March 1993

Resurrecting the National Labor Relations Act - Plant Closings and Runaway Shops in a Global Economy

Terry Collingsworth

Follow this and additional works at: https://scholarship.law.berkeley.edu/bjell

Recommended Citation

Link to publisher version (DO1)
https://doi.org/10.15779/Z38432C

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Resurrecting the National Labor Relations Act—Plant Closings and Runaway Shops in a Global Economy

Terry Collingsworth†

The text of the National Labor Relations Act can be read to confer upon employees extremely broad rights. The Supreme Court, however, has tempered this apparent statutory grant of rights by balancing workers' rights against employers' interests in entrepreneurial control. The author suggests that while Supreme Court decisions reading a balancing analysis into the NLRA might be at odds with its statutory language, the policy assumptions implicit in those decisions were consistent with then prevailing economic theory. In the intervening years, however, economic assumptions have evolved as the economy has become increasingly global, rather than 'national, in scope. The author contends that the analysis set forth in Textile Workers Union of America v. Darlington Manufacturing and First National Maintenance Corp. v. NLRB is out of step with modern economic reality, and that the NLRA's delineation of workers' rights should be given a new, more expansive reading.

INTRODUCTION .................................................................................................................. 73
I. THE SOCIAL CLIMATE THAT LED TO THE PASSAGE OF THE NLRA AND THE INTENDED SCOPE OF THE CONGRESSIONAL RESPONSE .......................................................... 76
II. LABOR'S RISE TO POWER AND THE CONTEXT OF THE SUPREME COURT'S PLANT CLOSING DECISIONS .......... 80
III. THE SUPREME COURT'S LIMITATION OF THE NLRA AND THE IMPOSITION OF CONSERVATIVE ECONOMIC POLICY .... 82
A. The NLRA Language Applicable to Plant Closing Decisions ................................................... 82
B. Darlington and the Overriding Right to Go Out of Business ...................................................... 85

† General Counsel, International Labor Rights Education and Research Fund; Associate Professor of Law, Loyola Law School of Los Angeles; B.A. 1979, Cleveland State University; J.D. 1982, Duke University. I would like to thank Joan Presky, Neil Klasky, and Molly White for their excellent work in helping me to research this article.

C. First National Maintenance: Entrepreneurial Subjects Beyond the Scope of Bargaining

IV. The Impact of the Supreme Court's Policy-Based Limitation of the NLRA

A. The Economic Assumption Underlying the Supreme Court's Recognition of the Right of Entrepreneurial Control

B. The Advent of the Global Economy

C. Job Loss and Capital Flight: The Effect of the Supreme Court's Creation of a Right of Entrepreneurial Control

V. Reconsidering Darlington and First National in the Context of the Global Economy

CONCLUSION

INTRODUCTION

In two landmark decisions, Textile Workers Union of America v. Darlington Manufacturing\(^1\) and First National Maintenance Corp. v. NLRB,\(^2\) the Supreme Court interpreted the National Labor Relations Act (NLRA)\(^3\) to protect the right of the owners of capital to make fundamental entrepreneurial decisions, affecting the nature and direction of the business, without interference from workers.\(^4\) In both cases, the Court held that express statutory rights of workers\(^5\) were not absolute, but instead should be balanced against the owner's right of entrepreneurial control.\(^6\) The Court stated that without a clearer indication of congressional intent, it would not alter the fundamental assumption of the American economic system that decisions about the use of capital belong exclusively to its owners.\(^7\) Thus, owners retained potent weapons for countering unionization: the right to inform workers that the company would close if they elect a union,\(^8\) and the freedom to make virtually

---

4. Darlington, 380 U.S. at 269-70; First National, 452 U.S. at 676-79. In some contexts, the word "workers" is extremely value-laden and has come to be identified with Marxism. However, I use the term in this article for want of a better alternative; unless otherwise stated, I intend it to convey simply a classification of individuals, whether union or nonunion, employed or unemployed, blue or white collar, who must rely on some form of employment for subsistence. The term "employee" is not sufficient, as many people in the class of workers may not be employed. Likewise, for lack of a better term, I use the term "owners" or "owners of capital" to refer collectively to the group of persons who own some interest in a company that employs workers.
5. At issue were the express protections of NLRA sections 8(a)(1), (3), and (5), 29 U.S.C. § 158(a) (1988). See infra part IV.A.
7. E.g. Darlington, 380 U.S. at 270. For a further discussion of the Court's reasoning, see infra notes 90-130 and accompanying text.
8. During an election campaign, an employer is free to communicate factual information to the workers. Thus, while not permitted to threaten to close solely for purposes of intimidating the
unfettered decisions to close or relocate in order to escape from a union.9

Since the express language of section 8(a) of the NLRA makes it relatively clear that Congress did intend to alter traditional economic assumptions,10 the Court's extreme dilution of one of the most important protections conferred on workers has been widely criticized.11 Yet the Court was not necessarily siding with owners in a clash with workers. The Court's opinions instead assumed that both sides shared a common interest in national prosperity, and that if the flexibility of capital helped owners make profits and expand, the resulting economic growth would create jobs and improve the standard of living for workers.12 This view was by no means innovative; widely accepted, it remains the basis for what is commonly known as "trickle-down" economics, more recently packaged as "supply-side" economics.13

The American economy experienced tremendous growth during the thirty years between the passage of the NLRA and the Supreme Court's Darlington decision.14 Both labor and capital were beneficiaries. American manufacturers enjoyed a virtual monopoly in world markets, and American employees were compensated for their productivity by wage increases that made them among the world's highest-paid workers.15 This success caused organized labor to adopt a comparatively cooperative posture, insofar as it accepted the proposition that its basic interests were tied to the success of capitalism.16 Thus, the Supreme Court's decisions, however questionable in terms of statutory interpretation,17 simply implemented an economic policy that was widely accepted. Since workers were prospering, the Court's interpretations seemed consistent with the NLRA's overall goal of improving the economic position of workers.

9. There are some potential restrictions on the decision to close, but as a practical matter, they are meaningless. See infra notes 110-14, 153-58 and accompanying text.
10. See infra notes 68-78 and accompanying text.
11. See infra notes 110, 159-64 and accompanying text.
12. See infra notes 166-85 and accompanying text for a discussion of the Court's economic assumptions.
15. There are a number of barometers of worker well-being, including wages, benefits, and quality of work. See, e.g., HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL (1974). Regardless of the dimension selected, American workers remain, on a relative scale, very highly compensated.
16. For a discussion of organized labor's change in position regarding its role vis-à-vis owners, see infra part III.
17. For criticism of the Court's statutory construction, see infra notes 96-127, 137-64, and accompanying text.
and shoring up the economy generally.18

The recent globalization of the economy, a development not factored into the Supreme Court’s policy analysis,19 requires a reevaluation of the economic assumption on which Darlington and First National were based. Today, the ease of transferring production to developing countries that lack substantial labor regulation has given employers the opportunity to exclude American workers, who have become comparatively expensive because of decades of shared prosperity, from participating in further economic growth. At the same time, employers have been able to return to practices made illegal by the NLRA by blatantly exploiting workers in developing countries who are desperate for any form of employment.20

Thus, the Court’s decisions had an ironic result: flexibility in the name of economic efficiency and the resulting shared prosperity have ultimately caused many American workers to lose their jobs.21 This result raises a serious question as to the continuing validity of the Court’s decisions.22 Globalization forces a reevaluation of the entire trickle down concept, particularly as it affects labor policy, which most directly determines the flow of wealth to workers, the downstream beneficiaries of this economic policy.23

Whether the Supreme Court’s labor policy decisions were appropriate interpretations of the NLRA at the time depends on the accuracy of their premise that Congress intended to leave owners with the exclusive right to make entrepreneurial decisions, regardless of the impact on express NLRA rights. In exploring this question, this article first discusses

18. According to Senator Wagner, the sponsor of the Wagner Act, these were the primary goals of the statute. See, e.g., To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Education and Labor, 73rd Cong., 2nd Sess. (1934) (statement of Senator Wagner), reprinted in II NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 2282, 2284 (1985) [hereinafter LEGISLATIVE HISTORY]. For a further discussion of the purpose of the NLRA, see infra notes 24-49 and accompanying text.
19. See infra part V.B.
21. This is not to suggest that American workers are prohibitively expensive. Instead, the simple reality is that they are priced well above workers in developing countries. See id. at 64, n.220.
22. See infra part V.B.
23. The Supreme Court’s decisions interpreting the NLRA are particularly ripe for a reexamination because they are so directly based on the assumption that the goals of the NLRA are consistent with an overriding freedom of owners of capital to make self-interested decisions. This circumstance provides a unique opportunity to examine whether the law is utilitarian or instead simply an instrument for implementing capitalism regardless of its impact on the larger population. Drawing on the NLRA for this inquiry is particularly appropriate because the Act regulates the relationship between labor and capital, a matter of great concern to most members of society. See, e.g., Clyde W. Summers, Industrial Democracy: America’s Unfulfilled Promise, 28 CLEV. ST. L. REV. 29, 29 (1979) ("[I]n every political democracy there is recognition that decisions of the work place may be more important to the worker than decisions in the legislative halls.") (footnote omitted).
the events that shaped the passage and implementation of the NLRA. As the discussion demonstrates, the Act had the potential to alter the traditional employer-employee relationship and vest workers with some control of workplace decisions. However, events conspired to push courts toward an interpretation more consistent with traditional capitalism.

The article then examines the major cases that limited the NLRA. While these decisions can be criticized for ignoring the express language of the NLRA, at the time they were reasonable applications of the Supreme Court’s economic philosophy. The Court believed that the interests of workers protected by the NLRA would ultimately be served by preserving the right of owners to make economic decisions.

But as the article proceeds to show, this assumption is no longer valid. Examining the ease with which American firms can increase their prosperity at the expense of American workers by escaping from NLRA regulation and relocating to countries that do not protect worker rights, the article concludes that a policy which emphasizes promoting un fettered flexibility for capital no longer furthers the goals of the NLRA.

Finally, the article reexamines the Supreme Court’s decisions that have allowed the large-scale displacement of American workers. It provides a fresh analysis of the rights and interests involved, viewing labor policy in the modern context of a global economy. In conclusion, the article argues for an abandonment of the Court’s limitation of the NLRA, and proposes a new interpretation that would resurrect the express rights given workers under the Act.

I

THE SOCIAL CLIMATE THAT LED TO THE PASSAGE OF THE NLRA AND THE INTENDED SCOPE OF THE CONGRESSIONAL RESPONSE

The historical context of the passage of the NLRA must be considered in resolving whether Congress meant the bill to create a fundamental alteration in the economic system by providing workers with a degree of control over entrepreneurial decisions. The NLRA was passed in the spirit of reform and as a reaction to the economic conservatism prevalent prior to its enactment in 1935. The political forces that led to its passage firmly and unambiguously rejected laissez-faire capitalism and demanded a more utilitarian form of economics.

24. The radical nature of the NLRA caused legitimate concern that the Supreme Court would hold the Act unconstitutional. The NLRA was passed shortly after the Supreme Court had declared the labor rights provisions of the National Industrial Recovery Act unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935). Ultimately, the NLRA was upheld by a 5-4 majority in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937).

25. See, e.g., LEGISLATIVE HISTORY, supra note 18, at 2280-96.
The NLRA targeted two specific problems. First, business was foundering as a result of the economic collapse marked by the Great Depression and increased industrial strife. Second, those workers who were able to find jobs were laboring under abysmal conditions for substandard wages. Workers and their supporters were becoming increasingly radical in their efforts to combat these problems. Widespread worker dissatisfaction with laissez-faire capitalism was producing increased participation in leftist alternatives, most notably socialism and communism.

The NLRA forged a compromise that stabilized the economy and provided a suitable environment for business growth. The Act afforded business both relief from industrial strife through regulated dispute resolution and an improved consumer market stemming from the increased purchasing power of workers. In addition to these benefits, the NLRA was also attractive to some members of the business community because it provided an acceptable alternative to more radical proposals for the redistribution of property.

Workers gained the opportunity to demand a share of the renewed prosperity through enhanced rights to form unions and bargain collectively. These rights were conferred through the NLRA's specific protection of workers in their attempts to organize and form unions, and were designed to enable workers to bargain for an improved standard of living.

In evaluating the scope of the Act, the most important question is whether Congress intended to alter the traditional capitalist model by giving workers the right to participate in entrepreneurial decisions. Beyond specific prohibitions directed at employer conduct, there was room to debate just how far the NLRA went in altering the employer-employee relationship. There was substantial support for the position that the Act was a radical departure from the status quo and completely restructured this relationship. As Professor Klare has observed:

26. Many detailed and scholarly works chronicle this aspect of the development of labor regulation. For a general discussion of business and working conditions during the period before the passage of the NLRA, see, e.g., SELIG PERLMAN ET. AL., HISTORY OF LABOUR IN THE UNITED STATES (1935); ZIEGLER, supra note 14.

27. See, e.g., ZIEGLER, supra note 14, at 17-21; 4 PERLMAN, supra note 26, at 386-402.


30. See, e.g., MILTON, supra note 28, at 15, 21, 29 & passim.

31. See LEGISLATIVE HISTORY, supra note 18, at 37-38, 47, 514-16.


33. See LEGISLATIVE HISTORY, supra note 18, at 37-38, 47, 514-16.

34. See, e.g., Ruth Weyand, Majority Rule in Collective Bargaining, 45 COLUM. L. REV. 556, 599 (1945) ("Congress viewed the objective of the Act as establishing . . . a system whereby employ-
[T]he Act by its terms apparently accorded a governmental blessing to powerful workers' organizations that were to acquire equal bargaining power with corporations, accomplish a redistribution of income, and subject the workplace to a regime of participatory democracy. The Act's plain language was susceptible to an overtly anticapitalist interpretation.  

This position is bolstered by the business community's reaction to the proposed NLRA. One business publication called an early version of the Act "one of the most objectionable, as well as one of the most revolutionary, pieces of legislation ever presented to Congress." The business community feared that the Act would result in the loss of employers' absolute freedom to run their businesses as they saw fit. Thus, there was reason to believe that the NLRA would be enforced so as to give workers a greater voice in their economic destinies.

The Supreme Court's initial opportunity to interpret the NLRA did not clarify this issue. Despite its consistent pattern of striking down "social legislation" as unconstitutional, the Court upheld the NLRA in *NLRB v. Jones & Laughlin Steel Corp.* The Court did provide some indication of its views on the scope of the Act in the text of this opinion. According to the Court, "[a] fundamental aim of the [NLRA] is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce." If the collective bargaining mechanism set up by the Act should succeed in accomplishing this aim, the Court later observed, "management . . . and society as a whole" would benefit.

---

35. Klare, supra note 34, at 285 (footnote omitted).
37. Klare, supra note 34, at 286-88. Given this solid resistance to the Act on the ground that it would mean giving up complete managerial control, the Supreme Court's later insistence that such a result was not conceivably within the scope of the NLRA was at least exaggerated. See infra note 106 and accompanying text.
38. See Klare, supra note 34, at 285, n.62.
39. The Court had taken the position that Congress did not have the power to engage in law-making that breached the relationship between states and the federal government. It had declared unconstitutional the National Industrial Recovery Act (predecessor to the NLRA), which included a labor rights provision nearly identical to § 7 of the NLRA. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).
40. 301 U.S. 1 (1937). The Court emphasized that the NLRA was constitutional because it would further the end of commerce, stating, "[T]he NLRA purports to reach only what may be deemed to burden or obstruct [interstate or foreign] commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." *Id.* at 31.
42. *First Nat'l*, 452 U.S. at 678.
Jones & Laughlin did not present the question of whether Congress had sufficient authority under the commerce power to alter the traditional employer-employee relationship by restricting employers' right of entrepreneurial control. However, the ruling did not foreclose this possibility as a matter of constitutional law. Over the years, the Court has been quite liberal in permitting legislative selection of rational means once the end passes constitutional muster. Thus, it would not necessarily cause constitutional problems if Congress had indeed intended to undertake such major restructuring. Congress could have given labor a voice in matters of entrepreneurial direction, provided the Court was able to satisfy itself that this approach furthered the end of commerce.

The Supreme Court did not soon find an opportunity to decide whether the NLRA redistributed a degree of entrepreneurial control to workers. The issue lay dormant for three decades while the American economy experienced unparalleled economic growth, fueled in large part by World War II. American companies had yet to begin large-scale plant closings that would have forced the issue, because this was a period of growth and the pressure on business to cut costs was not acute.

An additional explanation for the delay in confronting the issue of entrepreneurial control is that most of the dramatic organizing campaigns following enactment of the NLRA occurred in the heavy manufacturing sector. Industries like auto and steel manufacturing, with their extensive capital outlays for plants and equipment, were not readily able to pack their bags and slip away to the more congenial anti-union environment of the Southern states. Likewise, in mining, where many classic labor battles were fought by John L. Lewis's United Mine Workers, the issue was solely whether the union would win a recognition battle and begin representing the employees at a particular mine. It was not possible for the owners to move the mines. The owners' only option was to close a mine if it became unprofitable.

A final reason for the low volume of plant closings during the first two decades after the passage of the NLRA is that employers had no safe harbor. Even escaping to the largely nonunion South did not guarantee that a union would not successfully organize there, since the NLRA extended its protections to every state in the union. Moreover, other regulations applied nationally to set minimum wages and hours.

---

44. See generally Milton, supra note 28, at 121-67 (discussing how changes in the American economy impacted upon labor relations).
45. In contrast, less capital-intensive industries, particularly apparel manufacturing, often did attempt to escape the invasion of unions by closing the plant. The landmark plant closing case, Textile Workers Union v. Darlington, 380 U.S. 263 (1965), involved a South Carolina textile mill.
47. See Abner J. Mikva, Hard Times for Labor, 7 INDUS. REL. L.J. 345, 346-47 (1985) (The
union organizing battles during the early phases of the NLRA were fierce because the companies recognized that, at least in the short run, they were likely to be stuck with any union that successfully organized their facility.  

For all of these reasons, then, situations did not arise during the decades immediately following the NLRA that would force decisions about the right of owners to respond to unionization by closing plants or relocating to places where labor was cheaper in response to unionization.

II  
LABOR’S RISE TO POWER AND THE CONTEXT OF THE SUPREME COURT’S PLANT CLOSING DECISIONS

By the time the Supreme Court finally faced an opportunity to sort out the conflicting rights of labor and capital under the NLRA, a much different climate prevailed in the country regarding the appropriate role of organized labor. The initial consensus that the Act had been passed to give workers an advantage in attempting to organize had been replaced by growing sentiment that labor had become too strong and had abused its power. The Taft-Hartley amendments were passed by a Congress that agreed that organized labor had developed too much power. By 1965, the year of the Supreme Court’s first significant plant closing decision, much of the former popular enthusiasm and empathy for labor’s cause had dissipated. Nearly a generation had passed since passage of the Act. By this time, sympathetic supporters in Congress and on the Wagner Act addressed most of the relevant wage earners. Thus, management of the 1930’s could not simply turn to other labor markets to lower costs, and the competition was operating under identical restraints).

48. This situation has changed drastically with the advent of the global economy. Labor savings can now be so significant in moving to a developing country that the move is worthwhile even if there are great capital losses. Furthermore, now that the generation of factories that built the American manufacturing sector are virtually antique, companies are able to recapitalize in a more favorable setting. See infra section V B.

49. Resolution of the conflict was further delayed by expansion to international markets. See MILTON, supra note 28, at 154-58. This initial expansion benefitted the American economy because it primarily involved sending American-made goods abroad and thus contributed to American employment and prosperity. The conflict ultimately was brought into sharp focus when American companies were able to transfer production abroad. See infra notes 205-48 and accompanying text.


52. 61 Stat. 136 (1947). The amendments, designed to limit the power of unions in various respects, were incorporated into numerous provisions of the original Wagner Act, now codified at 29 U.S.C. §§ 151-166 (1988). For a version of the NLRA that distinguishes the various phases of the Act, see ARCHIBALD COX ET. AL., STATUTORY SUPPLEMENT FOR CASES AND MATERIALS IN LABOR LAW 25-48 (10th ed. 1989).

federal courts who remembered the struggle of labor had been replaced by people who viewed the modern personification of labor as something less than noble.54

Ironically, organized labor itself became closely aligned with the ideals of capitalism following the passage of the Act. Labor became an advocate for the view that its interest was the same as capital's: a booming economy. This outlook was consistent with the interpretation that the NLRA was not a radical act and had not altered the traditional employer-employee relationship. Those within the organized labor movement who advocated radical change were purged, leaving relatively conservative leaders in place.55 Organized labor's cause shifted from the struggle for recognition of rights to the pursuit of regular improvements in workers' income and benefits. Big labor in this era never challenged the assumptions of capitalism.56 Professor St. Antoine described the American labor movement as "the most conservative, least ideological of all labor movements, traditionally committed to the capitalistic system and to the principle that management should have the primary responsibility for managing."57

Since the mainstream labor movement accepted the idea that all members of the society would benefit as long as the economy boomed and business prospered, there was little pressure for a more radical interpretation of the NLRA.58 The class conflict was subordinated to a pact between capital and organized labor in which labor cast its lot with capital and focused on getting workers their share of the expanding pie.59

The institutionalization of modern capitalism occurred virtually without resistance from organized labor.60 The postwar buildup allowed business to harness the government, diverting its resources to consumption of armaments and other goods and services.61 There was wide acceptance of the assumption that all of society would benefit if business prospered, even at the expense of government, through job creation, increased revenues, and technology development.62 Likewise, the nation pursued corporate expansion to other countries with remarkable unity,
all hoping to prosper from any windfalls that might accrue. While other factors were certainly involved, a major reason for the unprecedented growth of the American economy was the cooperation of labor and capital.

As later events make clear, capital did not agree to share prosperity with labor based on some notion of community or national interest. Rather, capital viewed cooperation with a watered-down version of labor as acceptable in the short run and seized the opportunity to shape the future of labor by subordinating it to the growth of the economy.

All of these factors diverted the NLRA's implementation away from the ideals of the social revolution, which had served as the Act's catalyst, and toward the belief that there was a consistent national interest in letting capitalism work. Even though the NLRA unmistakably represented a rejection of laissez-faire capitalism, most of society agreed that the solution was capitalism somewhat restrained, not radically changed. This was the context in which the Supreme Court was finally asked to resolve the basic issue of conflict between workers and owners under the NLRA: whether the owners had ceded some degree of control.

III

THE SUPREME COURT'S LIMITATION OF THE NLRA AND THE IMPOSITION OF CONSERVATIVE ECONOMIC POLICY

A. The NLRA Language Applicable to Plant Closing Decisions

As with all questions of statutory interpretation, the language of the statute should be the primary guide. Thus, in determining whether the NLRA restricted an employer's right to make entrepreneurial decisions, the Supreme Court was bound to consider the Act's express language. Section 8(a) of the NLRA establishes five specific restrictions on an employer's conduct in dealing with employees. These restrictions abridged employers' absolute freedom in governing the employer-employee relationship. The most significant restriction on the employer's ability to prevent the formation of unions was created by section 8(a)(3), which provides that "[i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . ."

63. See id.
64. See, e.g., id. at 154-60.
65. See infra notes 201-44 and accompanying text.
66. BRODY, supra note 56, at 185.
67. See supra notes 24-38 and accompanying text.
This language limits the freedom an employer otherwise would have to discharge employees or otherwise retaliate in response to union organizing activity.71

As previously discussed, the early years following the NLRA’s enactment had presented no opportunity for the Supreme Court to assess whether this limitation prevented an employer from taking the most extreme form of retaliation following unionization by closing the entire facility.72 There was no doubt, however, that the nature of the employment relationship had changed, and that the employer was no longer free to terminate all employees at will,73 even though such a right undoubtedly existed prior to the passage of the NLRA.74 Indeed, virtually all of the lower courts that had considered the question held that section 8(a)(3)’s prohibition of discrimination against employees who had exercised their right to form a union prevented an employer from making an entrepreneurial decision, such as to close a plant, whose purpose was to discriminate against employees in response to the formation of a union.75

Section 8(a)(5) establishes a further express limitation on an employer’s ability to make unfettered, unilateral decisions regarding the employment relationship. It requires the employer to bargain with the union over decisions involving a “term or condition of employment.”76 The Supreme Court had no trouble finding that this was a direct limitation on the employer’s decision-making authority, statutorily altering the employer’s previously unfettered right.77

The language of sections 8(a)(3) and 8(a)(5) and the subsequent interpretations78 left little doubt that the employment relationship had been significantly changed. Employers had lost the right to make unilateral decisions and instead were required to comply with the limitations imposed by the statute. In the face of the statutory language and the

72. See supra notes 39-42 and accompanying text.
73. See, e.g., Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86 (3d Cir. 1943).
74. See, e.g., NLRB v. Condenser Corp., 128 F.2d 67, 75 (3d Cir. 1942).
75. NLRB v. Lexington Electric Products Co., 283 F.2d 54 (3d Cir. 1960) (employer closed plant and discharged employees in response to union activity); NLRB v. Missouri Transit Co., 250 F.2d 261 (8th Cir. 1957) (bus drivers discharged for union activity); A.M. Andrews Co. v. NLRB, 236 F.2d 44 (9th Cir. 1956) (employer threatened to close plant rather than recognize union); NLRB v. Wallick, 198 F.2d 477 (3d Cir. 1952) (employer refused to open plant in face of threatened union activity); NLRB v. Somerset Classics, Inc., 193 F.2d 613 (2d Cir. 1952) (plant shut down in response to union activity).
78. See cases cited supra note 75.
nearly uniform precedent, there was little reason to anticipate that when
the issue of whether the employer retained some exclusive right to make
decisions involving "entrepreneurial control" finally reached the Court,79
the Court would do anything other than affirm the analysis of the courts of appeal.

In a concurring opinion that seemed innocuous at the time, in
Fibreboard Corp. v. Labor Board,80 Justice Stewart first articulated a the-
ory of limitation concerning the NLRA. This theory was premised on
the reserved right of employers to decide fundamental questions about
the direction and scope of their businesses, even if the decision had a
substantial impact on the employees' employment terms or working con-
ditions.81 In Fibreboard, the employer terminated its in-house mainte-
nance workers and subcontracted the work.82 The majority of the Court,
finding that in this situation the employer had a duty to bargain under
section 8(a)(5), ordered the employer to bargain over the decision to sub-
contract.83 The Court reasoned that the issue was "well within the literal
meaning of the phrase 'terms and conditions of employment.'"84

Justice Stewart supported the majority's conclusion, but concurred
separately to comment on the scope of the Court's holding.85 He con-
tended that, "[n]othing the Court holds . . . should be understood as
imposing a duty to bargain collectively regarding . . . managerial deci-
sions . . . which lie at the core of entrepreneurial control."86 In explana-
tion of this position, he elaborated that "[d]ecisions concerning the
commitment of investment capital and the basic scope of the enterprise
are not in themselves primarily about conditions of employment . . . ."87

This was a curious statement that left considerable room for specu-
lation. Did Justice Stewart mean that an employer could make such de-
cisions as long as there was no intent to violate section 8(a)(5), or was he
according employers an overriding right that trumped the express lan-

79. See supra notes 43-46 and accompanying text for a discussion of the reasons why this issue
was not directly considered by the Supreme Court until nearly 30 years after the enactment of
NLRA.


81. The Supreme Court limited the NLRA in other significant ways that have been heavily
criticized for ignoring the express language of the Act. For example, in NLRB v. Mackay Radio,
304 U.S. 333, 345-46 (1938), the Court held that economic strikers could be permanently replaced to
allow an employer to stay in business during a strike. For criticism of this decision, see ATLESON,
supra note 56.

82. 379 U.S. at 219-20.
83. Id. at 209-10.
84. Id. at 210.
85. Id. at 217-18.
86. Id. at 223.
87. Id. Justice Stewart went on to explain that the subcontracting decision in Fibreboard fell
within the scope of the duty to bargain under § 8(a)(5) because it fell "short of such larger en-
trepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or
what the basic scope of the enterprise shall be." Id. at 225.
language of the Act? He did not claim to be relying on the statutory language or precedent. Instead, he simply asserted his personal belief that the NLRA could not have altered the basic right of employers to control their economic decisions.

B. Darlington and the Overriding Right to Go Out of Business

The seed planted by Justice Stewart bore fruit the following term. In Textile Workers Union v. Darlington Manufacturing Co.,88 which involved a plant closing in response to a successful union organizing campaign, the Court considered whether there was a right of entrepreneurial control to terminate a business. The Court also examined whether this right would excuse the employer's express obligation under section 8(a)(3) of the NLRA not to "discriminat[e] in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . ."89 The Court then addressed whether the termination of a business would unlawfully "interfere with . . . employees in the exercise of [section 7]90 rights . . ." in violation of section 8(a)(1).91

Darlington's facts provided a direct opportunity to consider the scope of the employer's right of entrepreneurial control. The employer had told his employees that the closure decision was "caused by" the employees' vote to join the Textile Workers Union.92 He gave workers the chance to revoke their decision and sign a petition disavowing the union.93

The Court swept past the section 8(a)(1) claim of interference, reasoning that an employer's closure of a business does not violate section 8(a)(1) unless the closure decision was motivated by anti-union discrimination in violation of section 8(a)(3).94 In the Court's words, a decision to close a business was among the types of "employer decisions [that] are so peculiarly matters of management prerogative that they would never constitute violations of section 8(a)(1), whether or not they involved sound business judgment, unless they also violated section 8(a)(3)."95

---

90. Section 7 of the NLRA, codified at 29 U.S.C. § 157 (1988), is the provision that created the substantive rights to act in concert and organize a union protected by the Act.
91. 29 U.S.C. § 158(a)(1) (1988). The union had also filed charges under section 8(a)(5), alleging that the employer had failed to bargain in good faith after the union won the election, and the Board found that the employer had violated § 8(a)(5), 380 U.S. at 266-67 & n.5. The Court did not address this issue, perhaps assuming that its holding that the employer had an absolute right to go out of business, regardless of the impact on § 7 rights, would leave the employer with no further duty to bargain. Id. at 273-74.
92. 380 U.S. at 265-66 n.3.
93. Id. This action resulted in a separate Board finding of a § 8(a)(1) violation, which was not challenged on appeal. Id.
94. Id. at 269.
95. Id.
This analysis created a substantial limitation of the NLRA, without citation to statutory language or legislative history, and contrary to the great weight of lower federal authority. 96 The Court thus established an overriding right of "management prerogative" 97 based on its assumptions of appropriate economic policy, 98 and dispensed with the traditional tools of statutory construction. 99 The Court also treated the more general section 8(a)(1) as rendered redundant by the more specific language of section 8(a)(3), 100 at least with respect to an undelineated set of employer decisions, including the decision to terminate a business that the Court would recognize as "peculiarly [a] matter of management prerogative." 101

The Court reached this point through particularly strained reasoning. First, the Court noted that "certain business decisions will, to some degree, interfere with concerted activities by employees. But it is only when the interference with section 7 rights outweighs the business justification for the employer's action that section 8(a)(1) is violated." 102 Next, the Court stated that a section 8(a)(1) violation was predicated on an act that was unlawful whether or not it involved discrimination, and therefore the issue of discrimination was relevant only to the section 8(a)(3) claim. 103 Thus, the Court did not perform the section 8(a)(1) balancing that it had just described, instead assuming that the issues would be completely resolved by the section 8(a)(3) discrimination analysis. 104 This reasoning neglected a point that the Court had made two years earlier: whether or not the employer's intent had been discriminatory, a closure following the election of a union would be such an extreme interference with section 7 rights that it would outweigh virtually any business justification. 105

The court then went on to deny the section 8(a)(3) claim. A proposition that a single businessman cannot choose to go out of business if he wants would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent . . . [I]t is sufficient to say that there is not the slightest indication in the history of the . . . Act that Congress envisaged any such result under [the

96. See supra note 75 for lower court rulings on this issue.
97. 380 U.S. at 269.
98. For criticism of the Court's policy assumptions in the present context of the global economy, see infra part V.A.
99. See supra notes 68-71 and accompanying text.
100. See 380 U.S. at 269.
101. Id.
102. Id. at 268-69.
103. Id. at 269.
104. See 380 U.S. at 269.
105. See NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963) (some acts are inherently so destructive of union rights that improper motive will be presumed).
The Court did not address the most obvious response to this assertion: the language of section 8(a)(3) so clearly prohibits the most extreme form of anti-union discrimination that could occur, a complete closing of the business, that reference to the legislative history was unnecessary.\textsuperscript{107} The Court instead endorsed the reasoning of the appellate court that the NLRA "'does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity, so long as the obligations of any employment contract have been met.'"\textsuperscript{108}

This analysis has been subject to widespread criticism.\textsuperscript{109} One problem with equating an employee's freedom to resign with an employer's freedom to close the entire business, even if for anti-union reasons, is that the Act does not restrict employee conduct in a manner parallel to the anti-discrimination prohibition it imposes on employers. The comparison would be more appropriate if the NLRA prohibited employees from discriminating against their employer on the grounds that the employer is nonunion. Under such a prohibition, an employee would not be free to resign simply because her union lost the election. However, she, like her employer, could terminate the relationship for any other reason as long as her conduct did not run afoul of the Act.

The \textit{Darlington} Court went on to hold that its ruling did not change the prohibition on "runaway shops" that close, only to reopen in another location, in order to escape a successful union organizing campaign.\textsuperscript{110} As the Court viewed this matter, complete liquidation, in contrast to a runaway shop, would gain the employer no future benefit from the anti-union closure.\textsuperscript{111} The Court acknowledged, however, that benefits do accrue to an employer who engages in a "partial closing," in that any remaining employees at the employer's other facilities are likely to be discouraged in the exercise of their section 7 rights.\textsuperscript{112}

Thus, according to the \textit{Darlington} Court, the employees at the closed facility were left unprotected due to the overriding right of the employer to close his business completely, even for anti-union reasons.\textsuperscript{113} The closing would become illegal \textit{only if} the employer's interest in some

\textsuperscript{106} Id. at 270.
\textsuperscript{107} See, e.g., Gorman, \textit{The Negligible Impact of the National Labor Relations Act on Managerial Decisions to Close or Relocate}, 58 TUL. L. REV. 1354, 1357 (1984); ATLESON, supra note 56, at 138-42.
\textsuperscript{108} 380 U.S. at 271 (quoting the court below at 325 F.2d 682, 685 (4th Cir. 1964)).
\textsuperscript{109} See supra note 107.
\textsuperscript{110} Id. at 271-72.
\textsuperscript{111} Id. at 272-73.
\textsuperscript{112} Id. at 274-75.
\textsuperscript{113} Id. at 275.
other business allowed him to obtain ongoing benefit from the closing.114 This was a significant departure from any previous analysis of unfair labor practices.115 As Professor Summers put it, "[w]e had always supposed that the purpose of the statute was affirmatively to protect employees in the exercise of their rights, not merely to preclude employers from profiting from destruction of those rights."116

The Court announced a three-part test for partial closings that focused on the employer's connection to and ability to chill the section 7 rights of a different group of employees (not at the facility being closed).117 Under no circumstances, however, could the employees who lost their jobs in a partial closing prevail in their section 8(a)(3) claim unless they could identify an intentional chilling effect on the section 7 rights of other employees working for the same employer.118 This test demonstrates the fundamental flaw in the Court's reasoning: In one breath, the Court stated that the Act could not restrict an employer in her decision to go out of business even when the action concededly reflected discrimination against the employees for having exercised their section 7 rights.119 In the next breath, however, the Court allowed that the Act could restrict the same decision to close if it created the potential for interference with the section 7 rights of employees who had not yet unionized.120

Thus, the Court held that in spite of its earlier sweeping statement that section 8(a)(3) of the Act was not such a "startling innovation" that it could be interpreted to restrict an employer's decision to close,121 the section created just such a restriction in a context that severely strains its language: after all, no "discrimination" would necessarily be visited on the employees at a facility that remained open. Even if the closing should cause the remaining employees to stop their union activities, they still would not have suffered discrimination under section 8(a)(3) unless they too were terminated.122

114. Id. at 275-76.
115. ATLESON, supra note 56, at 137-39.
117. The Court's test requires a showing that the employer who closed a facility for anti-union reasons (1) has an interest in some other, not necessarily related business such that she may realize a benefit from discouraging unionization in that other business; (2) her purpose in closing the plant was to realize that benefit; and (3) she has a relationship with the other business such that it is "realistically foreseeable" that its employees will fear that their business will shut down if they elect a union. Darlington, 380 U.S. at 270-71.
118. Id. at 276. This requirement has significant implications for the modern partial closing in which the other employees are in countries other than the U.S. and thus are not covered by the NLRA. See infra part V.C.
120. Id. at 275-76.
121. See id. at 270.
122. However, their § 7 rights would have been interfered with in violation of § 8(a)(1), the
This interpretation creates the anomalous result that an employer with two otherwise identical facilities violates section 8(a)(3) if he closes the one that unionizes, but only if he does so with the intent of chilling the exercise of rights by employees at the nonunion plant. The employees at the first plant, having been discriminated against because of their union activity, are covered by the terms of section 8(a)(3). However, according to the Court, the section affords these employees no protection in this situation because this could not have been the intent of Congress without a more explicit indication. The employees at the second plant are protected by the anti-discrimination provision of section 8(a)(3) as long as the employer does not discriminate against them. They lose their protection as soon as the employer takes the one step that puts them within the reach of the language of the statute: terminating them for, and thus discriminating against, their persistence in union activities.

This is a strange result, given that the highest priority of the NLRA was to protect employees during union formation. Following this logic, it would appear that an employer could defend a partial closing by terminating any remaining employees.

In the words of Professor Summers' eloquent criticism: The mischief in the Court's reasoning is that it ignores the rights of those who have been discriminatorily discharged. The essence of the Court's logic is that discharge for supporting the union is not itself an unfair labor practice, that it is no wrong as to the ones discharged, and that the law is not concerned with their injury. Discrimination against them is an evil only when it intimidates others; any remedy given them is only to make others feel secure. This is to see in the execution of hostages nothing more than an intimidation of the living; it is to make murder a crime only when the killer's purpose is to instill fear.

C. First National Maintenance: Entrepreneurial Subjects Beyond the Scope of Bargaining

The next major step in the Court's recognition of entrepreneurial control as a factor to be balanced against express statutory rights under the NLRA was taken by First National Maintenance Corp. v. NLRB.

---

123. See id. at 275-76.
124. See id. at 270.
125. See, e.g., Legislative History, supra note 18, at 47.
126. As the Court did not discuss the more obvious implications of its opinion, it is difficult to analyze whether there were policies that the Court believed justified its strained interpretation of the Act. Possible justifications that seem to fit into a larger economic rationale for the Court's decision are discussed below. See infra part V.A.
Again building directly on Justice Stewart's *Fibreboard* concurrence,\textsuperscript{129} the Court held that employer First National Maintenance Corporation ("FNM") had no duty under section 8(a)(5) to bargain over a decision to close a part of its business and terminate union employees in the discontinued operations.\textsuperscript{130}

The union had filed charges under sections 8(a)(1) and (5), alleging that the employer had violated its duty to bargain in good faith over "terms and conditions of employment."\textsuperscript{131} The Administrative Law Judge and the Court of Appeals for the Second Circuit both ruled, based on different theories, that the employer had breached its duty to bargain.\textsuperscript{132} As the Administrative Law Judge reasoned, "[t]hat the discharge of a man is a change in his conditions of employment hardly needs comment. In these obvious facts, the law is clear."\textsuperscript{133} The Court of Appeals, applying a more indirect analysis, held that section 8(d) creates a presumption that bargaining is required.\textsuperscript{134} The employer might rebut this presumption, however, "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain . . . ."\textsuperscript{135}

The Supreme Court began its analysis by presuming that the entrepreneurial character of the decision that the union sought to bargain over was a major factor in determining whether there was a duty to bargain.\textsuperscript{136} Directly begging the question, the Court stated that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."\textsuperscript{137} Virtually guaranteeing the result reached, this position ignored the express language of the sections 8(a)(5) and 8(d).\textsuperscript{138}

As the Administrative Law Judge had observed, the question was purely whether the statutory language "terms and conditions of employment" included the right to discuss the ending of the employment relationship.\textsuperscript{139} This question could be resolved without so severely overstating the case as requiring a determination of whether Congress had contemplated that the union would become an "equal partner in the

\textsuperscript{129} For a discussion of *Fibreboard*, see supra notes 80-87 and accompanying text.

\textsuperscript{130} *First National*, 452 U.S. at 686.

\textsuperscript{131} Id. at 670. The phrase "terms and conditions of employment" comes from § 8(d) of the NLRA, which defines the scope of the duty to bargain created by § 8(a)(5). 29 U.S.C. § 158(d) (1988).

\textsuperscript{132} *First National*, 452 U.S. at 670-72.

\textsuperscript{133} Id. at 670.

\textsuperscript{134} See id. at 672.

\textsuperscript{135} *First National*, 452 U.S. at 672 (quoting 627 F.2d 596, 601-02 (2d Cir. 1980)).

\textsuperscript{136} See id. at 676-77.

\textsuperscript{137} Id. at 676.

\textsuperscript{138} See supra notes 76-77 and accompanying text.

\textsuperscript{139} See *First National*, 452 U.S. 670-71 (quoting 242 N.L.R.B. 462, 465 (1979)).
The obligation to bargain includes only the requirement that the parties meet and confer in good faith; it does not require the employer to agree to the union's proposal. That the Court was not on very solid ground in ignoring the express language of the statute is well-illustrated by its choice of authority. Following its statement about the union not being an equal partner, the Court continued:

Despite the deliberate openendedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place . . . . "[The parties must bargain over] issues that settle an aspect of the relationship between the employer and the employees."

While one would have difficulty arguing with the Court's statement from Pittsburgh Plate Glass, it had little to do with the issue the Court was addressing in First National. The question in Pittsburgh Plate Glass was whether the employer had a duty to bargain with the union over a change in the benefits plan for retired employees who, as a matter of express NLRA definition, were no longer "employees" within the meaning of the Act. Consequently, the issue there did not involve, to use the language of the Court, "an aspect of the relationship between the employer and the employees." Bargaining over retirees' benefits is quite distinct from the question of whether current employees have a right to bargain over whether their jobs are to be eliminated, a matter that goes to the heart of the relationship between employees and the employer.

Thus the Court's primary citation to precedent failed to support the majority's view that the express duty to bargain was limited by the right of entrepreneurial control. Undeterred and using that position as its foundation, the Court proceeded to elaborate on the entrepreneurial right by dividing possible subjects for bargaining into three categories. First, the Court commented that some subjects should never be bargained over because they involved pure management decisions that "have only an indirect and attenuated impact on the employment relationship."

This category included decisions as to advertising, promotion, product design, and financing.

140. Id. at 676.
144. First National Maintenance, 452 U.S. at 676 (quoting Allied Chemical, 404 U.S. at 178).
145. See, e.g., 242 N.L.R.B. at 465. For a quotation from the Administrative Law Judge's opinion in First National Maintenance that directly addresses this point, see supra text accompanying note 145.
146. First National Maintenance, 452 U.S. at 676-77.
147. Id.
A second category, the Court explained, would always be subject to bargaining because it involved "almost exclusively 'an aspect of the relationship' between employer and employee." 148 This category included decisions involving work rules, layoff and recall rules, and production quotas.149

The final category included FNM's decision to discontinue a contract with a client, Greenpark, and terminate the affected employees, a decision admittedly having a "direct impact on employment . . . but [that] had as its focus only the economic profitability of the contract with Greenpark, a concern . . . wholly apart from the employment relationship."150 The Court explained:

This decision [to terminate the Greenpark contract], involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment."151

The primary factor in deciding whether bargaining was appropriate within the third category, the Court continued, was whether the subject "is amenable to resolution through the bargaining process."152 Suggesting the kinds of subjects it considered not amenable, the Court stated, "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."153 The Court then announced the balancing test for which the case is now well known:

[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.154

Applying this test to the facts of the Greenpark contract, the Court concluded that "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision . . . ."155

Thus, the Court's result in First National was premised on a series of

148. Id. at 677 (quoting Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 178 (1971)).
149. Id.
150. Id.
151. Id. (quoting Fibreboard, 379 U.S. at 223 (Stewart, J., concurring)).
152. Id. at 678.
153. Id. at 678-79.
154. Id. at 679.
155. Id. at 686.
steps that began with the question of whether an employer must bargain with his or her employees over the termination of their employment. From this, the Court ended up with a balancing test that placed primary importance on the employer’s interests in keeping the business going unencumbered by the responsibilities of bargaining.\textsuperscript{156} The Court failed to give primary importance to the statutory language, the normal practice in interpreting statutes.\textsuperscript{157} Instead, it gave controlling weight to a right of entrepreneurial control not expressed in the statute. As Justice Brennan observed in his dissent, even if it is appropriate to take the interests of management into account in some form of balancing test, the Court’s test virtually ignored the interests on the workers’ side, which are directly expressed in the statute.\textsuperscript{158}

The First National decision has been widely criticized for its reasoning and its implications concerning the relationship between employer and employee under the NLRA.\textsuperscript{159} Even if the Court’s balancing test was accepted as a reasonable interpretation of the Act, the Court failed to apply this test carefully to the specific facts of the case.\textsuperscript{160} The various management interests that the Court identified as adversely affected by bargaining, most notably the “need for speed, flexibility, and secrecy in meeting business opportunities and exigencies,”\textsuperscript{161} did not come into play in First National, although the Court without explicit analysis seemed to assume that these interests were affected.\textsuperscript{162}

There is nearly uniform agreement that the decision represented a major limitation on worker rights not justified by the language of the NLRA. As Professor Gorman put it:

The flaws in the . . . decision . . . are too many to enumerate in full . . . . These flaws can be summed up—in much the same manner as in the Darlington case—as an unexamined exaltation of the employer’s interest in unfettered control over major managerial decisions, without sufficient concern for a most basic statutory policy, here the participation of workers in discussing decisions (without the power to dictate the substantive terms) directly affecting their job security, literally their “terms and conditions of employment.”\textsuperscript{163}

The extensive criticism correctly calls into question the Court’s legal

--

\textsuperscript{156} Id. at 679.

\textsuperscript{157} See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (holding that where Congress has not directly addressed an issue, the issue must be resolved by a permissible construction of the statute); see also First National Maintenance, 452 U.S. at 671 (quoting 242 N.L.R.B. 462, 465 (1979) (the Administrative Law Judge had noted that coverage by the statutory language was “obvious”).

\textsuperscript{158} See 452 U.S. at 689-90 (Brennan, J., dissenting).

\textsuperscript{159} See, e.g., ATLESON, supra note 56, at 133-34; Gorman, supra note 107, at 1361-64.

\textsuperscript{160} See, e.g., Gorman, supra note 107, at 1361-62.

\textsuperscript{161} First National Maintenance, 452 U.S. at 683.

\textsuperscript{162} See id. at 683-84; see also Gorman, supra note 107, at 1361-62.

\textsuperscript{163} Gorman, supra note 107, at 1361-66.
reasoning, and ultimately its motivation. However, the criticism largely ignores the Court's reliance on prevailing economic assumptions of the time and whether its economic perspective was arguably consistent with the goals of the NLRA. The Court's approach did further the policy of preserving the flexibility of capital, a policy that many at the time of this decision understood as ultimately beneficial for workers, despite the restriction imposed on the scope of the Act.164

The following discussion first examines indications that the Court at the time believed its decisions in Darlington and First National to be consistent with the NLRA's overall goals. It then discusses global economic changes that have rendered the policy assumptions underlying Darlington and First National outdated, and the harm these decisions have led to in an era when the principle of capital flexibility often translates into the freedom to export jobs.

IV
THE IMPACT OF THE SUPREME COURT'S POLICY-BASED LIMITATION OF THE NLRA

A. The Economic Assumption Underlying the Supreme Court's Recognition of the Right of Entrepreneurial Control

In combination, the Supreme Court's decisions in Darlington and First National held that express rights in the NLRA do not override the right of "entrepreneurial control."165 The legal reasoning supporting this conclusion is highly questionable.166 However, the Court's decisions did further its policy assumption that protecting the economy by allowing commerce to flourish is a primary goal of the NLRA.167 By according employers the degree of flexibility it believed they needed to keep their businesses going, the Court anticipated that benefits would follow for the national economy as a whole.

There is very little discussion in either Darlington or First National about economic philosophy. The Court seemed to accept it as a given that the whole point of the NLRA was to ameliorate certain problems in the national system of commerce. However, under no circumstances did the Court read the NLRA as signaling an end to the free market system; rather, with some adjustment, that system was designed to bring wealth and prosperity to all.

164. This is not to say that the Court is free to stray from statutory language to further its own policy goals. However, to the extent that an identifiable policy shaped the Court's interpretation, the question is whether the Court will remain true to the policy and continue to shape the law to respond to policy needs. See infra notes 170-85 and accompanying text.
165. See supra sections IV.B, IV.C.
166. See supra notes 107-27, 137-64 and accompanying text.
167. See supra notes 41-43 and accompanying text.
In Darlington, the appellees expressly made the argument that the entire economic system was at stake:

It is a shock to this industry that it could seriously be considered that a law of the United States could be construed now—for the first time since its enactment nearly 30 years ago—to mean that the stockholders of a company are not free for any reason to discontinue a business venture and withdraw their capital investment. The essence of the competitive system is the right of an entrepreneur to venture his capital in a business or profession of his choosing and endeavor to succeed to whatever extent his abilities permit him. But the necessary correlative is that he be able to withdraw from that pursuit, with or without failure, if he wants to. The denial of that right in this case by the Board concerns not only the textile industry but our entire industrial and investing system.\(^{168}\)

The Court had little trouble agreeing with appellees: "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent . . . ."\(^{169}\)

The Court did not cite any authority for its position, apparently assuming that it was self-evident. This assumption proved determinative in the Court’s opinion.

A close examination of the Court’s economic policy assumptions is necessary to decide whether the policy can and should be adjusted now that recent developments have greatly increased the anti-union impact of Darlington.\(^{170}\) Prior to the Darlington decision, the Court had been criticized for being pro-labor,\(^{171}\) making it difficult to support the most cynical view that the Court simply made a decision designed to allow owners to enrich themselves at the expense of workers and in derogation of the NLRA. Without question, the Court could have made a decision that was more pro-labor than it did in Darlington;\(^ {172}\) but this does not necessarily make it accurate to view the decision as intentionally anti-labor. The Court simply did not view its decision as resolving a fundamental conflict between employers and workers. It instead assumed that if the employer had the flexibility to close facilities, regardless of motive\(^ {173}\) and without an obligation to bargain,\(^ {174}\) all members of society, including workers, would benefit.\(^ {175}\)


\(^{169}\) Darlington, 380 U.S. at 270.

\(^{170}\) See infra notes 186-244 and accompanying text for a discussion of the global economy and the particular problems created by Darlington.

\(^{171}\) See Klare, supra note 34, at 269.

\(^{172}\) See supra notes 50-67 and accompanying text for a discussion of the reason why the Court did not feel particular pressure to give the NLRA a more radical interpretation.

\(^{173}\) See supra notes 105-08 and accompanying text.

\(^{174}\) See supra notes 152-54 and accompanying text.

\(^{175}\) See infra notes 182-85 and accompanying text.
The Court had stated previously in the context of protecting the arbitration process and therefore the collective bargaining system, that workers and owners have a "common goal of uninterrupted production."\(^{176}\) A more direct statement of the necessarily shared interests of owners and labor came from the Court of Appeals for the Fifth Circuit in a decision predating Darlington: "If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, *the only system under which either labor or management would have any rights*, is on its way out . . . ."\(^{177}\) Thus, preserving the freedom of employers to make entrepreneurial decisions was thought to be consistent with an economic system that was seen as essential to the interests of both labor and capital. This view was consistent with mainstream economic theory at the time of these decisions and remains the dominant basis for economic policy today.\(^{178}\)

As previously discussed, organized labor itself accepted this position.\(^{179}\) Labor even became an enthusiastic proponent of capitalism, viewing economic growth as the way to improve the standard of living for workers.\(^{180}\) Likewise, this theory was pressed by liberal, pro-labor academics, most notably Professor Cox, who asserted that liberal capitalism would serve the interests of labor.\(^{181}\)

By the time of its *First National* decision, the Court was much more overt in expressing its underlying assumption. The Court declared that the collective bargaining process under the NLRA served the interests of "both management and labor and . . . society as a whole."\(^{182}\) Put in its best light, the Court's grant of economic discretion to employers was intended to ensure that capital would be put to its most efficient use. Social benefits would result even when plants were closed, since the capi-

---


178. Again, this is still the standard explanation for "trickle down" or "supply-side" economics. See Bluestone & Harrison, supra note 13. It was well-accepted, mainstream economic doctrine when Darlington was decided. See, e.g., Lefwich, The Price System and Resource Allocation 16-20, 326 (1963).


180. See supra notes 58-63 and accompanying text. This situation created an ironic dilemma for labor, in that its own institutional philosophy was consistent with the creation of a right of entrepreneurial control which ultimately gave employers the flexibility to flee from the high cost of American labor. See infra notes 201-28 and accompanying text.


182. First National Maintenance, 452 U.S. at 678. Presumably the Court felt that its decision in that case likewise furthered the interests expressed.
tal could be reinvested, creating new jobs.\textsuperscript{183}

While Darlington and First National leave much to be desired as a reading of the express provisions of the NLRA, it is important to recognize that the Court assumed that it was acting in the interests of labor and pursuant to the goals of the NLRA. The Court explained its decisions as aiming not to alter the basic system of capitalism.\textsuperscript{184} However, to the extent that the Court intended to reach a result that preserved the goals of the Act within the context of capitalism, it had extensive flexibility. The actual holdings of the cases went a great deal further than required by that broad purpose, by preserving maximum flexibility for capital. Arguably, the Court’s decisions did facilitate the growth of the economy and the efficient use of capital.\textsuperscript{185} However, the arrival of the global economy significantly undermined the assumption that the interests of labor and capital can be treated as identical for purposes of interpreting the NLRA.

\textbf{B. The Advent of the Global Economy}

During the past two decades the global economy became a reality, and capital took advantage of a new opportunity to advance its interests at the expense of labor.\textsuperscript{186} Management was once again free to operate without meaningful restraint, transferring production from high-wage union workers in the United States to workers in developing countries who can be employed under conditions remarkably similar to those that existed in this country prior to the NLRA.\textsuperscript{187} This change has contributed substantially to the decline of union membership, which is now at an all-time low.\textsuperscript{188} In addition, other American interests are being sacrificed\textsuperscript{189} as American companies pursue their traditional goal of increasing profits by reducing costs.\textsuperscript{190} This new economic environment has left organized labor with little but empty rhetoric as virtually every manufacturing sector has moved a large part of its production offshore.\textsuperscript{191} The NLRA offers virtually no remedy for labor against such management decisions, largely because of the Court’s decisions permitting unrestricted plant closings.


\textsuperscript{184} See, e.g., Darlington, 380 U.S. at 270.

\textsuperscript{185} See supra part V.A.

\textsuperscript{186} See Collingsworth, supra note 20, at 32.

\textsuperscript{187} See id. at 55-67.

\textsuperscript{188} There are other reasons for the decline in union membership, but the transfer of production in the manufacturing sector is one of the primary causes. See infra notes 201-18 and accompanying text.

\textsuperscript{189} For a discussion of the other interests affected, see infra note 244 and accompanying text.

\textsuperscript{190} See, e.g., KARL MARX, \textit{WAGE-LABOUR AND CAPITAL} (39 International Publishers Co. 1993) (1884).

\textsuperscript{191} See infra notes 206-21 and accompanying text.
Given the serious flaws in the Court's reasoning in creating a right of entrepreneurial control, a generous inference is that it was attempting to reconcile the NLRA with a real concern that labor rights would become meaningless without a robust economy. However, through its decisions, the Court unwittingly created a situation in which the freedom of entrepreneurial control enabled employers to exclude American labor from further participation in the gains of expansion. The global economy provides an opportunity for American industry to continue production without American labor. Furthermore, American trade laws have encouraged globalization, largely without regard to the impact on workers' rights.

Thus, it is not surprising that the first real clash of interest between workers' rights protected by the NLRA and the goals of capitalism occurred with the advent of the global economy. To modify a well-known statement justifying trickle-down economics, what's good for General Motors is no longer necessarily good for America, and particularly for GM's American employees.

Each plant closure or reduction in force made possible by the Supreme Court's decisions, which gave the employer virtual unfettered discretion in this area, has caused the loss of high paying, heavily unionized manufacturing jobs. This unmistakable anti-labor impact of the Supreme Court's labor policies provides a clear opportunity to examine whether the Court remains committed to formulating a policy that benefits "both management and labor and . . . society as a whole." The Court must examine the extent to which its policy-based decisions, none

192. See supra part IV.
193. See supra notes 164-85 and accompanying text. Without the benefit of the doubt, we are left with the possibility that the Court was in fact implementing an overtly anti-labor policy.
194. See Collingsworth, supra note 20, at 67-86.
195. To be sure, there have been clashes of interests in the many cases in which the employer and the union have negotiated contracts or the employer attempted to get rid of the union. However, throughout all of these microclashes, the protagonist saw no reason to question the basic assumption that labor and capital shared an interest in allowing capital to seek its most efficient use.
196. The original statement was made by the former president of General Motors, "Engine Charlie" Wilson, during his confirmation hearings for the position of Secretary of Defense. When asked whether he could foresee a conflict between the interests of the nation and those of GM that might cloud his judgment as Secretary of Defense, he replied that "what was good for our country was good for General Motors and vice versa." E.g., Robert Reich, Corporation and Nation, ATLANTIC MONTHLY, May 1988, at 76. General Motors now has substantial manufacturing facilities abroad, including plants in Japan and Korea, where it manufactures cars and parts for export to the United States. E.g., Edwin Finn, Jr. & Kathleen Healy, We've Met the Enemy, and They Are Us?, FORBES, Feb. 9, 1987, at 78, 83.
197. For statistics on the decline of union membership and the loss of jobs, see infra notes 216-18 and accompanying text.
198. First National Maintenance, 452 U.S. at 678. See supra notes 164-85 and accompanying text for a discussion of the Court's efforts to formulate a policy consistent with the goal of furthering commerce for the benefit of society.
of which were compelled by the language of the NLRA,\textsuperscript{199} have directly undermined the interests of workers and American "society as a whole." These decisions must be adjusted to reflect the underlying policy they purport to further. If the policy is no longer being served, any justification for the decisions is gone.\textsuperscript{200}

The next section demonstrates the direct relationship between the Court's policies and the flight of American employers. Following this discussion, part VI offers several proposals to modify the Court's policies in order to reflect the contemporary reality of the global economy and preserve the express rights protected by the NLRA.

C. Job Loss and Capital Flight: The Effect of the Supreme Court's Creation of a Right of Entrepreneurial Control

Professor Gorman has summarized the long-term effect of the Supreme Court's decisions interpreting the NLRA to give employers wide discretion in making economic decisions:

American workers are currently afforded little or no legal protection at times of employment termination resulting from relocation or closing of their workplace. For those American workers covered by the National Labor Relations Act, its modest regulation of such major managerial decisions has been unnecessarily and unwisely confined by the federal courts and to some extent even by the National Labor Relations Board.\textsuperscript{201}

In this passage, Professor Gorman was speaking of the lack of protection afforded workers in the purely domestic context.\textsuperscript{202} Here, at least, it may be possible to justify the result by asserting that the overall economy might benefit by increased efficiency of capital investment.\textsuperscript{203} Still focusing on the domestic situation, but acknowledging the changes on the horizon, Judge Mikva criticized the failure of the NLRA to address reality:

When the Act was passed, perhaps the single owner of the single plant had interests close enough to those of labor that any partial shutdown that was not strictly necessary meant cutting off the nose to spite the face. But now owners of conglomerates have the ability to shut down discrete lines of business in order to move capital to a completely different enterprise in a different state. Changes in technology, communications, and transportation mean that capital and equipment can be moved cross-country quickly and easily. The Act and the Board have failed to change with the times; the model of the local, single-product corporation is no

\textsuperscript{199} See supra part IV.
\textsuperscript{201} Gorman, supra note 107, at 1371.
\textsuperscript{202} Id. at 1354-55.
\textsuperscript{203} See supra notes 164-85 and accompanying text.
longer an accurate guide.\textsuperscript{204}

These concerns are greatly magnified in the global economy. The difficulties of monitoring the activities of a large, diverse manufacturer, which now can search the entire world for a safe haven, create new problems that still more urgently require the courts and the NLRB to update their policies.\textsuperscript{205}

Examples from the modern global economy illustrate the impact of the current policies and bring to life the changes in the world economy that have nullified the basic assumptions underlying the Supreme Court’s labor policy decisions. Long before there were serious discussions of the North American Free Trade Agreement ("NAFTA"), American companies made use of a tariff agreement between the U.S. and Mexican governments to set up assembly operations called \textit{maquiladoras}.\textsuperscript{206} This arrangement permits American companies to export components to Mexico, duty-free, which are then assembled and exported to the U.S., with duty charged only on the value added by the assembly.\textsuperscript{207} Most \textit{maquila} plants are in the border towns,\textsuperscript{208} which emphasizes the nature of the arrangement. American companies are using the \textit{maquilas} to escape their obligations to pay American wages and comply with hard-won labor regulations like the NLRA.\textsuperscript{209} The biggest names in American industry, including General Motors, Ford, and General Electric, have been closing unionized American plants and moving their operations to Mexico.\textsuperscript{210}

At the same time, across the Pacific in Malaysia, American companies have found another safe haven from union wages and labor regulation. Malaysia has become the country of choice for the American electronics industry. All of the major American electronics companies have operations there, and have formed a cartel called the Malaysian-American Electronics Industry ("MAEI").\textsuperscript{211} The main attraction for the American firms is that workers in an electronics plant in Malaysia

\textsuperscript{204} Mikva, \textit{supra} note 50, at 1129 (footnote omitted).

\textsuperscript{205} The various options for phasing out product lines and shifting production from one country to another have rendered traditional terminology obsolete. The blatant "runaway shop" accounts for only about 2\% of job losses. \textit{Bluestone \& Harrison, supra} note 13, at 6-10.


\textsuperscript{207} Collingsworth, \textit{supra} note 20, at 80-81.

\textsuperscript{208} \textit{La Botz, supra} note 206, at 162-63.

\textsuperscript{209} Collingsworth, \textit{supra} note 20, at 81-82.


\textsuperscript{211} Petition Before the U.S. Trade Representative for Malaysia’s Violations of the Worker Rights Provision of the Generalized System of Preferences, filed by The International Labor Rights Education and Research Fund, at 2 (1990) [hereinafter Fund Petition].
earn roughly $100 per month. Further, the Malaysian government has instituted policies to encourage the electronics industry to relocate to Malaysia, including a guarantee that unions will not be permitted to form at any electronics company. As a result, American companies have been closing their U.S. facilities and transferring production to Malaysia, where the government continues to forbid the formation of independent unions in the electronics industry.

The global economy has had a devastating impact on American workers and unions. Statistics compiled by the U.S. Department of Labor pursuant to its implementation of the Adjustment Assistance Act indicate that all of the major unions representing workers in labor-intensive, relatively unskilled manufacturing, such as the auto, steel, and textile industries, have suffered substantial membership losses. The statutory prerequisite to assistance under this legislation is that workers must be terminated due to "foreign competition." Between April 1975 and October 1989, the Department of Labor certified benefits for 1,223,280 union and 542,795 nonunion workers, including 681,252 autoworkers, 193,631 steelworkers, and 83,229 textile workers.

There are no reported NLRA cases in which union employees have challenged an employer's decision to close an American facility and relocate to a nonunion plant in a developing country. The main reason is that under current law, as developed by the Supreme Court in Darlington and First National, workers displaced by relocations to other countries have no remedy under the NLRA. The Court's policy-based analysis did not anticipate the impact of the global economy on worker rights under the Act.

A routine example demonstrates that current interpretations of the NLRA provide no relief for the workers who lose their jobs when their employer exercises "entrepreneurial control" by transferring production to a developing country to take advantage of cheap, nonunion labor. In February 1992, General Motors ("GM") announced a number of plant closings across the U.S., and indicated that some of the work would be

---

212. This is the approximate starting monthly wage for production workers at multinational electronics firms in Malaysia. Id. at 60.
213. Id. at 13-18.
214. See DATACENTER, MALAYSIAN-AMERICAN ELECTRONICS INDUSTRIES ASSOCIATION COMPANIES EXPERIENCING JOB LOSSES (summarizing domestic plant closings by MAEI companies) (on file with author).
215. See Fund Petition, supra note 211, at 15-17.
transferred to Mexico. The closures included a union engine plant in Moraine, Ohio, where 549 jobs were lost. The work was transferred to another GM plant in Toluca, Mexico.

If the Ohio GM employees wanted to challenge the plant closing decision, the first issue would be whether the NLRA prohibits the decision to close and relocate to Mexico. Darlington would control. A major initial problem for the workers would be that in this situation, unlike the facts in Darlington, there is no direct evidence of anti-union sentiment. Thus, the employees would have to carry the nearly impossible burden of establishing that GM had the requisite intent, while GM could argue that "economics" was the exclusive motivation, not anti-union sentiment.

Further, even if the employees could demonstrate that the closing was for anti-union reasons, they probably would be left without an effective remedy. Following the Darlington test, the premise for any relief for a partial closing is that the employer would reap a future benefit due to the chilling effect the closing would have on the section 7 rights of the remaining employees at facilities that were still operating. Assuming that GM's remaining U.S. employees are unionized, the only remaining employees likely to be discouraged from organizing are the Mexicans. However, they are not covered by the Act and therefore have no rights that could be chilled. Thus, the prerequisite for Darlington's partial closing exception—the employer's closure of a plant for the purpose of chilling the section 7 rights of the company's remaining employees—could not be met.

In this example, GM acknowledged that it was transferring the American jobs to Mexico. A more typical case would present additional problems of proof, including the issue of whether there was a relationship between a particular closing and offshore production. It is common for

---

220. Id.
221. Id.
222. See supra notes 88-127 and accompanying text.
223. In Darlington, the Court assumed that the employer closed the plant because the employees had voted to unionize. 380 U.S. at 268-69.
224. The issue of whether "economics" should be a legitimate defense is discussed infra notes 270-88 and accompanying text.
225. In the example, the closing would be "partial" because GM is still in business and is selling its product in the United States. An employer must "terminate his entire business" in order to obtain the benefit of Darlington's holding that it can close for anti-union reasons, because only then can it be said that the closing failed to yield "future benefit" to the employer. 380 U.S. at 262, 268.
226. Id. at 275-76.
228. See 380 U.S. at 275-76.
large multinational firms to discontinue product lines and replace them with "new" products manufactured in offshore facilities. The domestic workers who previously would have produced the new products are laid off. These workers might never learn that, but for the availability of cheap foreign labor, they would have continued working on the new products, nor are they likely to be able to trace the loss of their jobs to the initiation of a new production at another facility. This scenario is particularly typical when the company subcontracts the work to a foreign firm, making it all the more difficult to trace the lost work.

As for bargaining rights, application of First National to the GM example would be unlikely to result in a bargaining order. First, the decision to open the Mexican facility is almost certainly beyond the scope of bargaining under traditional NLRA analysis. It is a decision to expand, and it arguably relates to a fundamental change in the direction of the business. In addition, if it involves opening a new product line, the First National Court indicated that decision would be beyond the scope of bargaining.

Assuming that GM was probably free to open a new facility without bargaining, the subsequent decision to close the American plant probably also would be beyond the scope of bargaining. This action likewise could be characterized as a change in the direction of the business. In addition, as with the decision to discontinue the business relationship in First National, the Court would probably find little to be gained from the bargaining process. With the large differential in labor costs between Mexican and American workers, it is unlikely that management could be convinced to continue to pay American wages. Also, it is highly improbable that the American workers could be persuaded to take a reduction of nearly 90% in their wages and benefits. Futility is, in itself, a substantial factor in declining to order an employer to bargain. In a remarkable example of circular reasoning, the Supreme Court noted in First National that if there was a chance of resolving the matter through bargaining, the employer most likely would agree to pursue that

229. See Bluestone & Harrison, supra note 13, at 6-10.
231. For a discussion of First National Maintenance, see supra notes 128-62 and accompanying text.
232. See First National 452 U.S. at 677.
233. Id. at 688 (dictum).
234. See id. at 677; see also, NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961) (holding that an employer has discretion to close single plant of a multi-plant operation).
235. See First National, 452 U.S. at 679.
236. See La Botz, supra note 206, at 165.
The implication of this observation is that if the employer chooses not to bargain, it must be that bargaining would be futile and should not be ordered.

First National would also allow GM to argue that it had a great need for "speed, flexibility, and secrecy" in the highly competitive international auto manufacturing business. Therefore it could not take the time to bargain. However, this argument might lose its force in light of the recently enacted Worker Adjustment and Retraining Notification (WARN) Act, which requires employers to give sixty-days' notice before implementing any major reduction in force or plant closing. In effect, as a response to the contemporary crisis of plant closings, Congress has declared that workers' right to advance notice takes precedence over an employer's need for speed, to allow workers the time needed to take steps to avoid or mitigate the associated job loss.

Despite WARN, GM probably would not be ordered to bargain. Moreover, even if bargaining were ordered, as the Supreme Court has observed, "[t]he employer has no obligation to abandon its intentions or to agree with union proposals." If the decision to relocate is not unlawful, a requirement to bargain is merely a procedural hurdle that at most delays the implementation of the decision.

The implications of a policy that allows massive displacement of American workers go well beyond the loss of jobs. The nation's trade deficit soars as American-based multinationals shift their production offshore and then import goods previously manufactured in the United States. Estimates are that from 29% to 46% of all imports in the United States are brought in by American-based multinationals that now manufacture or subcontract the manufacture of these goods in another country. Under these circumstances, which are directly attributable to development of a judicial policy that predated the complications of the global economy, continued application of the outdated Darlington-First National policy is unjustified.

238. First National Maintenance, 452 U.S. at 682.
239. See id.
241. Id. at § 3(a).
242. See id.
244. See Collingsworth, supra note 20, at 53 and sources cited there. Further, there are other obvious problems created by increased use of offshore production. For example, national security interests are compromised when key components to defense-related equipment, such as steel and electronics components, are manufactured abroad.
V

RECONSIDERING DARLINGTON AND FIRST NATIONAL IN THE CONTEXT OF THE GLOBAL ECONOMY

Much has been written about the problems of the global economy generally.245 Another body of work focuses on worker rights, calling for standards applicable on an international scale.246 The discussion here is limited to the question of how to undo one of the primary causes of the loss of worker rights in the U.S.: the policy-based Supreme Court decisions in Darlington and First National which authorized employers to engage in wholesale relocation of production and jobs to developing countries.247 If the decisions were well-intentioned,248 today’s strong evidence that the underlying assumption for the policy they implemented is no longer valid should provide sufficient grounds for reconsidering these decisions, or at least modifying them to take account of the realities of the global economy.249 There can be little doubt that one of the integral goals of the NLRA was to protect worker rights,250 and there is reason to believe that the Court was attempting to further this goal by facilitating the growth of the economy.251 Without compromising the Court’s view that entrepreneurial control is an important value that warrants protecting, it is possible to deal with the new problems associated with the global economy in a manner that restores the rights of American workers.

Considering Darlington’s effect on worker rights under the NLRA, there are compelling reasons for reconsidering its holding. The primary question before the Court in this case was whether an employer had an absolute right to go completely out of business.252 The Court’s holding that a business does have that right,253 while itself subject to criticism, requires that an employer go completely out of business. Such total closure does not present special problems in the global economy.254 Thus, the central thrust of Darlington, along with all its premises about the health and safety of free enterprise in America, could remain intact.255


246. See generally, CAVANAGH, supra note 230; Collingsworth, supra note 20.

247. This discussion will focus on the legal and policy issues. For a discussion of proposed solutions for bringing about repair of the domestic harm, see, e.g., Barron, supra note 183, at 1405.

248. See supra notes 164-85 and accompanying text.

249. See supra notes 216-18.

250. See supra notes 68-78 and accompanying text.

251. See supra notes 164-85 and accompanying text.


253. See supra note 101.

254. If an employer genuinely goes completely out of business, there is no issue of flight to either Georgia or Malaysia.

255. See supra notes 164-85 and accompanying text.
It is the Court's analysis of the partial closing situation that has insulated employer closings that transfer work abroad, and this portion of the decision had little to do with protecting the values of capitalism in American society. By focusing on the chilling effect on any remaining domestic employees, instead of on the discrimination practiced against those who lost their jobs, the Court created a large, unnecessary loophole that has immunized multinational runaways. This approach deviated from the Court's normal method of analyzing discrimination cases under section 8(a)(3). In the context of global runaways, this approach prevents relief: the Court's partial closing test cannot be met if the remaining workers are foreign, and thus not covered by the Act.

This problem can be solved by shifting attention back to the American workers who stand to lose their jobs. These are the workers who should have been the Court's concern all along. The Court's three-part analysis for an unlawful partial closing, which is designed to determine whether the employer has a sufficient stake in another operation that employees in that other location will fear that they too, will lose their jobs if they unionize, should be reoriented to focus on the more relevant question of whether the employer has remained in business with nonunion employees. If so, the employer would not qualify for the only absolute exception that the Court has recognized to an 8(a)(3) violation: the employer's right to go completely out of business.

If an employer remains in business with nonunion employees following the closing of a union facility, whether or not the remaining employees are foreign, this finding should suffice to come within the direct prohibition of section 8(a)(3). The employer would necessarily have made a choice that discriminated against those employees who have exercised section 7 rights: the workers at the facility designated for closure. A finding that the employer had remained in business with nonunion employees would create a rebuttable presumption of discrimination. To rebut this presumption, the employer would have to demonstrate that

256. See 380 U.S. at 274-76.
257. See supra notes 113-24 and accompanying text.
258. See ATLESON, supra note 56, at 136-42; Gorman, supra note 107, at 1357-59.
259. See supra notes 206-28 and accompanying text.
260. See supra notes 114-27 and accompanying text.
261. See Darlington, 380 U.S. at 275-76.
262. Id. at 268.
263. In cases in which employees technically belong to a union, but are denied basic worker rights, the standard should be whether the employees have internationally recognized worker rights, not whether they are in a union. For many reasons, unions in developing countries may not protect basic rights of members. See, e.g., LA BOTZ, supra note 206, at 39-60.
264. The NLRB occasionally has apparently based its decisions on this premise, finding a § 8(a)(3) violation due to the direct violation of the § 7 rights of the terminated employees, without performing any analysis of the chilling effect on remaining employees. See, e.g., Sahara-Reno Corp., 262 N.L.R.B. 824 (1982); Capitol Chrysler-Plymouth, 242 N.L.R.B. 1274 (1979).
there was actually another, legitimate reason for the choice, a routine application of the NLRB's Wright Line test. Following a prima facie showing, Wright Line requires an employer to prove that the "same decision" would have been made, regardless of anti-union intent. Since the employer often is the exclusive source of information about its alternative production facilities, it is particularly appropriate to require the employer affirmatively to defend any closing.

Although not discussing its approach or confronting the problems of the Darlington holding, the Fifth Circuit Court of Appeals applied the Wright Line test to a case in which an employer closed a department within an ongoing business following the employees' election of a union. The court described various indications of anti-union intent that established a prima facie case, then, citing Wright Line, shifted the burden to the employer, and found that the employer failed to discharge the burden. This approach is true to the language and purpose of section 8(a)(3), and avoids the Darlington Court's interpretive stretch that premised a finding of discrimination on whether the rights of employees elsewhere, who had not yet been discriminated against, were chilled. Adoption of the Fifth Circuit approach also allows relief in situations where the remaining employees are foreign.

Returning to the example of the GM plant closing, since GM did not go completely out of business, a presumption would arise that the company had closed its union facility in Ohio for anti-union reasons in violation of section 8(a)(3). GM would then have the opportunity to demonstrate that it actually had legitimate reasons for the choice. It could, for example, claim that the Mexico plant was closer to raw materials or closer to the ultimate market for the finished product. But in a situation where components are shipped from the United States to Mexico for assembly by cheap, unprotected labor, then shipped back to the U.S. for sale, it would be difficult for GM to establish that a reason other than the abundance of cheap, nonunion labor had genuinely motivated the move, with its decidedly anti-union effect.

This example does raise a difficult question: whether an employer

265. See e.g., Peabody Coal Co. v. NLRB, 725 F.2d 357, 367 (6th Cir. 1984) (employer can defend a § 8(a)(3) charge by showing "some other, lawful rationale for [the] disparate treatment.").


267. Wright Line, 251 N.L.R.B. at 1089.

268. NLRB v. Robin Am. Corp., 654 F.2d 1022, enforced as modified on reh'g, 667 F.2d 1170 (limiting Board order, which had applied to all future department closings, to apply only to individual department at issue) (5th Cir. 1981).

269. Id. at 1024-25. The Board also followed this approach in Litton Mellonics Sys. Div., 258 N.L.R.B. 623 (1981), enforced, 738 F.2d 447 (9th Cir. 1984) (finding that the plaintiff met its burden for establishing a prima facie case, but defendant had also met its rebuttal burden).

270. See supra notes 110-27 and accompanying text.
could raise a legitimate defense by establishing that low wages, not anti-union sentiment, had motivated the decision to close a union plant. In other words, could an employer successfully argue that economic expediency is a legitimate defense to conduct that has an anti-union effect?

This issue has not been fully developed, despite its obvious significance. The probable reason is that an employer has rarely had to supply any justification following a plant closing, whether full or partial. Darlington has effectively rendered section 8(a)(3) meaningless due to its focus on the rights of employees at another domestic plant. Some pre-Darlington cases assumed that wage increases following unionization could justify a decision to terminate union employees on the theory that it was cost, not anti-union intent, that had motivated the discharge. However, none of these cases considered the larger implications of whether economics would always be considered a defense.

For example, NLRB v. Adkins Transfer Co. upheld the discharge of two maintenance employees following the employees' decision to join a union. The court credited the employer's testimony that "it was purely and simply a question of costs" and went to great lengths to demonstrate that the employer did not harbor any hostility towards unions. The court then found that the requisite anti-union intent could not be established. It determined instead that "[t]he real reason [for the discharge] was because the union wage scales were too high for the respondent to operate profitably . . . ."

271. As a practical matter, Darlington discouraged § 8(a)(3) charges from being filed because of difficulties of proof in a plant closing situation. In order to file a § 8(a)(3) charge under Darlington, employees must locate their counterparts at some other facility in which their employer had a legally sufficient ownership interest and, if those other employees are covered by the NLRA, demonstrate that there was a "realistically foreseeable" chance that those employees would be chilled in the exercise of their rights by the closing. See Darlington, 380 U.S. at 275-76.

272. See, e.g., NLRB v. New England Web, Inc., 309 F.2d 696, 701 (1st Cir. 1962) (overturning NLRB order finding violation of § 8(a)(3) because employer showed that its actions were not anti-union, but instead the result of financial distress); NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 175 (2d Cir. 1961) (overturning NLRB order because transfer of business to nonunion plant was required by economic necessity, even though the move was accelerated or reinforced by the employer's dispute with the union at the original plant); NLRB v. Lassing, 284 F.2d 781, 783 (6th Cir. 1960), cert. denied, 365 U.S. 909 (1961) (overturning NLRB order because service station owner had decided to discontinue shipping gasoline by using its own employees before union's arrival and because union could potentially ask for wage increases); NLRB v. Adkins Transfer Co., 226 F.2d 324, 327-28 (6th Cir. 1955) (overturning NLRB order because employer's action was not motivated by anti-union feelings and because union wage scales for service employees were so high that the services could be more cheaply performed by outside business concerns); Jay's Foods, Inc. v. NLRB, 292 F.2d 317, 320 (7th Cir. 1961) (overturning NLRB order because employer, in abolishing its automobile repair department was motivated by economic concerns); see also Chester C. Ward, "Discrimination Under the National Labor Relations Act," 48 Yale L.J. 1152, 1154-57 (1939).
Perhaps this interpretation could be justified on the ground the employer in *Adkins Transfer* simply could not operate with the union wage scale, and thus had no choice. This approach would be consistent with the NLRB's position that economics may provide a legitimate defense when an employer closes or relocates in response to unionization if the employer is "financially unable to withstand or meet [the] union's economic demands . . ." It might also be defended as consistent with the overall goals of the NLRA since neither the employer nor the employees would benefit if the employer were forced out of business.

Yet beyond this limited situation, it could not have been the intent of Congress to shield employers from liability for discharging workers who join unions simply because the employer objects to paying higher, union wages. It is difficult to believe that a genuine reason other than an objection to the increased costs of unionization fuels most anti-union behavior. The NLRA would be rendered meaningless if a simple demonstration of increased costs permitted anti-union conduct. As the NLRB stated in considering this question, "[a]lthough the employees' decision to organize may result in economic expense to their employer, Congress cannot have intended to permit the employer for that reason to take anticipatory action and to nip such organization in the bud."

Even if the question is close, permitting the courts some leeway to make a policy determination, it is difficult to imagine a situation that could have a more detrimental impact on the goals of the NLRA. To allow the fact that workers not covered by the Act cost less to control determinations of liability for anti-union conduct would sanction and foster a return to pre-Act conditions, with one significant difference: today, the jobs would be transferred away from the United States. This outcome would produce no benefit to workers or to this society, except for the employer who could have the best of both worlds by using third world labor while still enjoying access to first world markets. As the Fourth Circuit Court of Appeals stated in a similar context in *Alkire v. NLRB*, "such easy evasion of the obligations imposed by the Act would frustrate its objectives and render its protections illusory.

---


279. See supra notes 176-85 and accompanying text.


283. 716 F.2d 1014 (4th Cir. 1983).
indeed."\(^{284}\)

Although it has not directly considered the question, the Supreme Court did state in dicta in *First National* that "[a]n employer may not simply shut down part of its business and mask its desire to weaken the union by labeling its decision 'purely economic.' "\(^{285}\) By this statement, the Court appears to have been endorsing the view that it would render the Act completely meaningless if an assertion of economic motives were sufficient to defend a charge of anti-union conduct.

Problems associated with the global economy can readily be factored into the analysis of bargaining cases. However, the potential for bargaining requirements to respond to the challenges of the global economy is not nearly as significant as is the law relating to the decision to close. As the *First National* Court noted, it is section 8(a)(3) that protects against anti-union conduct.\(^{286}\) If the act of transferring work to a developing country is not unlawful, the bargaining requirement simply adds a procedural hurdle that may result in some delay in implementing the decision.\(^{287}\) At most, the employer would be required to bargain to impasse, becoming free at that point unilaterally to implement the decision to relocate.\(^{288}\)

The Supreme Court added the interests of capital to the bargaining equation in recognition that societal interests would not be served if a business was unduly hampered by a requirement to bargain.\(^{289}\) However, when the question is no longer whether society will benefit from a company's freedom to relocate or shift capital within that society, but instead whether the company can relocate capital and jobs to another society, the conclusion should be different. At this point, the Supreme Court's already questionable decision to balance the interests of capital in determining whether to require bargaining\(^{290}\) becomes even more objectionable. The inappropriateness of this approach increases along with the degree of hardship caused, relative to the benefit gained, as jobs are lost forever to another country.\(^{291}\)

Questions as to wages are normally the most directly susceptible to

\(^{284}\) *Id.* at 1018 (commenting on the need to prevent corporate employers from evading the Act by simply altering the corporate form or forming shell corporations).

\(^{285}\) *First National Maintenance*, 452 U.S. at 682.

\(^{286}\) *Id.*

\(^{287}\) See supra note 243 and accompanying text.

\(^{288}\) See 452 U.S. at 678, n.16.

\(^{289}\) *Id.* at 678-79.

\(^{290}\) See supra notes 153-62 and accompanying text.

\(^{291}\) See, e.g., Schatzki, supra note 280, at 1380-82. Discussing the damage to society from plant closings, the author does point out that even when a company flees to another country, society may receive a benefit in the form of lower prices. See also Barron, supra note 183, at 1391-92, 1398 (discussing the closing of plants and the hardship on workers and communities).
bargaining.\footnote{292} When a company relocates in search of cheap labor, wages are clearly at issue, especially when the company has no other plausible explanation for the move and incurs the added transportation cost of shipping most of the manufactured goods back to the U.S. for sale.\footnote{293} Thus, this should be the most obvious of decisions to hold subject to bargaining.\footnote{294} The problem remains, however, that an employer is simply required to bargain in good faith and is not bound to agree to any demands.\footnote{295} Even with sincere bargaining, it is unlikely that an American union could make sufficient concessions to come close to wages in developing countries. Unless the employer is prohibited from making such a move based on a modified \textit{Darlington} analysis,\footnote{296} it is unlikely that bargaining rights will seriously improve the chances that union workers can keep their jobs.

\section*{Conclusion}

When Senator Wagner introduced the NLRA, he spoke of it as a logical step in the "evolution" of humanity.\footnote{297} A case certainly can made that the protection of worker rights afforded by the NLRA resulted in tremendous progress for workers.\footnote{298} However, the benefits produced by this evolution are in danger of extinction as the NLRA becomes increasingly irrelevant. There are numerous possible explanations for the current situation. But there can be little doubt that a primary reason is the severe limitations that the Supreme Court imposed on the NLRA by elevating the right of entrepreneurial control above the express rights provided in the Act. The Court's rulings here allowed employers to use their entrepreneurial control in a way that is extremely detrimental both to workers' rights and to the objectives of the Act.

This course can be reversed by reexamining the Supreme Court's key labor policy decisions in light of the new realities of the global economy. While the changes suggested in this article will not cure all the problems of worker rights in the global economy, they will restore to the NLRA the power to confront the most blatant of anti-union tactics, a complete or partial closing in response to unionization. A more comprehensive solution will require careful consideration of international trade and the implications of labor policies and other policies that might result

\begin{itemize}
\item \footnote{292}{See \textit{First National Maintenance}, 452 U.S. at 676-77.}
\item \footnote{293}{See \textit{supra} notes 201-15 and accompanying text.}
\item \footnote{294}{See \textit{supra} notes 146-56 and accompanying text.}
\item \footnote{295}{\textit{First National Maintenance}, 452 U.S. at 678 n.17.}
\item \footnote{296}{See \textit{supra} notes 252-84 and accompanying text.}
\item \footnote{297}{\textit{Legislative History}, \textit{supra} note 18, at 47.}
\item \footnote{298}{There also exists an opposing view: that by aligning the interests of workers with the capitalist system, the NLRA destroyed a chance for meaningful reform of the quality of work and reduced American workers to consumers of goods. \textit{See generally Braverman, supra note 15.}}
\end{itemize}
in competitive disadvantages. However, such a solution may become unreachable if the flow of high-paying manufacturing jobs out of the United States continues unabated.

The ideal solution would be for Congress to update the nation's labor laws, bringing them into line with the realities of the global economy. But as far as global runaways are concerned, the statutes are serviceable in themselves; what has flawed our law is the Supreme Court's interpretations, premised as they are on assumptions about the economy and the national interest that no longer hold true. It is the responsibility of the Court to correct this situation. The Court's decisions in Darlington and First National were seriously flawed as exercises in statutory interpretation, and could be justified even at the time only as a matter of policy. Now that the flaws in that policy are so evident, no reasonable justification remains for the Court's position.

299. See Collingsworth, supra note 20, for an identification of some of the many issues that must be resolved to implement a rational overall labor policy that protects worker rights in the global economy.

300. See Mikva, supra note 50, at 1135-39 (advocating a radical overhaul of the Wagner Act).