the difficulty of determining the union's objective, the 8(b)(4) provisos further complicate this inquiry by allowing limited external support or


168. Section 8(b)(4)(B) (29 U.S.C. § 158(b)(4)(B) (1982)) is designed to preserve the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and shield unoffending employers and others from pressures not of their own making. A proviso reads "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." See also H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959).


170. Id.

171. NLRB v. Pipefitters Local 628, 429 U.S. 507 (1977); see also NLRB v. International Longshoremen's Ass'n, 764 F.2d 234 (4th Cir. 1985). Moreover, if the primary employer is simply caught in the middle of a dispute between two unions the secondary activity provisions may apply. See National Maritime Union v. NLRB, 342 F.2d 538 (2d Cir.), cert. denied, 382 U.S. 835 (1965); National Maritime Union v. NLRB, 346 F.2d 411 (D.C. Cir. 1965), cert. denied, 382 U.S. 840 (1965).


pressure through the honoring of picket lines and information dissemination.\textsuperscript{175} Recall that even if the activities are outside the restrictions of 8(b)(4), they still can be unprotected and subject to employer discipline and discharge.\textsuperscript{176}

The question of what is a "neutral" is not without power-balancing implications. Unions can follow struck work to allies of the primary employer without running afoul of the secondary activity ban.\textsuperscript{177} If labor's aim is to impose a significant cost of noncompliance on the employer, an effective way of doing so is to constrain its supply and distribution outlets. Clearly, however, external pressure against suppliers and distributors of the primary employer, outside the publicity proviso, is illegal.\textsuperscript{178} But a more fundamental question remains. Can external union pressure be brought against the other parts of a larger enterprise, or are the subparts "neutral" employers? With the rise of mergers and conglomerate enterprises the supply and distribution facets, as well as an integrated financial position, are housed within a multi-faceted organizational structure. Surely the organizational structure is designed to counter pressure from the various markets it serves. One might argue that an employer cannot be forced to cease doing business with another if the another is a part of itself and, in reality, the same employer.

The Board views common ownership as insufficient to free unions from the secondary activity prohibitions.\textsuperscript{179} Instead of looking solely to common ownership, the Board seemingly requires common control, ownership, and an integration of operations and policies.\textsuperscript{180} Thus, union power exercises against parts of a larger corporate whole are illegal secondary activity. Such a balancing of employer organizational prerogatives against employee collective interests, through judicial construction rather than express statutory command, clearly disadvantages labor while leav-

\textsuperscript{175} See supra, notes 167-73 and accompanying text.

\textsuperscript{176} See supra, notes 171-73 and accompanying text.


\textsuperscript{178} See supra notes 171-73 and accompanying text.

\textsuperscript{179} Miami Newspaper Pressmen's Local 46 v. NLRB, 322 F.2d 405 (D.C. Cir. 1963); Local 456, Teamsters Union, 273 N.L.R.B. 516 (1984); Los Angeles Newspaper Guild, Local 69, 185 N.L.R.B. 303 (1970), enforced, 443 F.2d 1173 (9th Cir. 1971), cert. denied, 404 U.S. 1018 (1972).

\textsuperscript{180} See supra notes 177, 179.
ing the employer’s ability to manipulate organizational structure to its power advantage unfettered.\textsuperscript{161}

Section 13 of the Act grants labor the right to strike. But the strike protection is viewed narrowly, reining in labor’s most significant power exercise even in the internal labor dispute arena. “[T]he right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.”\textsuperscript{162} The question of when the strike weapon is “legitimately” employed parallels the discussion of protected vis-à-vis unprotected activities.\textsuperscript{163} The time, place, and manner issues in strike activity are balanced against the employer’s interests in operating its business.\textsuperscript{164} As such, strike activities conducted in a “harsh” manner, using opprobrious, or threatening language or gestures are unprotected.\textsuperscript{165} Moreover, related work stoppage weapons, including slowdowns, sitdowns, and partial strikes, are generally deemed unprotected and subject to employer discipline and discharge but not necessarily Board sanction.\textsuperscript{166}

Even if the strike activity is conducted in a legitimate time, place, and manner, as with all power exercises, the strike activity is juxtaposed against an employer’s response. The Mackay doctrine, drawn from dicta in an early Supreme Court case,\textsuperscript{187} allows employers to hire permanent replacements for striking employees and retain permanent replacements in lieu of strikers.

\textsuperscript{161} See generally Atleson, supra note 9; Comment, supra note 177.


\textsuperscript{164} See, e.g., Clear Pine Mouldings, 268 N.L.R.B. 1044.

\textsuperscript{165} Id.


\textsuperscript{167} NLRB v Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

Although section 13 [of the act, 29 U.S.C.A. 163] provides, “Nothing in this Act [chapter] (sic) shall be construed so as (sic) to interfere with or impede or diminish in any way the right to strike,” it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.

304 U.S. at 345-46.
seeking to resume their employment. Thus, in a judicial sleight of hand, the right to strike is ostensibly protected. Although an employer is expressly prohibited under section 8(a)(1) and (3) from disciplining and discharging striking employees, he can permanently replace them in his workforce.\footnote{188}

The distinction between being permanently replaced and being discharged is lost on most employees. The employer is, of course, prohibited from discriminatorily denying reemployment to the replaced worker.\footnote{189} The replaced worker continues as an “employee” until rehired, or until she finds suitable substitute employment, and is relieved of employment selection process hurdles, can vote in representational elections within twelve months of severance, and has preferential recall rights.\footnote{190} Economic reality, however, will induce even the most diehard union member to seek other means of support during this interim period.\footnote{191} A right to permanently replace striking workers, read in context with sections’ 7 and 13 protections from interference with lawful concerted activity, raises significant NLRA policy problems because, as one noted labor law scholar observed, “one can conceive of few interferences greater than permanent replacement for striking.”\footnote{192}

The court’s balancing of interests in the context of replacement merits closer examination. The employer’s interest in continued operations apparently outweighs the employee’s interest in collective action free from employer interference. Even though the articulation is defensible, before ceding to the employer such a significant economic weapon, one must examine the particular substantive components and alternatives. The employer is not required to seek a less intrusive means of contin-

\footnote{188}{Id. at 346. See generally Gillespie, The Mackay Doctrine and the Myth of Business Necessity, 50 Tex. L. Rev. 782 (1972); Hirsch, Laidlaw—The Mackay Legacy, 4 Ga. L. Rev. 808 (1970); Schatzki, Some Observations and Suggestions Concerning a Misnomer—“Protected” Concerted Activities, 47 Tex. L. Rev. 378 (1969).}

\footnote{189}{304 U.S. at 346.}


\footnote{191}{Subject to the peculiarities of state law, permanently replaced workers, at the termination of the strike, will be entitled to the same benefit treatment as laid off employees. Even with this limited assistance and the placement on a preferential recall list, most workers will seek other employment. If the employer bypasses the recall list, he must show that the position now held by the replaced worker has comparable salary, benefits, and working conditions and that the worker did not intend to return to his old job even if offered. Aluminum Welding & Mach. Works, 282 N.L.R.B. 396 (1986); Lone Star Indus., 279 N.L.R.B. 550 (1986).}

\footnote{192}{J. Atleson, supra note 20, at 25.}
ing operations (e.g., operating with support personnel and temporary labor). The employer has available countermeasures ranging from ceasing operations, to operating with support and temporary personnel, to operating with permanent replacements; and no distinction is made between the impact on protected statutory rights by the exercise of different weapons. The larger questions of economic necessity—impact on the ongoing collective bargaining relationship and continuity of the bargaining unit—are not addressed. It is only when the employer excessively sweetens the terms of employment for the permanent replacements, to the additional disadvantage of striking employees and the collective bargaining process, that the balance favors the collective interests of the employees.

In contrast, while the employer is granted the most effective and destructive counter against employee exercises of collective action, related strike weapons, such as secondary pressure, slowdowns, sit-ins, and partial strikes, which one can argue are situationally effective, are simply denied to labor. Viewed against this judicial balancing of power, the statutory right to strike under section 13 rings hollow.

III. IMPLICATIONS

Judicial construction of the NLRA manifests itself in at least four analytical representations. First, certain power exercises are simply defined out of legal but not necessarily practical significance. For example, only labor-cost-motivated employer transformations are subject to the reach of section 8(d). Other transformations that purport to alter the scope and direction of the enterprise, or which are not amenable to “resolution through


194. See supra note 20.


196. See, e.g., Otis Elevator Co., 269 N.L.R.B. 891 (1984); see also supra note 18.

the bargaining process,” are theoretically left to private ordering. But, as argued earlier, with labor power constrained as a matter of law, not as a matter of economic strength, labor’s position is structurally disadvantaged in power confrontations with the employer. Similar treatment appears in the protected/unprotected activity distinctions.

Even where the attempt to define certain power exercises out of existence through the use of threshold determinations is unsuccessful, the alternate methodology embraces a benefits-burdens analysis where the “benefit for labor-management relations outweighs the burden placed on the conduct of the business.” But employer interests are represented in both the “labor-management relations” side of the equation and the “conduct of business” side, thereby structurally weighing the balance in favor of employers by counting their interests on both sides of the equation. As argued earlier, the representation of interests is problematic in all benefits-burdens analyses.

Third, certain employer power exercises are evaluated on a motivational or totality of circumstances representation. For example, the employer’s conduct in discharging union adherents under 8(a)(3) is evaluated on an affirmative antiunion animus basis. Many determinations of bad-faith bargaining are similarly evaluated according to a totality of conduct or circumstances approach. Fourth, certain conduct is viewed as inherently destructive or a per se infringement upon protected employee rights. For example, the Board and the courts have recognized some conduct at the bargaining table as a per se violation of section 8(a)(5). Moreover, some retaliatory tactics utilized by employers in response to concerted activities are

199. Id. at 679.
200. See supra note 20.
201. See, e.g., NLRB v. Advanced Business Forms Corp., 474 F.2d 457 (2d Cir. 1973); Cannady v. NLRB, 466 F.2d 583 (10th Cir. 1972); Solo Cup Co. v. NLRB, 332 F.2d 447 (4th Cir. 1964); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953), cert. denied, 346 U.S. 887 (1953).
202. 29 U.S.C. § 158(a)(3) (1982); see, e.g., Cannady v. NLRB, 466 F.2d 583 (10th Cir. 1972); see also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). If an action has a natural, foreseeable consequence or is inherently destructive of union activities, the motive element may be inferred. See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); Radio Officers’ Union v. NLRB, 347 U.S. 17 (1954).
203. See supra note 201.
204. See, e.g., Radio Officers’ Union v. NLRB, 347 U.S. 17 (1954); H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941); Teamsters Local 688 v. NLRB, 756 F.2d 659 (8th Cir. 1985).
deemed "inherently destructive" of protected rights in violation of 8(a)(3). 206

But what does it mean when the Board or court states that a power exercise is, for example, "inherently destructive" or "defined out of existence?" Regardless of the representation made, a power balancing determination is made. Classifying an activity as "inherently destructive" or an unquestioned "employer command-obedience prerogative" is simply a shorthand substitution for a more detailed balancing analysis. In the former, the balance is struck in favor of employee interests; in the latter, the balance is struck in favor of employer interests. But is the shorthand correctly utilized in the fact-sensitive and policy-rich areas of labor management confrontations? The shorthand analysis invites manipulation of issue definition on the part of interested parties exploiting power control loopholes. 207 Although such shorthand utilizations are necessary to the operation of labor law, the dynamic nature of labor law requires constant recognition of the underlying policy rationales and their links to control of power.

The writings of Professor Commons and the institutional perspective offer insight into the dynamic processes involved. 208 Any primer must define and articulate the scope of the policy and purpose of the NLRA, for which the artificial mechanism in question [collective bargaining process/private ordered dispute resolution] was designed, fashioned, and remodeled . . . whether [it] . . . accomplishes that purpose [policy rationales of the NLRA] in an efficient or economical way, and, if not[,] what is the limiting factor out of the thousands of cooperating factors [environmental/mitigation impacts], that obstructs the operation, and to what extent that limiting factor [power exercise] can be and requires to be controlled in order to facilitate the mechanism and accomplish its purpose. Then it adopts or changes the shop


207. If an employer can define corporate transformation issues in a non-labor cost basis he can avoid the mandatory bargaining obligation. Similarly, economic rationales can be used to rebut antiunion animus. See, e.g., Shell Ray Mining, Inc., 286 N.L.R.B. No. 41, 1987-1988 NLRB Dec. (CCH) ¶ 19,054 (Sept. 30, 1987). Issue definition is an exercise of power. Employers can be expected to exploit these areas. The most workable solution, therefore, is to close off as many areas as possible to manipulation.

208. See supra notes 42-59 and accompanying text. See generally Zimarowski, supra note 41.
rules, working rules, common law or statute law [judicial construction] that regulates the actions and transactions of the participants.  

In the judicial or legislative balancing process the "limiting or strategic" factors (Table I's Power Sources) are manipulated to achieve legislative policy or purpose. From this general process theory comes understanding of the system's construction. Theory, however, is useful only if it can be linked back to practical application. One must ask whether the manipulation of the limiting or strategic factor(s) in fact produce the desired purpose, or whether the combination of unrestrained strategic and cooperating/complementary factors interacting in the dynamics of the system distorts policy achievement.

In adopting an institutional methodology, the evaluation of factors interacting to achieve a particular purpose is drawn from case performance in a power balancing context. This performance base, across the multidisciplinary areas in labor/employment law, requires methodological uniformity of inquiry. In this endeavor, the scope of legislative purpose and policy, including both the economic and noneconomic policy articulations, must be affirmatively incorporated into the balancing analysis. Second, there must be an articulation of the particular factors interacting in the conflict situation. Third, these factors must be sorted out to determine which power exercises (Table I) are strategic or limiting, and which are environmental or mitigating factors (outside the volitional control of the parties in conflict). When placed in the context of the NLRA, a distinction must be recognized between those that are legislatively controlled and those controlled through judicial construction.

These factors, it must be recognized, are operating in a dynamic system. As Professor Commons argued, the strategic factors (control of particular power exercises) are situational. They are not cumulative at a given point in time, but successive during a sequence in time—changing as parties shift power (utilizing dynamic feedback loops) to exploit structural weaknesses and imbalances in their opposition, and as environmental and

209. J. Commons, supra note 13, at 377; see also supra note 52.

210. Much of the balancing under the NLRA is left to the Board and the courts. The interpretation and construction of the Act initially is vested in the expertise of the Board. As such, their decisions and interpretations are afforded great deference. See, e.g., Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, Meyers Industries, Inc. v. NLRB, 108 S. Ct. 2847 (1988); United Steelworkers Local 2179 v. NLRB, 822 F.2d 559 (5th Cir. 1987).
mitigating factors change the fabric of the system.\textsuperscript{211} For example, two judicially created power loci, the \textit{Mackay} replacement doctrine and the mandatory-permissive bargaining item dichotomy, had a minor impact upon the fulfillment of NLRA legislative policy and purpose in the 1960s.\textsuperscript{212} Due to the changing social-economic-political conditions, however, these factors, at this point in time, have a significant impact upon policy achievement. Thus, the system is in constant flux, particularly in the judicially created power control areas, and must be examined at both the particularized conflict level and in the overall power balancing paradigm.

Judicial power balancing is always at risk as new data is accumulated and incorporated into the balancing analysis. The utility of the institutional methodological approach is to constantly rework the power balancing function of the NLRA to adjust and counter the use of factors deleterious to NLRA policy achievement. The burden placed upon the courts, and particularly an impartial and professional Board,\textsuperscript{213} are significant. Nevertheless, such a broad-based approach is commanded by the complex and often conflicting bargaining, managerial, and rationing transactions incorporated within the ambit of the NLRA.

\section*{Conclusion}

The National Labor Relations Act has not been significantly amended in thirty years.\textsuperscript{214} As many observers have stated, the power balancing mechanisms are in need of modification due to

\begin{itemize}
\item \textsuperscript{211} J. Commons, \textit{supra} note 42, at 628.
\item \textsuperscript{212} In the 1960s, the low unemployment rate fueled by a war driven economy as well as structural differences in the need for skilled labor muted an employer's ability to replace striking workers. The mandatory bargaining item classification was viewed broadly even after Fibreboard Paper Prod. v. NLRB, 379 U.S. 203 (1964), \textit{supra} note 87.
\item \textsuperscript{213} Board politics have always played a role in labor-management relations. Contrary to some labels, there has never been a "pro-labor" Board, but only variations to the right of the ideological center. Under the direction of Chairman Dotson, however, the Board was viewed as more pro-employer than in previous Republican administrations. The political gamesmanship played by administrations with the Board contributes to its lack of continuity and predictability in decision making. \textit{See generally} Address by Charles Morris, \textit{Board Procedures, Remedies and the Enforcement Process}, at the Conference on The Labor Board at Mid-Century (Oct. 4, 1985) (summarized in BNA Daily Lab. Rep. No. 196 at A-9 (Oct. 9, 1985)).
\item \textsuperscript{214} The last significant amendments to the NLRA were from the Labor-Management Reporting and Disclosure Act of 1959. \textit{See} Cox, \textit{The Landrum-Griffin Amendments, supra} note 150. The moderate changes proposed in the Labor Reform Act of 1978 were filibustered in the U.S. Senate.
\end{itemize}
the dynamic changes in society. A premise underlying the preceding presentation, and in fact underlying the NLRA, is that conflict between employers and employees is inevitable, and that the best way of resolving the deleterious effects of conflict is through power balancing. With the recent economic instability and structural changes, the possibility of cooperative relationships replacing the old competitive and conflict relationships has been raised. Like most idealistic propositions, this one has more emotional than pragmatic appeal.

In the current employer-employee power balance, the cooperative model is a cruel and exploited myth. Cooperation is simply economic coercion passing under a more dignified, but transparent, label. Cooperative approaches only work in systems of rough power parity or balance. As this Article has argued, the present industrial relations power system is imbalanced. Employers have, and have always had, the greater power. Their interests have always been, and will continue to be, in conflict with the interests of employees. Given the structural imbalance of power now present in the construction of the NLRA, employers simply have additional, effective, sources of power to achieve their private interests.

As Frederick Douglass observed, power, be it economic, physical, or moral, concedes nothing without a demand backed by countervailing power. Such a proposition is equally true today. The question is not how do we completely eliminate conflict and power inequality from labor-management relations, for that cannot be done in a free society. Rather, through the construction of the bargaining, managerial, and rationing transactions, how much power imbalance will we tolerate in furtherance of the public good?


216. See supra, note 1 and accompanying text.