REVIEW ESSAY

The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace


John M. True, III†

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† John True is a Superior Court Judge in Alameda County, California. Prior to his October 2003 appointment to the bench, he spent 27 years practicing labor and employment law in the San Francisco Bay Area on behalf of plaintiffs and labor unions. He also mediated and arbitrated employment disputes. He continues to teach employment law at the Boalt Hall School of Law, University of California at Berkeley. He is indebted to Michelle Roberts, Boalt ’05, and to the other members of the editorial staff of the Berkeley Journal of Employment & Labor Law for their advice and assistance in preparing this article.
I. INTRODUCTION

In 1932, as the labor struggles of the Great Depression began to intensify, the United States Congress made a historic finding: "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor" against the forces of concentrated capital. A few years later, as the confrontation grew sharper and bloodier, Congress revisited this reality. In the National Labor Relations Act (NLRA) it decreed that American employees were entitled to democracy at work, that they should have the right to band together and be heard about the terms on which they leant their muscle to the enterprises for which they labored. In the words of the NLRA's author, Senator Robert F. Wagner,

\[\text{[t]he [preferred] method of coordinating industry is the democratic method. . . .} \]
\[\text{It places the primary responsibility where it belongs and asks industry and labor to solve their mutual problems through self-government. That is industrial democracy, and upon its success depends the preservation of the American way of life. The development of a partnership between industry and labor in the solution of national problems is the indispensable complement to political democracy. And that leads us to this all important truth: there can no more be democratic self-government in industry without workers participating therein, than there could be democratic government in politics without workers having the right to vote. . . . That is why the right to bargain collectively is at the bottom of social justice for the worker, as well as the sensible conduct of business affairs.}\]

The language of Section 7 of the NLRA, the Act's keystone, is as unequivocal and emphatic as the remarks of its author quoted above. All employees, the law says, have the right "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 . . . ." 4

The fundamental principle animating the Wagner Act is that working

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4. 29 U.S.C. § 157. Of course, when Congress said "all" it didn't really mean it. Excluded from the coverage of the NLRA were, among others, agricultural and domestic workers, "independent contractors," (29 U.S.C. § 152(3)) and supervisors (29 U.S.C. § 152(11)). Otherwise, however, "all" meant—and still means—just that: all those defined as employees by the Act.
people are supposed to be able to act in democratic concert, to get together, to talk with each other about the issues that concern them on the job, and to engage their employers in some constructive pushing and shoving about those issues. This right given to workers to combine, so the theory goes, will produce fairness and justice in the workplace by counteracting the innate strength of capital. Workers' institutions were supposed to prosper, to integrate themselves into the political fabric of the nation and to provide a counterweight in the market and in political discourse that was to inure to the benefit of society as a whole.

The NLRA also contemplates that employers—though they have a First Amendment-based right to push and shove back against these workers' institutions—are to permit, indeed respect, their workers' collective activities.\(^5\) Not only that, they are affirmatively obliged to respond in good faith to—to bargain over—their employees' proposals.\(^6\) The Wagner Act, modeled explicitly on the concepts underlying American representative democracy itself, requires nothing less than that workers be given the basic right to participate in discussions about the terms and conditions of their employment.

Why, then, does this almost never happen anymore? Why does the American labor movement—with union membership plunging below ten percent of the private-sector workforce—seem more and more "flat on its back" every time we look at it?\(^7\) Union leaders, members, supporters and activists ask themselves these questions incessantly, of course, and Professor Charles J. Morris\(^8\) is one of several eminent labor scholars among those doing so. His latest inquiry, *The Blue Eagle At Work: Reclaiming Democratic Rights in the American Workplace*, slaps down a dramatic and provocative challenge in the middle of this discourse.\(^9\) Charting a new approach (that is not so new), he proposes that democratic rights have atrophied in the workplace because unions have fallen into self-defeating, addictive reliance on elections conducted by the NLRB as the way to organize workers. They have forgotten the remarkably broad promise set out in Section 7 of the Act: that *all* employees—not just those who work for an employer where a union has won an election—have the right "to bargain

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5. 29 U.S.C. § 158(a)(1) (making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the... rights guaranteed in section 157 ...").

6. 29 U.S.C. § 158(a)(5) (making it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a)" of the Act).

7. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK (1991).

8. Professor Emeritus, Southern Methodist University School of Law.

collectively through representatives of their own choosing.\textsuperscript{10}

Ignoring the elegant simplicity of this proposition, unions have swallowed the intoxicating potion contained in the election/certification procedures provided for in Section 9 of the Act.\textsuperscript{11} Under its influence, they have opted to confront employers only when and if they become the certified or recognized representatives of a majority of those in “appropriate” bargaining units.\textsuperscript{12} Though this “all or nothing” approach led the union movement to spectacular successes in its early days, it has resulted more recently in increasingly futile attempts to win the hearts and minds of workers in situations where the odds are impossibly long. The annals of the union movement in the late twentieth century are full of bitter stories of struggle and defeat in National Labor Relations Board (NLRB)-supervised, set-piece battles in which employers hold all or most of the power.\textsuperscript{13} Nothing that has happened during the Bush-dominated transition to the twenty-first century suggests any change of direction.

It is Morris’ claim that this demonstrably unsuccessful approach by the union movement is the product of a fatal case of amnesia. Better, he proposes, to borrow a page from the unions engaged in the organizing struggles of the thirties and forties when labor’s back was similarly against the wall. In those days, unions in the steel and auto industry (for instance) demanded, and were granted, up-front recognition and bargaining rights for their members only. They were able to represent those who had firmly decided they really wanted representation—well before an employer was able to wear down union support in officially sanctioned, but endlessly delayed and hopelessly stacked electoral campaigns. A minority of determined workers—even a few such souls—were able to make their employers sit across the bargaining table and discuss their demands.

Nothing in the actual language of the NLRA, in its legislative history, in NLRB or court cases, in the constitution, in international law, or indeed in common sense or sound policy suggests that unions could not still use this “members only” bargaining approach. It is just that we have all forgotten about it. Which is too bad, according to Morris. Minority union representation could bring significant benefits to otherwise unrepresented

\textsuperscript{10} 29 U.S.C. § 157 (emphasis supplied).
\textsuperscript{11} 29 U.S.C. § 159.
\textsuperscript{12} See 29 U.S.C. § 159(a)(b) and (c) setting out “appropriate unit” standard (§9(a)), procedures for NLRB determination of bargaining unit (§9(b)) and procedure for holding Board hearings on petitions for recognition and certification (§9(c)).
\textsuperscript{13} Famously, the United Auto Workers (UAW) spent many years and large sums of money in ultimately futile attempts to organize workers at plants opened by Nissan Motor Manufacturing Corp. in Smyrna, Tennessee and by Honda Motor Co. in Marysville, Ohio. See, Susan Carney, Victory Would Help Open Doors to Foreign Automakers’ Plants Across Anti-union South, DETROIT NEWS, Oct. 1, 2001; see also Alan Hyde, Frank Sheed and Mary Deery Uva, After Smyrna: Rights and Powers of Unions The Represent Less Than A Majority, 45 RUTGERS L. REV. 637 (1993) for a discussion of union strategies following these defeats.
workers, multiply organizing opportunities for unions, and even benefit employers by providing an otherwise unavailable mechanism for resolving workplace issues. This is, Morris is not abashed to claim, a revolutionary rediscovery of an important device workers could use to advance their collective interests.

II.
A SEMINAL STORY

Professor Morris begins his defense of this proposal with an apt story. Seventeen low-wage, immigrant workers who were part of a non-union workforce of about 50 employees of a San Diego, California company, shut down their machines one day in 1999 and walked off the job. They were fed up, they said, with unfair promotion policies, low pay, long hours and otherwise miserable working conditions. Before they walked out, they presented a signed petition and requested to meet as a group about their grievances with a representative of their employer, Hi-Tech Honeycomb, Inc. The employer rejected this demand to meet and talk, although it indicated that individual employees were free to ask for meetings with management. When the workers declined to opt for one-on-one meetings and then failed to return immediately to work when told to do so, they were deemed to have forfeited their jobs and were terminated.

A. The "New" Approach in Practice

The employees’ plight attracted the attention of an organization called the San Diego Employee Rights Center whose Executive Director contacted Professor Morris who, in turn, agreed to take up their cause. Based on the above facts, he proposed to the local NLRB Regional Director that the employees had been terminated in violation of their rights under Section 8(a)(1) of the NLRA because when they petitioned and walked out, they had been engaged in activity protected by Section 7 of the Act. It is well established that employees discharged for engaging in “concerted” activity, as long as that activity is “protected” by the NLRA, have a remedy under Section 8(a)(1) even if no union is present. Under this theory Morris was ultimately able to win back pay and reinstatement for most of his clients.

He felt that they were entitled to more, however, and his efforts to obtain a greater degree of justice for these employees led to further effort and (not incidentally) to this book. Morris argued to the NLRB Regional

17. BLUE EAGLE, supra note 9, at 4.
Director and to the Board's General Counsel in Washington that the employees had the right under both Section 7 and Section 8(a)(1)\textsuperscript{18} of the NLRA to compel their employer to bargain collectively and in good faith with them over their concerns until either an agreement about how to adjust them had been reached or a bargaining impasse had been arrived at. It was not just Hi-Tech's termination of the workers who acted concertedly, but its prior refusal to meet with them that violated the law. Employees have the right, Morris says, to demand bargaining even when there is no certified or recognized bargaining representative for a majority of the employees in an appropriate unit at the plant. The broad language of Section 7 and the corresponding obligations imposed on employers in Section 8(a)(1) make no mention of union majority status as a prerequisite for the exercise of these employee collective rights. And Section 8(a)(5) of the Act, though it refers to the majority-exclusivity principle found in Section 9(a), cannot be read to limit the rights of an \textit{ad hoc} group such as those at Hi-Tech Honeycomb from demanding that an employer deal with it on behalf of those at the workplace it represents. This was the way it was at the beginning of federally regulated labor relations, Morris says, and this is the way it should be now.

\textbf{B. The "New" Approach Launched to a Higher Level}

\textit{Blue Eagle} would be little more than an interesting polemic on the topic of the collective rights of informally congregated \textit{ad hoc} groups were it not that Professor Morris uses the plight of the "Hi-Tech Seventeen"\textsuperscript{19} as a launch pad from which to explore a whole "new" conceptual level of labor relations. The central point of the book is this: had this group organized itself into (or affiliated with) a \textit{union}, it would have been entitled under well-settled (but now ignored) labor relations law to attempt to negotiate an actual collective bargaining agreement with the employer. Such an agreement would benefit \textit{only} the union's own members, Morris concedes, but it would be a collective agreement nonetheless. Morris contends that such a "non-majority union" (NMU) has the exact same statutory right to demand recognition for its members on a "members-only" basis as does a traditional, majority labor organization.\textsuperscript{20}

In the Hi-Tech case, Morris argues, the NLRB should have provided

\begin{itemize}
\item \textsuperscript{18} 29 U.S.C. § 157, 158(a)(1).
\item \textsuperscript{19} Not his term, but a useful, if dated, shorthand reference nonetheless.
\item \textsuperscript{20} The NLRA defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (29 U.S.C. § 152(5)). Not that this language contains no reference to majority status, Morris argues that Congress never contemplated withholding the bargaining obligation until a "labor organization" was recognized and/or certified. See \textit{BLUE EAGLE}, supra note 9 at 8–11.
\end{itemize}
not only reinstatement and back pay—a remedy Morris found to be ludicrously ineffective under the circumstances—but a bargaining order, a command that the employer meet and deal in good faith with the *ad hoc* group of workers about the concerns which led to the walkout. But that contention is really only the beginning of his analysis. The transformative and original thinking in his book is directed not at the employer or the Board, but at these outgunned but determined workers—and at others like them. The Hi-Tech Seventeen, Morris says, should have done nothing less than unionize and demand a contract for any and all who became members of the union. No matter whether the group had chosen to affiliate with an American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) union or simply constituted itself as the "Hi-Tech Honeycomb Employees Association," it would have been entitled to the full panoply of rights accorded unions under the NLRA. And if other such groups would start to take these steps, Morris asserts, the nature of labor relations could actually be taken to an entirely new level, one that would greatly benefit working people.

Just as the nascent UAW of the 1930's was able to force General Motors to recognize it as the bargaining agent of those employees who had become its members (so long as no union had yet been certified as the majority-designated representative in the plant),\(^2\) so the Hi-Tech Seventeen, constituting themselves as a labor organization within the broad parameters of Section 2(5) of the NLRA,\(^2\) should be entitled to attempt to strike a deal with their employer addressing the conditions of their own employment until and unless a union is actually recognized or certified as the majority bargaining representative.\(^3\)

In the actual Hi-Tech Honeycomb case, alas, the NLRB Regional Director disagreed with this notion. Although, as noted, Section 8(a)(1) relief for the retaliation the workers suffered was pursued by the Board, Morris’ Section 8(a)(1) bargaining charge was dismissed by the Region, and his attempt to obtain review of that decision by the NLRB General Counsel was denied.\(^4\) The claim that Hi-Tech Honeycomb had an obligation to bargain with its protesting employees thus came to the end of the line. Professor Morris’ effort to establish this right for all workers, however, had only just begun.

\(^{21}\) **BLUE EAGLE**, *supra* note 9 at 84.
\(^{22}\) 29 U.S.C. § 152(5).
\(^{23}\) **BLUE EAGLE**, *supra* note 9, at 4–5. In like manner, Morris argues, those union adherents who survive an unsuccessful union organizing drive ought not to be left disenfranchised as they are now, at least by practice. The mere fact that the organizing union failed to obtain majority status should not erase the Section 7 rights of those who supported the union and wish to be represented by it.
\(^{24}\) *Id.*
C. Less Can Be More

Morris' premise is a beguilingly simple one: "less can be more." He recognizes, as we all must, that the promise of a robust, collective bargaining-driven industrial democracy envisioned by the Wagner Act has not been fulfilled. The twenty-first century brings with it perilous lows in the percentage of those in the private American workforce represented by unions. The seventy years since the passage of the Wagner Act have seen a dramatic shift from collectively bargained workplace rights to individual rights, some derived from statutes passed by Congress and state legislatures and some mandated by common law judges. Such rights as workers have to workplace safety, compensation for workplace injuries, minimum wages and maximum hours of work, equal employment opportunity and treatment, pension and benefit regulation, arbitrary termination and a safety net when unemployed are not any longer the fruits of union contracts but of legislation or court litigation.

Not only is that the case, but employers seem well on their way to privatizing the resolution of most workplace disputes, including many that arise under the public laws referred to above. More and more employers require their employees to agree as a condition of employment that any and all disputes over these individual rights will be resolved privately through arbitration, rather than in the courts. Thus, ironically, workers are finding themselves forced into arbitration of workplace issues (a widely accepted and generally constructive feature of collective bargaining agreements), but must face the arbitration process without the support or assistance of a labor organization.

25. In Can Less Mean More?: Exploring the Representation Rights of Non-Majority Unions [hereinafter Can Less Mean More?], an unpublished paper given to the Labor and Employment Law Section of the American Bar Association at its August 8, 2004 Atlanta, Georgia meeting, Professor Morris summarized the arguments made in this book (on file with author).


27. See, e.g., California Workers Compensation Act, CAL. LAB. CODE §§ 3200 (West 2003) et seq. and similar statutes in other jurisdictions.


31. See, e.g., Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. Ct. App. 1971); Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988); Nees v. Hocks, 536 P.2d 512 (Or. 1975); and other "wrongful termination" cases.

32. See, e.g., CAL. UNEMP. INS. CODE and similar statutes in other jurisdictions.

33. Or, practically speaking, with the help of anyone else. One of the dirty little secrets of private arbitration is that it puts many individual workplace disputes outside of the "wrongful termination" legal market. Plaintiffs' lawyers are likely to find mandatory arbitration cases economically difficult to justify taking on a contingent fee basis, and workers are thus more than likely to find themselves on their own.
So, the idea that fairness and justice in the workplace would be arrived at through the enlightened pushing and shoving of the collective bargaining process has failed to materialize. But, says Morris, going quietly into the night is not in order. Just as unions fighting for survival in the thirties struggled for and obtained members-only recognition as a foothold in the workplace, so it should be now. Unions, employee organizations and even ad hoc groups of employees such as the Hi-Tech Seventeen should grab whatever advantage they can in their ongoing confrontations with their employers. An important but overlooked foothold in this context is minority union, members-only bargaining. Morris believes that workers have the legal right to take this approach, and that it makes strategic and tactical good sense to do so whenever possible.

This intriguing idea is not without flaws. Both the legal and the practical aspects of Morris' proposition will be critiqued herein. It bears stating up front, however, that it is a remarkably compelling, innovative stroke, one which should be taken very seriously by those who wish to see any kind of renaissance for workers' collective power. There may not be the perfect symmetry that Morris suggests between the early struggles of the labor movement in the 1930s and 1940s and the rear guard action unions seem to be fighting now, but the essential genius of his thesis is that unions, employee associations, labor organizations of whatever label, can and should act as organic, vibrant forces at the workplace, interacting with other similarly situated workers and confronting their employers in ways that have the potential to give new potency to the idea of collective action. A "labor organization," in Morris' vision, need not—should not—be a bureaucracy with headquarters downtown or in Washington, D.C. It should be a group of gritty, savvy workers spreading the fight for democratic rights on the shop floor, in the office, the fields, orchards, mines or wherever it needs to be fought. He points out that the precursors of the United Steel Workers, AFL-CIO, once a mighty union, were informal Steelworkers Organizing Committees (SWOCs) in dozens of plants which battled for workers' rights in hundreds if not thousands of individual struggles. Modern workers organized in that model can accomplish much, Morris argues, maybe not as much as those groups did, but much more than is being accomplished now.

III.

IS AN NMU LEGALLY ENTITLED TO COMPEL AN EMPLOYER TO BARGAIN WITH IT?

If, as Professor Morris argues, workers have always had the right to attempt to engage their employers on a "members-only" basis, why has this approach not been the norm? Blue Eagle proposes that the basis for enforcing employer obligations to bargain with non-majority unions are
clearly present (though ignored) in various sections of the NLRA.\textsuperscript{34} The bulk of the book's contentions center on how Sections 7, 8 and 9 of the NLRA should be interpreted in relation to each other.

\textbf{A. Section 7 of the NLRA}

As noted above, the language of Section 7 of the NLRA is all-inclusive. It does not by its terms limit in any way the rights it confers, including "activities for the purpose of collective bargaining," to those who have designated a union as their exclusive representative. The clear language of the statute confers this right on \textit{all} employees. So as a matter of simple logic, a \textit{minority} group of employees is entitled to engage in "activities for the purpose of collective bargaining" including, presumably, the right to make their employer respond to its bargaining demands.

Nor is this broad Section 7 mandate \textit{sui generis}. As Professor Morris points out, the statute was derived from substantially similar language in the National Industrial Recovery Act (NIRA).\textsuperscript{35} And, significantly, under the NIRA, non-majority union bargaining was common.\textsuperscript{36} One of Morris' sources, Richard Carlson, has noted that "[e]arly collective bargaining agreements took two forms: exclusive and non-exclusive. In non-exclusive agreements, employers agreed to recognize a union as representative only for employees who were members of the union."\textsuperscript{37}

It is clear from a comparison of the almost identical language found in both sections, and from the legislative history of the Wagner Act,\textsuperscript{38} that Section 7 of the NLRA was not intended to change these rights in any respect from those exercised under the NIRA. It therefore seems appropriate to conclude therefore that Congress meant to confer non-

\textsuperscript{34} Professor Morris also finds sources for this obligation in the freedom of association guaranteed in the First Amendment to the U.S. Constitution (\textit{Blue Eagle}, supra note 9 at 110–30), and in similar rights guaranteed U.S. citizens under international law. (\textit{Blue Eagle}, supra note 9 at 140–52).

\textsuperscript{35} "[E]mployees shall have the right to self-organization, to form, join, or assist labor organizations, \textit{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." Ch. 90 § 7(a), 48 Stat. 195 (1933) (emphasis supplied). The NIRA gave the nation the "Blue Eagle" emblem of industrial fairness and justice. Those firms, which met the democratic standards contained in the NIRA's Code by bargaining in good faith with their employees, were entitled to display the Blue Eagle as a symbol of their compliance. The NIRA was declared unconstitutional in \textit{A.L.A. Schechter Poultry Corp. v. United States}, 295 U.S. 495 (1935).

\textsuperscript{36} \textit{Blue Eagle}, supra note 9, at 20; see also \textit{Milton Derber, The American Idea of Industrial Democracy} 94, 1865–1965 (1970) ("The majority-rule principle . . . was not an established principle in determining union representation in the workplace . . . . Normally the union established its status by persuading the employer of its desirability or by a showing of strength through a strike. Majority rule played little or no role on the management side.")


\textsuperscript{38} \textit{Blue Eagle}, supra note 9 at 41–80.
majority rights of some kind on employees in the latter statute. The question is, exactly what kind?

B. Section 8(a)(1) of the NLRA

Just as Section 7 paints with broad strokes, the protections given employees in Section 8(a)(1) of the Act are not limited in any manner. An employer may not “interfere with, restrain or coerce” any employee in the exercise of that employee’s Section 7 rights. So, those stalwarts such as the Hi-Tech Seventeen who take their collective grievances to their employer and are canned for doing so are clearly protected.39

But Professor Morris takes this proposition a step further: he argues that a duty to bargain—or at least to “deal”—with such employees derives directly from Section 7 and 8(a)(1) taken together. Thus, an employer, which refuses to bargain in good faith with a group of employees over the terms and conditions of employment, would be interfering with (at the very least) the exercise of these employees’ Section 7 rights. More precisely, the employer which insists that it will only meet with protesting employees one-on-one (as did Hi-Tech Honeycomb), commits an 8(a)(1) interference with those employees’ right to act collectively for mutual aid and protection.

In Morris’ view, the rights of ad hoc groups of employees to require their employers to respond to their demands are definitely protected under Section 7 of the Act, but in a fundamentally different way than are the rights of NMUs. Morris notes that the operative language of Section 7 allows employees to engage in concerted activities for two distinct, though related reasons, (1) “for the purpose of collective bargaining” or (2) for “other mutual aid or protection.” Addressing these two clauses separately, Morris conceives of two “tracks” of collective activity intended to be protected by Congress. The “first track” is that identified in the first clause in the statute: “collective bargaining.” The second, entirely separate and distinct “track,” has to do with the “other mutual aid and protection,” set out in the second part of the statute.40 Although the author argues to some extent that “second track” demands must be responded to (or at least “dealt with”) by employers, the thrust of his arguments has to do with “first track” bargaining obligations. He contends that these obligations are considerably more apparent from the language of the statute—and more useful to the union movement—than are the vague notions that employers must “deal with” ad hoc groups of workers with ad hoc demands.

40. BLUE EAGLE, supra note 9, at 154–56.
1. Concerted Activity for the Purpose of Collective Bargaining

Morris’ main point, his “first track” analysis, is that the logic of Sections 7 and 8(a)(1) requires the conclusion that minority unions should be able to compel collective bargaining on a “members only” basis with employers at least until a union is recognized or certified as the exclusive representative of all of the employees. So all that is necessary, Morris asserts, is that ad hoc groups such as those at Hi-Tech Honeycomb coalesce into actual labor organizations and make bargaining demands.

Part of the reason why this “new” idea is so surprising to many in the contemporary labor law community is that we all seem to have Section 8(a)(5) of the Act, with its explicit reference to the duty to bargain, too much on our minds. As discussed, Professor Morris makes the case that a minority union bargaining obligation can be construed from Sections 7 and 8(a)(1) of the Act alone. But as those parts of the statute may not be read in isolation, a big part of Blue Eagle’s discussion centers on the provisions of the Act that deal explicitly with an employer’s obligation to bargain with the recognized or certified representative of its employees. Section 8(a)(5) was added to the original NLRA, and it does apply, as we know, “subject to the provisions of Section 9(a)” of the Act.

In this regard, Morris argues that the legislative history of the Wagner Act makes it clear that what is now Section 8(a)(1) (then Section 8(1)) of the Act was always intended to support a general obligation to bargain on the part of employers. He points out that Section 8(a)(5) (then Section 8(5)), which expressly requires that employers bargain in good faith with majority labor organizations, did not appear at all in any of the early drafts of the Act. This was precisely because the Act’s authors considered that bargaining obligation sufficiently spelled out in Section 8(1). It was only relatively late in the drafting process that the explicit duty-to-bargain language of Section 8(5) was added to the Act and linked to Section 9. Important to Morris’ argument is historical evidence that during the negotiations leading to the passage of the Act, Senator Wagner and others felt that the 8(a)(5) language was unnecessary or superfluous.

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42. 29 U.S.C. § 159(a). (providing that “representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment”) (emphasis added). The statute contains a significant proviso to the effect “that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: provided further, that the bargaining representative has been given the opportunity to be present at such adjustment.” Id.
43. BLUE EAGLE, supra note 9, at 56–80.
It is the interplay of Sections 8(a)(5) and 9(a) which have created the “myth,” to use Professor Morris’ characterization, that the duty to bargain arises only where a union has been certified or elected as the majority representative of the employees in an appropriate unit. Section 8(a)(5) does require that an employer recognize and bargain with such a representative, but Section 8(a)(1) also imposes that requirement prior to what Professor Morris describes as the “mature” collective bargaining stage, that is when a majority union has been selected. Nothing in the language of the Act, Morris argues, relieves an employer of the obligation to bargain with an NMU before that “mature bargaining” point is reached. Up to then, a sort of parliamentary system should exist, with one or more minority representative groups entitled to their democratic say until and unless they are displaced by a majority group.

Although this theory has never been adopted in an NLRB decision, Morris argues that it has been proposed by several different NLRB General Counsels and never rejected by the Board itself. Nor has any court ruled adversely on this issue. In Chapter 9 of Blue Eagle, Professor Morris canvasses and discusses all of the references he could find to a minority-bargaining requirement in NLRB and judicial decisions since the NLRA was enacted. There are a dozen or so such decisions, each with a passage or two which refers to, and thus reinforces, what Morris calls the “myth” that an employer need not bargain with an NMU.

He categorizes the greater part of this handful of cases as “false majority” claims. In this group of decisions, he says, the existence of a bargaining obligation turned on whether, in fact, the Board was dealing with a claim by a union that it represented a majority of the employees in a plant when it really did not. Professor Morris found eight such “false majority” cases, most of them harking back literally to the inception of the Act in the thirties: Segall-Maigen, Inc., Mooresville Cotton Mills, Wallace Manufacturing Co., Brashear Freight Lines, Inc., Olin Industries, Inc., Olin Industries, Inc., Agar Packing & Provision

44. Id. at 153–70.
45. Where a union claims that it represents a majority of an employer’s employees (and is therefore entitled to exclusive representational status under Section 9 of the Act), but is in fact not a majority representative, then by well-established Board law, it cannot compel the employer to bargain with it as the “exclusive” representative of those employees. See BLUE EAGLE, supra note 9, at 158–59.
46. 1 N.L.R.B. 749 (1936).
47. 2 N.L.R.B. 952 (1937), enforced as modified, 94 F.2d 61 (4th Cir. 1938) (modification unrelated to issue).
48. 13 N.L.R.B. 191 (1939), enforced, 119 F.2d 359 (8th Cir. 1941).
49. 48 N.L.R.B. 171 (1943).
50. 86 N.L.R.B. 203 (1949), enforced, 191 F.2d 613 (5th Cir. 1951), and cert. denied, 343 U.S. 970 (1952).
Corporation,\textsuperscript{52} and \textit{Int'l Ladies' Garment Workers v. NLRB} (Bernhard-Altmann Texas Corp.).\textsuperscript{53}

According to Professor Morris, language in each of these cases suggesting that an employer has no duty to bargain with an NMU may be explained away as ill-considered \textit{dicta}. The Board or the court was resolving a claim by a union that it had majority status (and thus rights under Section 8(a)(5) or its predecessor, Section 8(5)), when in fact it did not. And he definitely has a point. In a number of these cases, although it is clear that the Board or the court was not specifically focused on the nuanced argument Professor Morris now makes, it does seem that language denigrating the obligation of an employer to bargain with an NMU is gratuitous and unnecessary to the holding.\textsuperscript{54} The problem is that not all of the cases fall so neatly into this category.

\textit{Mooresville Cotton Mills}\textsuperscript{55} is instructive. In it, a union demanded that the owner of the mill meet and bargain with it over "a fair rule for hiring and discharging workers."\textsuperscript{56} When the owner showed the union committee the door, a strike was called, and all who failed to return were discharged. The union brought charges alleging that the company had refused to discuss certain grievances with its committee and had thereby engaged in unfair labor practices within the meaning of Section 8(1) and (5) of the Act. The Board dismissed the union's 8(1) and (5) charges based on the refusal to bargain, stating:

We feel we would be warranted in concluding that respondent's conduct constituted an actual refusal to discuss grievances with the committee, but this it is unnecessary to decide. \textit{It is not an unfair labor practice within the meaning of Section 8, subdivisions (1) and (5), of the Act for an employer to refuse to discuss grievances with employee representatives when such representatives do not represent a majority of his employees}. That the Union, on September 21, 1935, represented only a minority of respondent's employees is clear from the record.\textsuperscript{57}

Professor Morris argues that this statement simply resolves the obvious "false majority claim" rule referred to above. And, of course, if it could be

\begin{footnotes}
\textsuperscript{52} 81 N.L.R.B. 1262 (1949).
\textsuperscript{53} 366 U.S. 731 (1961).
\textsuperscript{54} See, e.g., \textit{National Linen Service Corp.}, 48 N.L.R.B. 171 (1943) (unclear as to whether union was falsely claiming majority status or not; no prior cases cited regarding sections 8(1) or 8(5) issues); \textit{Olin Industries, Inc.}, 86 N.L.R.B. 203 (1949) (workers engaged in some protest meetings at plant, but no mention of bargaining in case at all); \textit{Agar Packing & Provision Corp.}, 81 N.L.R.B. 1262 (1949) (no majority status claimed by union, but Board refused to find a strike by minority group illegal; \textit{dicta} to the effect the employer not obliged to bargain with NMU); and \textit{Int'l Ladies' Garment Workers}, 366 U.S. 731 (1961) (recognition of NMU violation of Sections 8(a)(1) and (2) even if extended in good faith belief that union represented a majority of employer's employees).
\textsuperscript{55} 2 N.L.R.B. 952 (1937).
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 955. (emphasis added).
\end{footnotes}
concluded conclusively that the Board was explicitly dealing with a false claim of union majority status, he would be correct. After all, the union, by invoking Section 8(5) of the Act had to be linking that element of its charge to its alleged status as the majority representative under Section 9(a). Otherwise, why allege an 8(5) violation at all? And the Board, finding no Section 9(a) status, would naturally dismiss the refusal to bargain charge.

Professor Morris suggests that this was what was going on. And it is true that the union did allege a Section 8(5) violation. The facts suggest pretty clearly, however, that the union knew it was not a majority representative of the employees. The particular union local in the case was made up entirely of Mooresville Cotton Mills employees, of which there were approximately one thousand four hundred at the relevant time. Only two hundred forty-two of these employees were union members when the union's leadership requested to meet with management. Thus, the local was clearly an NMU. That being so, shouldn't it be assumed—or at least contemplated—that the union might have been making an 8(1) bargaining demand? Especially since this dispute arose back in 1936 when, according to Professor Morris, unions were routinely doing so? And nowhere in the Board’s factual discussion of the dispute does it appear that the union claimed to be acting as anything other than an NMU. The Board’s decision does not state that the local was asking to meet for the benefit of any employees other than those who were members of the local. True, about one thousand workers struck when the employer refused to bargain with the NMU,58 but that, it seems, is not helpful to Professor Morris’ claim that the language quoted above in this case is pure dicta indulged in by the Board while analyzing a straight-up “false majority” situation.

A number of the other cases he characterizes as “false majority” claims feature ambiguities similar to Mooresville Cotton Mills.59 To be sure, none of them squarely disposes of Morris’ interpretation, but neither does any seem like the “myth” and dicta that he says stand in the way of minority bargaining rights. However, although each of these cases is troubling for one reason or another, it is also clear that none can be characterized as anywhere near the thoughtful, comprehensive treatment of the question of

58. 2 N.L.R.B. at 954–55.
59. See, e.g., Segall-Maigen, Inc., 1 N.L.R.B. 749 (1936) (union filed sections 8(1)(3) and (5) charges; claimed majority status; thirty-five workers employed; only fourteen were members; Board found that the union was falsely claiming majority status but decision is silent as to whether Board considered section 8(1) claim of entitlement to minority bargaining); Wallace Manufacturing Co., 2 N.L.R.B. 1081 (1937) (union filed sections 8(1)(2)(3) and (5) charges; did not explicitly claim majority status and had only thirty-seven members out of one hundred eighty-one employees; “false majority” claim found, citing Mooresville Cotton Mills, discussed in text, supra, but, again no discussion of minority bargaining claim); Brashear Freight Lines, Inc., 13 N.L.R.B. 191 (1939) (union filed sections 8(1)(3) and (5) charges; explicitly claimed majority status, but Board found no majority without discussing possible NMU claim).
minority bargaining that might be fairly considered to dispose of the issue once and for all. At best, the statements in these decisions are off-hand. They do not bury Professor Morris' thesis, but perhaps they do explain how the "myth" of which he complains has taken on the force that it has.

2. **Concerted Activity for the Purpose of Mutual Aid and Protection**

The "other mutual aid and protection" prong of Section 7 ("second track") is given considerably less attention in the pages of Blue Eagle, though it is just as intriguing. Morris argues that Section 7 and 8(a)(1) not only require an employer to bargain with an NMU, but they also make it clear that an employer which slams its door on an ad hoc group of workers is violating the letter and spirit of the law. It cannot be the case that workers would be given the Section 7 right to insist on "dealing" with their employers collectively if those employers were not burdened with a corresponding obligation to deal with employees exercising the rights Congress gave them. Only the most cynical could believe that Congress thought that Sections 7 and 8(a)(1) contemplated the futile scenario played out in the Hi-Tech Honeycomb situation in which workers gathered impotently in front of the manager's office with no right to insist that he actually come out and talk to them about their concerns. This being so, Morris persuasively argues, it must be that employers have a duty, however vestigial it may seem now, to sit down and talk to any group of employees—whether they call themselves a "union," a "caucus," an "association," an "affinity group" or whatever—and discuss in good faith work-related grievances that group might present.

In this regard, Blue Eagle relies on, among other cases, Lundy Manufacturing Corp in which the Board was faced with a dispute not unlike that presented by the Hi-Tech Honeycomb workers. In Lundy, a rump group of employees was dissatisfied with an employee association—alleged to be a company union—and supported another (AFL-CIO) organization. When one of the group was discharged, the workers gave voice to their unhappiness by walking off the job and demanding that the employer meet with a committee designated by the group. The employer asserted that it wished to continue recognizing the employee association (which apparently had been dormant), but also stated that it would be happy to meet with the employees' committee as long as the "outside union" did

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60. See 29 U.S.C. § 152(5). The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. (emphasis added).

not inappropriately influence it (in the employer's view). The workers declined to reorganize their group according to the company's preference and were discharged when they would not return to work.

In Lundy, as in similar cases, the Section 8(a)(1) retaliation issues were easily resolved. Those fired because they acted collectively were entitled to reinstatement and back pay. But the real question was what obligation did the employer have to sit down and talk—in good faith—to the protesting employees during the "vacuum" created by the demise of the allegedly company union but prior to any recognition or certification of a successor organization as a majority representative? In other words, what obligation did the employer have to meet and deal with the ad hoc group of protesting employees?

The Board answered this question by declaring that inasmuch as "there was no recognized bargaining representative of the employees, nor was there any valid collective bargaining agreement covering the processing of grievances in effect at the time[,] the company was under statutory obligation to at least accept and meet with and discuss grievances with [an employee] committee." In enforcing the Board's order, the Second Circuit Court of Appeals stated:

In this vacuum [created by the demise of the company union and the lack of any successor] the employees were not required to rest their § 7 rights on the hope that when a grievance arose, the individual employee affected would somehow manage to obtain a hearing, which the employee [already] discharged . . . had obtained only through a work stoppage.

"Accept." "Meet with." "Discuss." These are intriguing and potentially very useful concepts, particularly to those who lack anything more potent in their quiver. Much of the practical advice Blue Eagle has for union organizers has to do with resourcefulness, grabbing the opportunity to be face to face with the employer and, by dint of sheer wit and compellingly meritorious proposals, turning that moment into a victory on the shop floor. But do these "accept, meet and discuss" notions support an obligation to bargain on the part of an employer enforceable by an unfair labor practice charge if it does not? There is deplorably scant authority that they do.

Professor Morris identifies three pertinent cases in addition to Lundy that mention this issue, but none seems to reach the goal for which he strives. In Swearingen Aviation Corp., the Board held that it is not an 8(a)(1) violation "for an employer to refuse to entertain and adjust grievances . . . where there is no collective bargaining agreement with an exclusive representative of employees in an appropriate unit requiring it to

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62. Id. at 1244. (emphasis added).
63. Lundy Manufacturing Corp, 316 F.2d at 926.
64. 227 N.L.R.B. 228 (1976) enforced in part denied in part, 568 F.2d 458 (5th Cir. 1978).
do so." 65 A year later, in *Pennypower Shopping News, Inc.*, 66 the Board again concluded that no violation of 8(a)(1) occurred when an employer insisted on meeting with *individual* employees rather than a group thereof. 67 Most recently, in *Charleston Nursing Center*, 68 the Board found on the facts of the case that no actual refusal to meet with an employee group had occurred. 69 However, in *dicta* and citing *Swearingen* and *Pennypower*, the Board observed that

while it is clear that Section 8(a)(1) prohibits an employer from retaliating against employees for engaging in protected concerted activities such as the presentation of grievances, it is also clear that generally an employer is under no obligation to meet with employees or entertain their grievances upon request where there is no collective bargaining agreement with an exclusive bargaining agent requiring it to do so. 70

The best that can be said about these obscure and now somewhat dated cases is that they do little to put to rest the question of whether *ad hoc* groups seeking to exercise their right to take collective action "for other mutual aid or protection" are entitled to get a substantive response from their employer. But Professor Morris has correctly identified them as coordinates along an important, if again ignored, fault line of modern American labor law. They address but do not answer the following fundamental, three-part question latent within various provisions of the NLRA and tremendously important to millions of unorganized workers in America today (even if they have yet to realize it):

- if employees may act under the protection of Section 7 collectively to demand certain concessions from their employer, and
- if that employer may not, under Section 8(a)(1), retaliate against them for doing so,
- how in the world can it be that the employer does *not* have an obligation to actually talk to the employees and at least give them a good faith response to their demands? 71

Not surprisingly, a considerable amount of space in *Blue Eagle* is

65. *Id.* at 236.
67. *See id.*
69. *Id.* at 555.
70. *Id.* (emphasis supplied).
71. As the NLRB has noted in another context, that of an employee's right to seek the assistance of a co-worker during an investigatory/disciplinary interview, "[i]t is the actual presence of the coworker, not the request for one, that affords employees the ability to act in concert for mutual aid and protection. In our view, the right to make such a request is devoid of any substance without a corresponding right to have the request granted." *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676, *affirmed in pertinent part*, 268 F.3d 1095 (D.C. Cir. 2001), and *cert. denied*, 536 U.S. 904 (2002).
devoted to *Weingarten*, the landmark U.S. Supreme Court case\(^{72}\) which established the right under Section 8(a)(1) to have a witness present during an interview leading to potential discipline, and to subsequent Board and court cases which have addressed the issue, closely tied to Professor Morris' "other protected concerted activity" argument, of whether the "*Weingarten* right" applies in the non-union setting.\(^{73}\) Were it still the case that the NLRB considered non-union employees to have the same rights in this regard that union employees do, Morris' argument would be easier to make. The combination of employee-plus-witness could be seen as the beginnings, a rudimentary prototype of an NMU. But, this past year the Board pulled back the extension of *Weingarten* to the non-union sector.\(^{74}\) Although the Board's more recent decision in *IBM Corporation* really does nothing to limit the Section 8(a)(1) underpinnings of the "*Weingarten* right," so that Professor Morris still can argue that the statute can be read to require minority union bargaining, the case seems like a clear indication that the Board will not likely be receptive to the idea if and when it is ever presented with it.

At bottom, though, it cannot possibly be that all the Act contemplates is that employees may *ask*, but only ask, to deal with their employers as a group about important workplace issues. It cannot be that employers are perfectly within their rights to stand mute, responding, in effect, "*I can't hear you*" while figuratively clapping their hands over their ears like so many six-year olds. Morris argues forcefully that such a dysfunctional view of the NLRA is unwarranted. The Wagner Act was, after all, conceived in a time of sharp, even desperate confrontation between labor and capital, not in an era of forelock-tugging bowing and scraping by crowds of docile serfs before the lord of the manor whose right it was to dispose of their petitions in whatever way he saw fit. American labor fought for and won the right to a good-faith *dialogue* with employers, not the mere chance to beg an audience.

\section*{C. A Word About Some Other Possible Legal Bases for Minority Bargaining}

As we have discussed, the primary thrust of Professor Morris' book has to do with how Sections 7 and 8(a)(1) of the NLRA should be read to authorize members-only bargaining. Before turning to some practical issues raised by his idea, it should be noted at least in passing that he points as well to some other possible sources of the right. As noted, in Chapters 6,

\footnotesize
\begin{itemize}
\item \(^{72}\) NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).
\item \(^{73}\) *Blue Eagle*, supra note 9 at 136-38, 188-91.
\item \(^{74}\) See Epilepsy Foundation of Northeast Ohio, 331 N.L.R.B. 676 ("*Weingarten* right" does apply in non union workplace); *IBM Corporation*, 341 N.L.R.B. No. 148 (June 9, 2004) (overruling Epilepsy Foundation and restricting right to unionized setting).
\end{itemize}
7 and 8 of Blue Eagle, he discusses the U.S. Constitution as well as various treaties to which this country is bound under international law, arguing among other things that the right of association found in both support the idea of minority bargaining. He makes substantial arguments along these lines which could conceivably provide independent bases for the program he espouses. He also notes that minority union bargaining is common practice in European countries and elsewhere. However, this review of his proposals is limited to the main ideas discussed above.

IV. DOES NMU BARGAINING MAKE PRACTICAL SENSE?

As we have discussed, Professor Morris makes a convincing case that the law should—indeed probably does—require employers to meet and bargain with NMUs. However, his proposal carries with it a number of practical problems which, although they are acknowledged and explored in Blue Eagle, are never quite resolved.

A. Getting Started

The first and most obvious of these has to do with the mechanics of getting the idea off the ground. Recall that Professor Morris’ efforts on behalf of the Hi-Tech Honeycomb workers came to a screeching halt with the NLRB Regional Director’s essentially unreviewable decision not to issue a complaint on their behalf, at least not on the refusal-to-bargain theory Morris was espousing. As the author admits, until and unless an NLRB General Counsel is appointed who wishes to pursue this theory, there is virtually no likelihood that it will be established through Board

75. See supra note 34 and accompanying text.
litigation.\textsuperscript{78} Morris' suggestions that the Board be stimulated to act either by means of direct legal action against its General Counsel under \textit{Leedom v. Kyne},\textsuperscript{79} or by petitioning the NLRB to exercise its rulemaking authority under the Administrative Procedure Act (APA),\textsuperscript{80} each seems a bit desperate in its own way. Neither is remotely likely to produce results.

More plausible, if only because it could be carried out by an actual group of determined workers, is the idea of throwing up a recognitional picket line—on a "members only" basis. Such a tactic might well draw a Section 8(b)(7) charge\textsuperscript{81} and injunction proceedings in federal court under Section 10(l) of the Act.\textsuperscript{82} In that situation, Professor Morris argues, the NMU would defend itself in the injunction proceeding with—and have a chance to litigate—the argument that its picketing was for "members-only recognition and bargaining, not as the exclusive representative of all the employees in the bargaining unit, which is the only recognition proscribed by Section 8(b)(7)."\textsuperscript{83} While that approach would allow court litigation of the issue, it is not at all clear that the language of Section 8(b)(7) does not in fact prohibit petitioning for a recognitional objective by an NMU.\textsuperscript{84}

The bottom line, in any event, is that it is going to be more than a little difficult to push this theory into an arena in which it can be properly litigated, much less to a favorable outcome.

\textbf{B. Some Other Practical Problems}

The remaining practical issues affecting Professor Morris' proposal in \textit{Blue Eagle} arise from the possibility that the seismic shift in labor relations he hopes for will not have taken place. That is, neither the Board nor the courts will have endorsed members only bargaining. If this continues to be the case, the following painfully blunt question has to be asked: What employer in its right mind is ever going to even respond to a bargaining

\begin{itemize}
  \item \textsuperscript{78} Professor Morris acknowledges generally that the Board's General Counsel makes the final decisions about which legal theory to pursue in Board charges. See \textit{BLUE EAGLE}, supra note 9 at 173–75. It need hardly be said that the chances of such an appointment during the second George W. Bush administration must be considered to be vanishingly small.
  \item \textsuperscript{79} 385 U.S. 184 (1958).
  \item \textsuperscript{80} 5 U.S.C. §§ 551–559.
  \item \textsuperscript{81} 28 U.S.C. § 158(b)(7), which prohibits so-called "recognitional picketing"—"where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative [and] such picketing has been conducted without a petition being filed within a reasonable period of time not to exceed thirty days . . . ."
  \item \textsuperscript{82} 29. U.S.C. § 160(l).
  \item \textsuperscript{83} \textit{BLUE EAGLE}, supra note 9 at 179–80.
  \item \textsuperscript{84} Professor Morris argues otherwise but it is hard to see why his own contentions about the sweeping inclusiveness of the Act's language in Sections 7 and 8(a)—which he claims benefits NMUs—should not operate to limit them where it occurs in Section 8(b). \textit{Id.} at 181.
\end{itemize}
request by an NMU, much less actually engage in a constructive dialogue with it? Morris argues hopefully that there will be circumstances in which employers will see it in their interests to do so. With due respect, this seems, well, hopeful. The grim reality is that most, if not all, will see fit to respond as did Hi-Tech Honeycomb.

Moreover, it is unclear that the results of any bargaining that might occur on a members-only basis would be all that concretely useful to the workers affected. The reason for this comes through with painful clarity towards the end of Blue Eagle where the author lays out his vision of how an NMU bargaining demand would actually be made and responded to. In Chapter 11 of the book, entitled "Union Organizing Through Members-Only Bargaining," Professor Morris includes a draft bargaining demand which he imagines an NMU would present to an employer. The document begins with the statement, "This letter is to advise you that a substantial number of the employees of the [named] company—although not a majority—in [a described category or location] are currently members of this union."

It goes on to request recognition on a members-only basis, to disclaim any current desire to be recognized as the exclusive representative of all at the plant, but to demand that the employer "refrain from making any unilateral changes in [working] conditions or negotiating directly with any [union] employees." The draft letter concludes, "When necessary or appropriate, it will be the responsibility of the employee involved or this union to advise the company of the employee's union membership."

The author then advises, "With the sending of this letter, the union will need to make a soul-searching decision whether to reveal at this stage the identity of all or only a portion of its membership." Soul-searching indeed. Unless the union wishes to expose itself to the charge that it is making a false claim of majority status, it seems that it would immediately have to give up the identity of its members. Moreover, as a practical matter, how would an employer be able to respond to almost any substantive demand the union might make without knowing to whom the proposal was meant to apply?

Morris' answer to this problem is, in part, that it makes better sense from an organizing standpoint to require potential union adherents to commit to membership, as opposed to the less drastic step of signing an authorization card. For one thing, of course, this is what would allow an NMU to attempt to bargain on a "members-only" basis. But this approach also allows the union to make more realistic, informed decisions about its actual support in the workplace. From this concept, the idea flows naturally
that members, as opposed to mere card-signers, will be less fearful about having their support for the union revealed, so that disclosure in connection with a members-only demand for bargaining will be less of a problem.

This well may have been the case back in the thirties and forties—and it may well be the case now. However, it seems unproductive to speculate about whether individual workers in the early 21st century are more or less likely than before to wish to be identified to their employers as union members. It is unwise, moreover, to base an organizing strategy on the assumption that they will.

But let’s assume that they do. And let’s assume that their employer displays some interest in meeting with them and even in agreeing to some of their demands. This possibility just raises another troubling dilemma: An employer agreeing to set a higher wage, for instance, in response to a demand for such a concession by an NMU—for its members only, of course—would be pretty clearly subject to charges under Section 8(a)(3) of the Act from the other employees. Of course, the employer could simply raise everyone’s wages, which would no doubt be what the NMU would be hoping would happen. It is truly difficult, however, to imagine this being a realistic possibility.

V.

CONCLUSION

Minority union bargaining is a commendable effort at making the best lemonade possible from the lemons the union movement appears to have been given. As Professor Morris himself admits, the ability of an NMU to obtain meaningful concessions at the bargaining table would depend largely upon the persuasiveness and merit of its ideas, its tactical acumen and its ability to appeal broadly to workers with the idea that a collective stand against the employer could actually have some effect. Knowledge about the law governing individual employment rights and benefits, skill and experience in finding ways to win those rights for workers, plain old savvy about useful techniques for dealing with employers and their representatives, and a generalized willingness to stand up and assert employee rights are, of course, extremely valuable commodities on the workplace floor.

89. Section 8(a)(3) of the NLRA makes it illegal for an employer “by discrimination in regard to hire or tenure of employment or any term or condition thereof to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).

90. An NMU representative could, for instance, be of invaluable assistance to an employee wishing to invoke his or her rights under a Gilmer-type, employer-mandated, compulsory arbitration procedure over a dispute involving discipline, discharge and/or discrimination or harassment. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The employer refusing its employee such assistance would seem to be inviting a charge under Section 8(a)(3) of the Act; see also, Montalvo v.
These are certainly not at all bad attributes for a labor organization to have. Indeed, there are many who wish more present-day unions had them. But it must be said that sheer muscle is decidedly not a part of Professor Morris' portrait of the hypothetical NMU, a truism best illustrated by the fate of Hi-Tech Honeycomb whose struggle led to this book. When that group's employer politely but firmly informed it that it would meet with them one-on-one, but not otherwise, all seventeen of them, like so many 21st century workers, were dispersed into the ranks of the unemployed with nothing to show for their experience but the hope of some back pay (they were, after all, discriminated against). That and the bitter wisdom they acquired from watching their collective efforts rendered meaningless by their employer's complacent disdain for them—and by the law's impotence. What a good development it would be if that latter were to change.