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NLRA Values, Labor Values, American Values

Ellen Dannin†

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A few years ago, a public radio producer for a local talk show called me. He wanted a nonpartisan, expert guest to analyze and explain the legal

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issues involved in a local strike. I answered his questions about collective bargaining and strike law with basic black letter labor law. He was clearly surprised that the law did not require employees to take whatever an employer offered. He also thought that employees who struck had quit their jobs and had no right to come back to work.

I was not surprised that the producer did not call back, for I could sense, even over the telephone, that to him black letter labor law seemed so radical it just could not be true. When the show aired a few days later, the show's sole guest was the struck company's human resources director. No one was there to present the union's point of view, and there was no nonpartisan guest to give a neutral explanation of the issues.

I suspect that few in the radio audience thought it odd to have the views of only one partisan to a dispute when that person was a company official. We may have reached the point where any business representative is regarded as neutral and reliable, while a union official is partisan and the representative of a special interest. These days, it seems that the National Labor Relations Act (NLRA), the National Labor Relations Board (NLRB), and unions are popularly regarded as irrelevant and even un-American. I think that this experience captures some reasons why union membership is declining. The subject, of course, is complex, and discussion of it is usually heated.

I.
INTRODUCTION

The 2004 election inserted the issue of values into public discussion at a level most of us would not have anticipated. This coincided with my completing the draft of a book whose central focus is values, but not the sort of values that have been discussed in the election and since. Taking Back the Workers' Law: How to Fight the Judicial Assault on Labor Rights, argues that the values embodied in the National Labor Relations Act matter to labor and to the welfare of this country. Those familiar with the NLRA know that it has no section labeled "values." I contend,
however, that important social, justice, and economic values are expressed in—and underpin—the NLRA’s policies found in sections 1, 2(3), 7, and 13.\textsuperscript{4} This is to say that the NLRA’s policies play the role—or should play the role—of any legislative policy: providing guidance in interpreting and applying the law. In addition, they are intended to—and should—be used to transform the fundamental values of this country.

In my view, the NLRA was drafted to be far more than a technocratic exercise. Through its values, the NLRA was intended to play an expansive role in restructuring and transforming this society. \textit{Taking Back the Workers’ Law} presents a comprehensive program for using the NLRA’s policies—and its values—as part of a litigation strategy to restore its power to promote worker collective action in the workplace. But, more important, it emphasizes that enforcing the law is but one part of a broader educational and litigation strategy to create a more just and democratic society. The educational and litigation strategies in \textit{Taking Back the Workers’ Law} are inspired by those developed by the civil rights movement and the NAACP Legal Defense Fund in the first half of the 20\textsuperscript{th} Century to overturn legalized racial apartheid in this country.\textsuperscript{5}

In other words, \textit{Taking Back the Workers’ Law} is more than a manual for smart litigation. Its basic premise is that unions cannot survive—and certainly cannot thrive—in a country whose core values are inhospitable to the essence of what unions as worker representatives are and do. \textit{Taking Back the Workers’ Law} urges taking a fresh look at the NLRA, seeing it as the Workers’ Law with a potential for reinvigorating the labor movement and saving the soul of this country. That potential springs from the NLRA’s policies—not as a list of simple statements of purpose, but, rather, as mapping to values of industrial and social democracy, solidarity, social and economic justice, fair wages and working conditions, equality, and industrial and social peace. The NLRA itself and its policies embody values that were intended to, and still can, transform our workplaces and our society.

II.

\textbf{TAKING BACK THE WORKERS’ LAW}

\textit{A. NLRA Policies as Values}

These words are written in 2005, the seventieth anniversary of the enactment of the National Labor Relations Act. I write as a member of a

\textsuperscript{5} See RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY (1975).
society in which the noble ideas of the NLRA seem quaint, at best, perhaps irrelevant or even hostile to labor's interests. But I say: although late, it is time to honor the National Labor Relations Act by putting its policies into practice. Now is the time to begin the process of creating a society imbued with the values of the NLRA? Certainly, the society in which we all will thrive is one built on values of industrial and social democracy, solidarity, social and economic justice, fair wages and working conditions, equality, and industrial and social peace.

Taking Back the Workers' Law maps out a detailed program of legal and litigation strategies beyond the scope of this article. Although the book's main focus is on developing a litigation strategy, it recognizes that success depends on far more than good lawyering. Litigation coupled with a public education campaign that was built on the values of justice and equality were critical to the successes of the NAACP Legal Defense Fund. So, too, a critical component of the strategy for taking back the Workers' Law is an education campaign. Taking Back the Workers' Law offers an invitation to join a campaign to build on these strategies, and so, too, does this article. I am confident that this campaign can succeed. We can apply lessons learned from campaigns to change laws and values to take back the Workers' Law—the NLRA.

The campaign I advocate is not the only effort to reshape our values and rights. At this very time, we see conservatives advancing a long-term, broad-based campaign built on their values to transform United States policy and society. That campaign was begun decades ago. One measure of its success is the change in the type of legislation that can be enacted now versus that which was enacted during the Nixon administration. Although a Republican, laws enacted during his presidency included the Occupational Safety and Health Act (OSHA) and the National

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6. Briefly, Taking Back the Workers' Law considers current proposals for reviving the labor movement, such as statutory reform and Board avoidance. It then argues the merits of a litigation strategy. The book explores the forces that have led judges to rewrite labor and employment laws, often in ways that are fundamentally at odds with the statutes' express language. Taking Back the Workers' Law dissects a series of cases in order to assess which values and rights influence judges' decisions—NLRA values and rights versus property or economic values and rights. It builds on this information by identifying the challenges most likely to be encountered and most likely to affect the interpretation of the NLRA and the arguments and strategies that can be used to trump them. It builds on these ideas to outline a long-term strategy for using litigation to take back the NLRA. That strategy is built around NLRA policies and values, the subjects discussed in this article.

Taking Back the Workers' Law also explores sources outside the NLRA, such as international law and United States laws, that are consonant with NLRA values and policies and can be used in litigation and in educational campaigns to strengthen those values and policies. Developing a strategy to take back the Workers' Law depends on more than policies and theory. One of the challenges is the NLRB's role as doorkeeper for NLRA litigation. Therefore, the book provides information on technical aspects of enlisting the NLRB's support for using a litigation strategy to take back the Workers' Law and for dealing with situations in which the NLRB is opposed to it.

Environmental Policy Act (NEPA). American values and the balance of power have changed so greatly in thirty years that these laws would not even be proposed by a Democratic administration and would not be acceptable to many, even liberals.

The United States is not the only country experiencing a campaign to change its values. For example, in Canada, the Simon Fraser Institute has endeavored to effect fundamental ideological change in a conservative direction. Beginning in the late 1970’s, New Zealand was the arena for a campaign to alter public values in order to replace a collective bargaining law with individual employment contracting law. There, employer and conservative groups campaigned to change public opinions about the nature of society, work, citizenship, and employer-employee rights and obligations. We can learn from the methods used and the substance of the messages, and assess where they succeeded and why.

The NAACP Legal Defense Fund and NAACP themselves are inspiring models of what can be done to change public attitudes and values. They teach us that a powerless minority can create and execute a long-term plan to supplant a system infused with legalized racism. When their campaign began in the 1930’s, racism was entrenched in statute, in Supreme Court precedent, and in the very architecture of this country. This is not to say that there is no more work to do in order to create a country where all are treated justly and given true equal opportunity; but, as a result of the work of the NAACP and the NAACP LDF, this is a country that has made great strides in the right direction.

I also speak as a child of the Depression. This does not mean that I literally lived through the Great Depression. But I grew up in a single-parent family, headed by a disabled mother, in the small Ohio community where my ancestors had farmed since the late 18th century. A necessary part of the food we ate came from foraging in the local forests, growing it ourselves, working picking crops, and getting handouts. Poverty is a wonderful teacher. You learn the values of thrift, to throw nothing away—not food, not clothes, not furniture, not books, no matter how bad, tattered,
or out of style. Nothing. Poverty teaches you to make the most of what you have.

Unions today are living in their own Great Depression, but they are not applying the lessons of poverty. Instead, many in the union movement are turning their back on resources that still have value. The greatest tragedy of these is the attack on the NLRA and the NLRB. While neither is perfect, they are resources that can become important tools in labor’s arsenal. I argue and demonstrate in Taking Back the Workers’ Law that what hurts labor most is not the NLRA itself. It is that judges have “rewritten” the NLRA in their decisions. The laws that most undermine unions are striker replacement, implementation upon impasse, lockouts, weak remedies, and the breadth of the reach of secondary boycott law.11 None of these, except the secondary boycott, can be found in the NLRA.12 Some of these doctrines actually undercut express NLRA rights and policies, such as protection of concerted and labor activities,13 the right to strike,14 and the obligation to bargain in good faith concerning workplace terms.15 All of these, as they are now applied, including the law on secondary boycotts, are the product of “judicial amendments” to the NLRA.16

It does not have to be this way. A litigation and activist strategy that is rooted in the NLRA’s policies and values and that is undertaken with imagination and intelligence can make a profound change. What I propose is something that is not now on the radar screen for most people, so let me give a modest example. It is commonly believed that NLRA section 8(c) gives employers a broad right of free speech. In fact, many speak of it as the employer’s free speech right.7 But, when read closely, section 8(c) says nothing about employers nor rights. Even more important, its language offers opportunities that unions could add to their arsenal.

Section 8(c) speaks of speech broadly, as the “expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, 11. These issues are discussed throughout Taking Back the Workers’ Law. See TAKING BACK, supra note 3 passim.
17. See, e.g., David Brody, Labor vs. the Law: How the Wagner Act Became a Management Tool, NEW LAB. FORUM, Spring 2004, at 9, 13 [hereinafter Labor vs. the Law]. As I was writing Taking Back the Workers’ Law, I did an informal poll of labor law professors and found that they characterized section 8(c) as creating a free speech right for employers. After I told them that the language of 8(c) says nothing to limit its application to employers nor about rights and asked them to reread section 8(c), they concurred that it might have been used in too limited a way. For a discussion of section 8(c)’s enactment and an analysis of its application, see Alan Story, Employer Speech, Union Representation Elections, and the First Amendment, 16 BERKELEY J. EMP. & LAB. L. 356 (1995).
printed, graphic, or visual form . . . if such expression contains no threat of reprisal or force or promise of benefit.” Again, nothing in the language of section 8(c) limits its application to employers, and it says nothing about protecting free speech. Section 8(c) merely says that certain sorts of speech cannot be evidence of a violation of the NLRA. Nothing in section 8(c) says it does not apply to unions and employees. Section 8(c) is the employer free speech right only because everyone has stopped reading the statute and come to accept this label.

There is, however, no reason to let this continue. Unions could use the now well-developed section 8(c) jurisprudence of employer free-speech rights and advocate applying parallel rights to unions. In other words, they can take back this small piece of the Workers’ Law to make section 8(c) into a resource unions can develop into a useful protection. Unions use a wide range of speech, including views, arguments, and opinions in written, printed, graphic, or visual form, and speech plays a role in many union unfair labor practices. Violations of section 8(b)(4) often depend on union or employee speech. In other words, a litigation strategy to take back the Workers’ Law would seize this as an opportunity to push judges to apply the law developed under section 8(c) to give unions and employees “free speech rights” that are the equal of employers. As a result, section 8(c) could provide a general free speech proviso to sections 8(b)(4)(i) & (ii), the secondary boycott prohibitions of the NLRA.

The litigation strategy I propose seeks to reexamine and rethink the language of the NLRA and capitalize on opportunities to expand it to promote the NLRA’s policies. This example is not meant to suggest that the strategy to take back the Workers’ Law is about clever parsing of statutory language. It is about being mindful and open to opportunities, to not getting stuck in destructive and limiting patterns of thought about labor law and rights. But far more important, it is about basing reform in NLRA policies. That discussion is the core of this article: how these policies in and of themselves embody values that were intended to—and still have the power to—shape our workplaces and our society to be more humane, just, and democratic.

B. Why NLRA Values and Policies Matter

NLRA policies matter in two ways. First, they say that work and the way workers are treated is central to determining the sort of country the United States will be. They provide the tools so workplaces can operate on principles consistent with those of a democratic country. Put another way, NLRA policies set out steps to make workplaces more democratic and to

empower workers by giving them the skills to be citizens of a democracy. Cynthia Estlund observes that the NLRA’s “most basic provisions—were grand and ennobling, for they proposed the extension of freedom and democracy into industrial life. It articulated fundamental rights; it laid the groundwork for institutions of self-governance within industry.”

The NLRA says that our country’s welfare depends on what happens between employer and employee within the workplace. The NLRA is the Workers’ Law. It envisions unions’ fundamental mission to be improving wages and other working conditions and standing with and supporting workers. These actions are the foundation on which industrial democracy can be built. The NLRA’s noble vision of unions’ role in promoting fairness is one that will appeal to American workers and the public at large. Actions by unions that demonstrate what this means will go far to persuade the unorganized that union membership and engagement is what they want.

The second way that NLRA policies matter is that a law’s policies are the standard against which every case decision can be measured. The NLRA’s policies include promoting collective bargaining; safeguarding workers’ full freedom of association, self-organization, and designation of representatives of their own choosing; acting for mutual aid or protection; achieving equality of bargaining power; protecting the right to strike; preventing business depressions; improving wage rates; increasing the purchasing power of wage earners; and stabilizing competitive wage rates and working conditions within and between industries. In other words, we can—and should—assess decisions in each NLRA case by whether it promotes one or more of these policies. A decision that does not promote NLRA policies and values is essentially not a legal interpretation of the

20. This issue is one on which there is a fundamental difference of opinion among unionists. Unions are now embroiled in a fierce debate about the very purpose of the union movement. That debate is described in Richard Hurd, The Failure of Organizing, The New Unity Partnership, and the Future of the Labor Movement, 8 WORKINGUSA 5 (2004), and Benjamin Day, Organizing for (Spare) Change? A Radical Politics for American Labor, 8 WORKINGUSA 27 (2004). Michael Zweig is promoting a more conscious attention to class. He argues “that union organizing will largely fail unless it is conducted in the context of a broad social movement for worker rights, which in turn needs to be embedded in a broad class-based social movement that challenges capitalist power if not the capitalist system itself. Such a movement will need to assert directly and openly the interests of workers as a class in opposition to the interests of capitalists, also taken as a class.” Michael Zweig, Class-Based Union Organizing (Oct. 2, 2002) (unpublished paper delivered at Workers Rights Conference, East Lansing, Michigan, Oct. 11-12, 2002), available at http://www.lir.msu.edu/event/worker-rights/Zweig.doc.
Unfortunately, NLRA values have too often been ignored, their power left untapped. But these policies are still the law, and the success of a litigation strategy to take back the Workers' law and promote the success of unions must be built on them.

C. A Modest Example of Using NLRA Policies for Decision Making—
NLRA Remedies

1. The Current State of NLRA Remedies

The NLRB has broad power to order remedies, yet many now complain that NLRA remedies are so weak as to be useless. The NLRB itself has initiated reforms to improve remedies, including General Counsel Leonard Page's advocacy for seeking front pay and the NLRB's 1999 remedial initiative, which stated, in part:

In order to improve the effectiveness of the Agency’s remedial arsenal so that we can more fully achieve compliance with the Board's orders and the Act, the General Counsel would like to pursue several remedial initiatives. Some of these initiatives are necessitated by recent economic and technical changes in the workplace, while others represent an effort to correct longstanding remedial deficiencies.

It is well settled that the Board has broad power to determine the proper scope of its remedial orders, particularly with respect to affirmative relief. The Supreme Court “has repeatedly interpreted [section 10(c)] as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review,” in which the Circuit Courts of Appeals “should not substitute their judgment for that of the Board in determining how best to undo the effects of unfair labor practices.”

In short, it is the Board's institutional role to serve as a remedial laboratory, which involves a responsibility to periodically rethink and update its remedial strategies. It is in this spirit that the following initiatives are proposed. Until there are Board decisions affirming these remedies, we recognize that it will be difficult to attain them in informal settlements. However, to the extent that a Region can successfully incorporate these

23. As one scholar has put it, “[t]he legitimacy of Board determinations is dependent upon their conformity to statutory policy.” Lee Modjeska, In Defense of the NLRB, 33 MERCER L. REV. 851, 855 (1982).


remedies into settlement agreements, seeking these remedies in the context of settlement is encouraged.\textsuperscript{27}

While, in this case, the NLRB properly recognized that section 10(c)\textsuperscript{28} requires it to seek remedies that effectuate the Act’s policies, in general, it has done little to use the NLRA’s policies as the yardstick against which remedies must be measured. Of greatest importance has been its failure to be guided by the requirement in section 10(c) “to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.”\textsuperscript{29} Instead, the NLRB has developed a reflexive menu of remedies which it seeks in most cases, giving no thought to whether and how they promote the NLRA’s policies.\textsuperscript{30}

I contend that new legislation is not necessary to attack the problem of weak remedies. What is necessary is to demand remedies that obey the command of section 10(c) and to demonstrate what those remedies are. Critics of NLRB remedies speak as though the NLRA had a rigid scheme of remedies, but this is not the case. Not only does the NLRA not require any specific remedies,\textsuperscript{31} it places no upper limits on remedies. Rather, section 10(c)’s only command is that remedies promote the Act’s policies. The Supreme Court says this task of making the Act’s policies effective is central to the Board’s powers.\textsuperscript{32}

The policies against which NLRA remedies must be measured are to be found in sections 1, 7, and 13 and are discussed below.\textsuperscript{33} Briefly, they include promoting collective bargaining, equality of bargaining power, freedom of association, and employee mutual aid and protection, as well as protecting the rights to form and join unions and to strike. One permissible reading of section 10(c) says that any remedy that does not promote the NLRA’s policies is not lawful. Any ineffective remedy must, therefore, be replaced by ones that do promote the NLRA’s policies.

One part of the litigation strategy I propose involves the hard work of changing the business-as-usual way of trying NLRA cases. In the case of remedies, this means persuading judges and the Board that NLRA remedies

\textsuperscript{27} Memorandum from Richard A. Siegel, Associate General Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, OM 99-79 (Nov. 19, 1999), available at http://www.nlrb.gov/nlrb/shared_files/ommemo/ommemo/om99-79.asp?useShared= (emphasis added).

\textsuperscript{28} 29 U.S.C. § 160(c) (2002).

\textsuperscript{29} Those policies are to be found primarily in sections 1, 2(3), and 7 of the NLRA. 29 U.S.C. §§ 151, 152(3) & 157 (2002). See discussion infra Part III.

\textsuperscript{30} I speak as a former NLRB field attorney. When the Region decided to issue complaint, we cut and pasted remedies from a form book. I cannot recall a single case in which we thought over what remedy was necessary and appropriate in the specific case.

\textsuperscript{31} Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

\textsuperscript{32} Phelps Dodge, 313 U.S. at 191, 192-93.

\textsuperscript{33} See infra Parts III-V.
should not be boilerplate, to recognize that the law demands that their
decisions be measured against the benchmark of the extent to which they
promote NLRA policies and rights.  

The NLRB is the expert agency charged with interpreting the statute
and promoting its policies. According to one judge,

Congress deliberately drafted section 10(c) to include all reasonable
remedies consistent with the Act's purposes. The final version of section
10(c), authorizing "such affirmative actions . . . as will effectuate the
policies of [the NLRA]" replaced earlier provisions that had enumerated
specific types of remedies available to the Board. The broader language
was intended to "delegate to the Board the primary responsibility for
making remedial decisions that best effectuate the policies of the [NLRA]."
The Board's choice of remedy "should stand unless it can be shown that the
order is a patent attempt to achieve ends other than those which can fairly
be said to effectuate the policies of the Act." And, "[the court is] obliged to
deferr heavily to the Board's remedial decisions."  

The Supreme Court in Phelps Dodge explained, "A statute expressive
of such large public policy as that on which the National Labor Relations
Board is based must be broadly phrased and necessarily carries with it the
task of administrative application . . . . It entrusts to an expert agency the
maintenance and promotion of industrial peace."  

It therefore is—or should be—the Board's job to monitor whether
remedies are effective, and, if they are not, to seek remedies that will be
effective. This is not the NLRB's task alone. Those who criticize the
NLRA's remedies as weak are obliged to engage in actions that will lead to
change and improvement. The avenues for doing so are laid out in Taking
Back the Workers' Law and sketched below. The whole task is not the
NLRB's. All of us have a critical role to play. For many of us, our current
task is to remind the NLRB of its mission, to demonstrate where it has
failed, and to provide the resources so it can change and improve. We
cannot do this if we are rigid, hide-bound, or unimaginative. We need to
free ourselves from the shackles of old ways of thinking about the NLRA.
In the case of remedies, we must bear in mind that what we have come to
think of as NLRA remedies—and, indeed most of what we think of as

34. To achieve this, one component of a successful litigation strategy must be the development of
a jurisprudence of NLRA values. NLRA policies have been so little used or even referred to that this is
close to a blank slate. In the next section, I take some steps toward filling in that space. This is no small
task. Its success depends on the efforts of many.

[hereinafter Litigational Process].

and citations omitted). Although Judge Wald was dissenting in part, the dissent was not over this
principle.

37. Phelps Dodge, 313 U.S. at 194; Republic, 324 U.S. at 798.
NLRA law—are often not based on the NLRA itself. They are, instead, the creations of the judicial process. Therefore, they can be changed using the judicial process.

2. Ways to Strengthen NLRA Remedies

Showing that remedies do not promote the NLRA’s policies lays the groundwork for replacing them with ones that do. How is this theory to be translated into effective remedies? The litigation strategy would: (1) identify the NLRA policies that apply to the specific violation, the injury it has caused, and the actions necessary to undo the harm and promote those policies; (2) demonstrate at trial—and in detail—how current remedies do or do not promote specific NLRA policies; and (3) present evidence—not mere unsupported argument or theory—showing that the proposed remedy will promote NLRA policies. Here, briefly, is an example of how this strategy would work with two remedies—backpay and bargaining orders.

a. Backpay Remedies

A common complaint is that backpay remedies for workers who have been illegally discharged during an election campaign are so low it pays employers to violate the NLRA. The studies on which this claim is made should be introduced into the record at the NLRB hearing, and the researchers who conducted the studies should be called as expert witnesses to testify concerning their data. Their testimony must include evidence that explains how such a discharge undermines the NLRA policies that promote self-organization, mutual aid and protection, and equality of bargaining power.

In addition, there must be studies and expert witness to present evidence that demonstrates the level of back pay that will ensure that this worker and other workers feel free to organize a union. But it is not sufficient to focus only on the impact on the workers. There should also be evidence as to what level of back pay will encourage this employer and other employers to abide by the law and respect workers’ legal right to organize. It may be helpful to call on theories such as disgorgement to make the case for increased backpay and monetary remedies.


39. In Avondale Industries, Inc. (Avondale II), 15-CA-12639 (July 6, 2001), the administrative law judge found the employer guilty of severe and egregious unfair labor practices and ordered it to reimburse the government for litigation expenses. See Avondale Indus., Inc. 337 N.L.R.B. 33 (2001). However, it must be borne in mind that the Supreme Court’s 1938 decision in Consolidated Edison Co. v. NLRB holds that NLRB remedies may only be remedial and may not be punitive. 305 U.S. 197 (1938). As long Consolidated Edison is the law, it is necessary to demonstrate why a proposed remedy
The studies and expert testimony that can be effective evidence include case studies and statistical analyses. It can also include testimony of those with practical experience, including lay witnesses, such as employees and union representatives. The Federal Rules of Evidence permit testimony of lay witnesses as to opinions or inferences that are rationally based on the witness’ perceptions and helpful to determining a fact at issue.40

b. Remedies for Bad Faith Bargaining

The usual remedy for bad faith bargaining, an order to bargain in good faith, does little to prevent an employer from going back to the bargaining practices it has already used to undermine bargaining and deprive employees of their NLRA rights.41 Put another way, it does nothing to promote the policy of collective bargaining, because it does not persuade that employer—or other employers—to bargain. The question is: What would be an effective remedy for bad faith bargaining?42 To be effective, it must promote employees’ equality of bargaining power and their right to self-organization and to engage in the practice of collective bargaining for the purpose of negotiating the terms and conditions of their own employment. If an order to bargain in good faith does not promote these policies—and even undercuts them—what remedy would promote the NLRA’s obligation to bargain?

One intriguing possibility is ordering interest arbitration as a remedy. In interest arbitration, the union and employer present evidence to an arbitrator as to why their proposals are most appropriate. The arbitrator then decides, based on that evidence, which proposal will be the terms of the parties’ collective contract.

Interest arbitration would make it impossible for an employer to resume bad faith bargaining and obstructing a bargained agreement. It would make actual bargaining more attractive. Whereas, in bargaining, an employer has some input into the terms of an agreement, in interest arbitration, the arbitrator decides the terms. In order to persuade the arbitrator to choose its proposed terms, the employer would have to provide
evidence in support of its proposals. This is potentially a greater intrusion into an employer’s privacy than opening its books to the union if the employer cries poverty. In addition, the union could be given discovery of the employer’s records in order to rebut the employer’s claims and present the case for its own proposals. Interest arbitration might also have the effect of persuading this and other employers to engage in genuine collective bargaining—and thus not to engage in bad faith bargaining. For all these reasons, interest arbitration could be a remedy that promoted the NLRA policy for collective bargaining.

Interest arbitration is just an example of a remedy judges today might be persuaded to impose, one that does not have legal precedent against it, and one with greater ability to promote NLRA policies than a bargaining order. But others are also possible. What I propose is that, in every case, careful thought be given to what the appropriate remedy should be. It should be requested before the hearing begins. Finally, evidence that demonstrates why a better remedy is needed and what that remedy is must be introduced during the trial. Each of these steps must be guided by thoughtful analysis as to what remedy would be effective in promoting freedom of association, equality of bargaining power, acts of mutual protection, unionization, and collective bargaining.

What is done with remedies can be done with doctrine after doctrine. In other words, serious thought needs to be given to identifying how and whether well-entrenched doctrines, such as striker replacement, promote or undermine the NLRA’s policies and then developing a litigation strategy to overturn those that fail the test.

44. A remedy that is not currently available is an order requiring the inclusion of a specific term in an agreement. The Supreme Court majority held that such a remedy for bad faith bargaining was not permissible. H.K. Porter, 397 U.S. at 102. The Court stated in a conclusory way that the object of the NLRA was to ensure that employers and employees work together to establish mutually satisfactory work conditions. Id. at 103. It did not engage in any real consideration of whether its ruling promoted NLRA policies, other than section 8(d)’s statement that the obligation to bargain does not compel agreement on a proposal or a term. Id. at 108. A case such as H.K. Porter presents the question whether creating a record that demonstrates the appropriateness for such a remedy for bad faith bargaining could persuade the Court to revisit this issue.
45. In the 1990’s the NLRB was willing to pursue innovative remedies and even persuaded courts to enforce them. For example, some cases imposed attorney or negotiation fees for abuse of the litigation process and for bad faith bargaining. See, e.g., Unbelievable, Inc., 118 F.3d 795 (D.C. Cir. 1997); Avondale Indus., 15-CA-12639 (July 6, 2001).
46. Int’l Bus. Machs, 339 N.L.R.B. 966 (2003) (denying union request that a notice be posted electronically because the request was not made in the underlying proceeding before the administrative law judge or the Board). Details about the rules for doing this are discussed in chapter seven of Taking Back the Workers Law, supra note 3. Failure to request an innovative remedy before the hearing can be grounds for denying it. NATIONAL LABOR RELATIONS BOARD, NLRB CASEHANDLING MANUAL, PART ONE - UNFAIR LABOR PRACTICE PROCEEDINGS § 10266.1, at 10266 (2003), available at http://www.nlrb.gov/nlrb/legal/manuals/FORMAL%20PROCEEDINGS%202010250%2010452.pdf.
NLRA VALUES

D. Failing to Focus on NLRA Policies

Although the NLRA’s policies have been little used in deciding cases, the idea that they should matter is not new. In *Curtin Matheson*, for example, the Supreme Court said that the Board “may adopt rules restricting conduct that threatens to destroy the collective-bargaining relationship or that may impair employees’ right to engage in concerted activity.” In his dissent in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, Justice Blackmun said that judges should not issue decisions whose logic undermines the basic purpose of a statute. He said that an employer “cannot be permitted to reap rewards from a strike so much in excess of the rewards of negotiation that it will ‘have a strong reason to prolong the strike and even break the union.’” Blackmun said the majority’s decision was encouraging “employers to test the limits” of the law and needlessly creating “incentives to undermine long-term labor stability and to expand labor conflicts beyond their natural bounds.”

Unfortunately, courts so often focus on minutiae or non-NLRA rights and policies that they fail to see the harm their decisions do to NLRA rights and policies. An example of this problem can be found in the D.C. Circuit’s 1997 decision in *International Paper Co. v. NLRB,* which permitted actions that effectively violated the NLRA. In *International Paper*, the parties began bargaining for a successor contract in early January 1987. On February 20, the employer said it would lock out the employees if the union did not accept the employer’s “best and final” offer. The union rejected the offer, and on March 7, International Paper (“IP”) unilaterally implemented its proposal and hired temporary replacements through BE&K. On March 21, the company locked out its employees, claiming this was to forestall whipsawing.

During the lockout, International Paper proposed to the union that the employer be given the right to temporarily or permanently contract out maintenance work. The union insisted that it was willing to bargain about the subcontracting proposal, but all the parties knew the union could never agree to it. One union representative said, “Do you think that we are going to give up 280 jobs? We want to stay alive. You’re going to get us killed.” The union and employer representatives knew that judicially legal doctrines were shaping what the parties did and said, and that those doctrines did

49. *Id.* *Trans World Airlines* was decided under the Railway Labor Act; however, the logic and holding of NLRA and RLA cases are often applied across statutes.
nothing to promote the practice of collective bargaining or any other NLRA policy.

The parties knew that, had the union refused to bargain, the employer could implement its final offer, and when an impasse was reached, the employer also was allowed to implement its final offer. In short, this judicial doctrine meant there was nothing the union could do to persuade the employer to bargain. On August 11, International Paper declared an impasse and implemented permanent subcontracting of the maintenance work. The Court of Appeals said, truthfully and without irony, that, in doing this, the company was “fulfilling its bargaining obligations on the issue.” However, this was an obligation that met only the requirements of judicial doctrine and not those of the NLRA.

The court reached its conclusion that none of IP’s actions violated the law without ever considering whether its decision promoted or undermined NLRA law and policies. Instead, it looked only at each discrete issue and concluded that, since each step was sanctioned by judge-made law, so too must be the whole of the acts. It found that, because past judicial decisions said employers have the right to lock out employees, this lockout was legal. It said that, because the union did not agree to give IP the right to subcontract bargaining unit work permanently at its sole discretion, IP had the right to implement its subcontracting proposal and then subcontract the work. In one sense, all this was good law. The court was simply applying judicial doctrines that had been developed over many decades.

But the reality is that the court allowed IP to terminate the unit employees, destroy the bargaining unit, and end the union’s status as employee representative. These actions violate sections 8(a)(3) and 8(a)(5). The court effectively allowed IP to discharge the employees solely for not agreeing with the employer’s offer, an act that violates section 8(a)(3). Even if the court did not see that these actions violated the NLRA, the result might have been different had it asked how permitting an employer to pursue this course of action furthered the Act’s goals of promoting equality of bargaining power and collective bargaining.

Indeed, had the court thought about the parties’ actions and their meanings, it would have seen that IP was in no danger of a strike. The union had said it would not strike, despite the party’s failure to reach an
agreement. A thoughtful court would have found this curious and, had it considered the matter, would have understood that the union could not strike because it was afraid IP would permanently replace the strikers, a judicially created doctrine that is mentioned nowhere in the NLRA.\textsuperscript{54} The court would have also seen that the cumulative effect of all these doctrines was that the union faced an employer whom law had given the right to dictate an offer that the union had no power to reject and that the employer had the right to use the most extreme measures to enforce its rights. A court that looked at all these facts would have had no trouble seeing that the employer's actions were against the plain wording of the NLRA and also undermined its policies. But the court did none of these things. As a result, it did what Justice Blackmun feared: it "needlessly created incentives to undermine long-term labor stability and to expand labor conflicts beyond their natural bounds."\textsuperscript{55}

In order to strengthen the NLRA, to take back the Workers' Law, judges must be helped to see when and how a decision or even longstanding doctrine undermines or destroys an NLRA policy. To do this, those who deal with NLRA cases must maintain a sustained focus on the NLRA's policies. Unfortunately, in my experience, even people who work with the NLRA regularly rarely think about its policies. This must change. A fundamental part of developing a strategic litigation policy is collectively mining the NLRA's policies for opportunities and strategies to remake and strengthen the Workers' Law. This means studying the policies and considering what they mean, how they operate, how they can be expanded and applied.

However, taking back the Workers' Law is about more than clever lawyering tactics to tweak and prod the law to move in a new direction, although it includes that. It is about seeing the NLRA's policies broadly, seeing them as embodying values for establishing a society built on the principles of social and economic justice and democracy. The balance of this article takes the first steps of exploring the dimensions of the NLRA's policies as values in order to lay the foundations for a more just society.

\textsuperscript{54} RAY, ET AL., \textit{supra} note 51, at 270-79. In fact, section 13 says: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (2002).

\textsuperscript{55} \textit{Trans World Airlines}, 489 U.S. at 456-57.
III.

VALUES AND POLICIES—THE NLRA WORKPLACE AND SOCIETY

NLRA section 1 paints two pictures of society and work, employers and employees. It first shows a society being destroyed as a result of a power imbalance in the workplace. It then explores how this unequal power between employers and employees came about. Finally, section 1 sets out its vision for a new society built on a balance of power. This vision is rooted in the workplace, but with effects felt throughout society.

The NLRA’s portrait of a society with a power imbalance should seem familiar to us. In that society of seventy years ago, wage rates and the purchasing power of wage earners were depressed. Employers had so much power they were able to compete by lowering wages and working conditions. Nothing stood in their way as they continually ratcheted down working conditions. With wages depressed, workers were able to buy little. This led to a society plagued by recurring business depressions. Eventually, workers reached the limits of what they could tolerate and struck back. As a result, the fundamental infrastructure of this society was in danger of being destroyed.

The NLRA identifies the cause of all these problems as law, especially corporate law. Corporate law had helped one side—employers—to become collective and immortal and to amass power far in excess of that of the employee, who had only the power of an individual. As a result, employees could not bargain with employers as equals. They could not act together collectively, because they had no rights to freedom of association and could not contract as an equal with an employer. Therefore, freedom of contract existed only in theory.

NLRA section 1 tells us that the private workplace is not truly private. What happens at work does not remain there. It spills out into society, and when there is inequality and injustice in the workplace, society pays the price for that inequality.

The NLRA provides a process to remedy inequality in the workplace and thus to repair our society. This is not ancient history. It is the world we are living in today. We now see unparalleled levels of corporate power.

57. “[F]rom 1980 to 2002, the latest year of available data, the share of total income earned by the top 0.1 percent of earners more than doubled, while the share earned by everyone else in the top 10 percent rose far less. The share of the bottom 90 percent declined.” Editorial, New Hope for the Fabulously Wealthy, N.Y. TIMES, June 7, 2005, at A22; see also David Cay Johnston, Richest Are Leaving Even the Rich Far Behind, N.Y. TIMES, June 5, 2005, §1, at 1; Max B. Sawicky, The Easy Money, AM. PROSPECT, May 22, 2005, at 61; Robert B. Reich, The Vanishing State?, AM. PROSPECT, Apr. 19, 2005, at 12; Sen. Kennedy Comments on Budget Conference Resolution, US FED. NEWS, Apr. 28, 2005, at 1, available at 2005 WLNR 6861679.
Wages and worker benefits have stagnated for years. So, at the very least, there is no evidence that the NLRA's insights in this area were wrong.

The sections in which the NLRA sets out its policies are inextricably linked in order to give rights to all employees. Its section 1 policies and insights become explicit employee rights in section 7, enforced through section 8(a). Section 7 grants employees the right to give one another mutual aid and protection, to seek union representation, and to bargain for better working conditions. Section 1 articulates the need to protect employee voice and collective power; section 7 actually protects employee voice and collective power. Section 2(3) strengthens these rights by giving all employees the legal right to make common cause with one another, regardless of who their employer is. Finally, section 13 says that nothing in the NLRA is to be interpreted so as to interfere with, impede, or diminish the right to strike. These collectively are the building blocks of worker and workplace power.

These basic NLRA rights are built on the value of employee solidarity. As Staughton Lynd says, NLRA rights are communal rights and unions are built on collective values:

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59. In the words of William Corbett:

What can nonunionized employees get in the workplace from the section 7 right to engage in concerted activity for mutual aid or protection? The most obvious thing is voice, a means for nonunion employees to express their views and to obtain information regarding terms and conditions of employment and other aspects of the employment relationship and the business. The second thing that employees might obtain through exercise of this section 7 right is power. . . . Power is a less direct result of the exercise of section 7 rights, and, even when mustered, it rarely, if ever, will reach the level in the nonunionized context that it does when there is a union and a collective bargaining agreement. Still, exercise of section 7 rights can give employees some power. . . . Section 7 gives employees the flexibility to decide what they want and protects them in undertaking their own concerted actions to persuade the employer to give them what they want. The employer is not required by law to give employees what they want, but the employer cannot fire the employees for acting in ways that cause the employer to do so. Moreover, the exercise of voice may cause employees to seek unions or other representative structures that will increase their power to obtain what they want.

A number of Board and court decisions in the last few years on the issue of protected concerted activity suggest that section 7 is becoming an important law for nonunionized employees and that it could become even more important.


60. Section 2(3) defines employees as including any employee and as not limited to the employees of a particular employer. 29 U.S.C. § 152(3)(2000). Put another way, section 2(3)'s main purpose is to define who is an employee. This definition is critical, because only employees have rights under the NLRA. As a result, anyone who does not fall into the definition of employee is not protected, and there are limits on protections for making common cause with someone who is not an employee. Could these limits be overcome by proving that making common cause with a non-employee was necessary to promote the employee's NLRA rights? One example would be raising wages in a community for people not defined as employees, domestic workers for example. As their wages are increased, this might make it easier to increase those of other workers in the community. See, e.g., UFCWU, Local 1036 v. NLRB, 307 F.3d 760 (9th Cir. 2002), cert. denied, 537 U.S. 1024 (2002).
I suggest that the right of workers “to engage in concerted activities for 
... mutual aid or protection” now guaranteed by federal labor law is an 
example of a communal right. More than any other institution in capitalist 
society, the labor movement is based on communal values. Its central 
historical experience is solidarity, the banding together of individual 
workers who are alone too weak to protect themselves. Thus, there has 
arisen the value expressed by the phrase, “an injury to one is an injury to 
all.” To be sure, at times particular labor organizations, and to some extent 
trade unionism in general, fall short of this communal aspiration. Yet it is 
significant that trade union members still address one another as “Brother” 
and “Sister” and sign their correspondence “Fraternally yours.” These 
conventions evidence an underlying attitude and practice fundamentally 
different from that in business and even in academia, where one person’s 
job security subtracts from, or at most is separate from, another’s.

... There is nothing metaphysical or indeterminate about this right. It 
arbitrates the historical experience of rank and file workers. It is, if 
anything, more specific in content than most legal rules. No one has ever 
doubted that “concerted activity” meant strikes, picketing, the formation of 
labor organizations, and related activities. And it is clearly not a right akin 
to an individual’s ownership of property. On the contrary, it is a right to act 
together, to engage in activity commonly and most effectively undertaken 
by groups.61

Therefore, fundamental to creating a jurisprudence of NLRA policies and 
rights is an understanding of collective values and worker solidarity. The 
NLRA’s policies are intended to protect values that are critical to forming 
and sustaining a good society, by providing processes for achieving 
collective employee power, leading to balance in the workplace.

In my view, the policies set out in sections 1, 2(3), 7, and 13 can be 
divided into two basic groups: those that promote personal values and those 
that promote commercial values. These rights are found not in just one 
section, but are usually included in several. We tend to think of the NLRA 
policy concerning interstate commerce as protecting only employer 
interests. Here, I argue that we should be looking at these policies in a 
different way. I contend that both personal values and commercial values 
promote employee interests.

What I am arguing for is a novel way of looking at the NLRA. My 
experience is that people read section 1 of the NLRA, if they have read it at 
all, as an amorphous mass. They do not take the time to notice that it is 
composed of discrete parts nor to ponder what each means and how they fit 
together. The litigation strategy I advocate requires first disaggregating 
each policy / value, noticing the roles it plays, and conceptualizing the ways

omitted); see also id. at 1425-26 (examples of solidarity); Lee Modjeska, Litigational Processes, supra 
in which it can be used to make the NLRA’s policies effective. Ultimately, of course, all of these policies must be reintegrated, because they were meant to function as a unified whole. Integrating these policies requires seeing them not just as discrete policies but, rather, understanding how they function as an ecosystem of rights. NLRA rights should be understood as part of a process in which the attainment of some rights has the capacity to lead to the attainment of other rights. For example, acting concertedly is a step toward promoting equality of bargaining power, and this step then can lead to improved wages. In this way, rights can be seen as related in a linear fashion: some are initial, others intermediate, and still others ultimate rights. However, the exercise of NLRA rights is not only linear. As rights are gained in one workplace, they can promote the exercise of rights in other workplaces. In other words, NLRA rights exist within an ecosystem of rights.

To help readers here with the first steps of that process, I have disaggregated the NLRA’s policies and placed them into functional categories. Later in this article, I explore several of them and the roles they can play in taking back the Workers’ Law. The policies and rights I would classify as NLRA personal rights, policies, and values include:

- promoting equality of bargaining power between employees and employers
- creating actual liberty of contract
- protecting the right of employees to organize and protecting employees’ exercise of self-organization
- protecting employees’ exercise of full freedom of association
- protecting employees’ right to mutual aid or protection
- ensuring employees’ right to self-organization and to form, join, or assist labor organizations
- protecting employees’ exercise of choosing their own representatives
- protecting the right of employees to bargain collectively and encouraging the practice and procedure of collective bargaining
- encouraging practices that lead to the friendly adjustment of disputes about wages, hours, or other working conditions
protecting employees’ right to negotiate the terms and conditions of their employment

safeguarding the right to strike

The commercial rights, policies, and values embedded in the NLRA embrace goals that are designed to promote the economic interests of individual workers, employers, and society as a whole. They include:

improving wage rates

increasing the purchasing power of wage earners

stabilizing competitive wage rates and working conditions within and between industries

promoting the free flow of commerce

preventing business depressions

In 1947, the Labor-Management Relations Act (Taft-Hartley) added additional policy goals to each of these policy sections. These co-exist with the original NLRA values. Read together, these additional Taft-Hartley policies include:

eliminating practices by some labor organizations that burden or obstruct the free flow of goods in commerce and that impede the rights guaranteed by the Act

protecting individual employees’ freedom to refrain from joining unions, engaging in collective activities, and engaging in collective bargaining

It is a great loss that, for nearly seventy years, most of the NLRA’s values have been ignored, unexplored, and virtually unused. Even though the courts and the NLRB itself should be guided by these policies, they are not. Indeed, in my experience, it is a rare case that even briefly mentions an NLRA policy. Even when mentioned they are most often given mere lip

62. One exception was NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995), in which the issue was whether “salts” were protected as employees. The Court found salts to be employees and
service. The core personal rights and policies of promoting equality of bargaining power, actual freedom of contract, freedom to choose a representative, and collective bargaining are rarely relied upon in deciding cases. Instead, the personal rights I see the courts most often cite are the right to refrain from engaging in NLRA rights and the policy of encouraging the friendly adjustment of disputes.

The former elevates one right above other NLRA rights that should be at least its equal, and thus makes those rights less effective. The latter is an edited version of what the NLRA actually says: encouraging "practices that lead to the friendly adjustment of disputes about wages, hours, or other working conditions." Here, the courts have not even focused on one policy; they have focused on but one part of one policy and ignored equally important policies. They have effectively promoted a policy of peace at any price. The result is that both of these tendencies fail to promote a balanced and integrated NLRA.

When judges make decisions based on a truncated version of NLRA rights and policies, they radically alter the NLRA. The tendency to seek peace without attention to the process by which peace was achieved was a concern of Robert Wagner. He saw "the important legislative goals of industrial peace and macro-economic growth and stabilization" as "always secondary to the achievement of social justice through democratic consent in the workplace." As to industrial peace, Wagner often advanced the
proposition that tranquil labor relationships were not the sole consideration: "It all depends upon the basis of tranquility. The slave system of the old South was as tranquil as a summer's day, but that is no reason for perpetuating in modern industry any of the aspects of a master-servant relationship."  

The commercial value that the courts most frequently name is promoting the free flow of commerce. We live in a time that celebrates global wage competition despite the fact that it decreases purchasing power, thus destabilizing wages and working conditions. It is not surprising, then, that no court or NLRB decision in my experience even mentions the policies of improving wage rates, increasing the purchasing power of wage earners, or stabilizing competitive wage rates and working conditions within and between industries. 68 Yet, there is no reason to assume that these policies do not matter or were not intended to be of equal importance with the free flow of commerce.  

In short, the courts are interpreting the NLRA as if it were a very narrow statute whose purpose is to resolve disputes, even though that resolution means trampling on the rights of freedom of association and collective bargaining. Judges elevate individual rights over collective rights, even when they undercut the rights of the majority. Our courts reflect what has become the popular view today: that we must value the free flow of commerce, even when it undermines wages and working conditions.  

Unions need to be clear that these interpretations are wrong. Robert Wagner certainly rejected such a narrow view:  

[A]lthough Wagner was one of the earliest advocates of counter-cyclical public spending and redistribution to sustain mass purchasing power, he often said unequivocally that “the moral injustice of gross inequality . . . is more important than its economic unsoundness. . . . Economic stabilization is desirable; social justice is imperative.” Wagner further insisted, in an exchange of letters with John Dewey, that even if distributive justice could be achieved by tax-and-transfer policies, the latter would not remedy the injustice of authoritarianism within workplace relations. Only collective empowerment would implement “the new freedom”—“a freedom for self-direction, self-control, cooperation.” 69

68. See supra note 57. Mark Barenberg says that Wagner supported the NRA's code of "industry-by-industry standardization of minimum labor conditions to ensure that competition did not take the form of "destructive" wage cutting and sweating of labor. . . . Wagner believed that the end of labor sweating was but an instance of a visionary, culture-shaping project initiated by the Recovery program." Barenberg, supra note 67, at 1421.  
If the NLRA is to fulfill Wagner’s vision, it must be on a foundation of NLRA rights and values. The statute itself gives primacy to certain fundamental rights. It is these rights that must form the foundation of all the other NLRA rights. The NLRA says that it is not enough to have a goal of promoting the free flow of commerce, for that goal can only be achieved by following the process which the NLRA also sets out: “by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

As Justice Marshall observed: “These are, for the most part, collective rights, rights to act in concert with one’s fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife ‘by encouraging the practice and procedure of collective bargaining.’” Skipping the process of supporting the attainment of collective rights means the ultimate goals of industrial peace and the free flow of commerce cannot be achieved.

Restoring these values to a central position is critical if we are to have a robust Workers’ Law. The NLRA’s rights and policies map to values and a vision of the just society and a process built on values consonant with that just society. The NLRA’s policies have been long ignored in deciding case, but little time has been spent, certainly in recent years, in envisioning the sort of society they lead to. So there is much work to be done in order to understand these individual values and how they function with one another and, as a whole, construct a just society.

72. In the NLRA’s early days, the Supreme Court affirmed that NLRA rights and policies are part of a process and that failure to achieve the fundamental goals means the ultimate goals are undermined: “Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife.” NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937); see also id. at 45-46. A similar view is expressed in Phelps Dodge Corp. v. NLRB:

Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ultimate concern, as well as the source of its power, was “to eliminate the causes of certain substantial obstructions to the free flow of commerce”. This vital national purpose was to be accomplished “by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association.” § 1. Only thus could workers ensure themselves economic standards consonant with national well-being. Protection of the workers’ right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise.

313 U.S. 177, 182 (1941).
IV.
EXPLORING NLRA POLICIES AND VALUES

The language of the NLRA is clear about what its policies are, yet much interpretation is needed in order to apply them to the cases that the NLRB and courts decide. In *Phelps Dodge Corp. v. NLRB*, the Supreme Court observed:

A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. . . . [I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.  

In other words, the challenge of helping the NLRB and the courts enforce the NLRA includes the challenge of exploring and expanding the meaning of its policies, values, and vision—and limiting the role of courts.

This large—and crucial—task needs wide participation if it is to succeed. What follows, then, is but a piece of what must become a broad and inclusive conversation about NLRA policies and values. The topics examined in this article are limited to five: (1) Work and citizenship; (2) NLRA dispute resolution—the procedure of friendly adjustment of disputes; (3) Freedom of association; (4) Mutual aid or protection; and (5) Improving and stabilizing wages and working conditions. These are but a

73. There are, of course, many ways to interpret the NLRA. Bellace sketches some of those views, in particular those based on evidence of Congress' historical intent in enacting the NLRA. See Janice R. Bellace, *The Future of Employee Representation in America: Enabling Freedom of Association in the Workplace in Changing Times Through Statutory Reform*, 5 U. PA. J. LAB. & EMP. L. 1 (2002). Historical study of the NLRA has been a popular approach to establishing its meaning. See, e.g., Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. (1977-1978). So, too, has Critical Legal Studies. See, e.g., Karl E. Klare, *Critical Theory and Labor Relations Law, in The Politics of Law: A Progressive Critique* 539 (D. Kairys ed., 3d ed. 1998). Related to this approach has been a critique of judicial interpretations based in class analysis. See, e.g., JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) [hereinafter VALUES]. Each of these, and more, are legitimate ways to interpret a law, and all bring something to the table. This may be why the canons of legislative interpretation are so varied. What I propose here is an approach that focuses on the text, but not solely as doctrine. It includes critical theory and history in the sense of taking historically accepted interpretations and questioning them. This must be combined with a law and society approach that draws on empirical evidence—much of which does not yet exist—to give meaning to how law operates.

74. *Phelps Dodge*, 313 U.S. at 194; see also Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).
few of those listed above in Section III, and the treatment here can do little more than selectively sketch a few issues in each. Ultimately, all must be explored—and in greater depth—as part of an effective litigation strategy to take back the Workers' Law.

A. Unions, Work, and Citizenship

The NLRA draws a connection among unionization / collective action, work, and society. In my view, these connections are fundamental to the whole point of the law. That is, employee collective action is not meant to benefit only union members: it is a positive force for our society as a whole. This is not a mainstream view. Unions are more likely to be classed as a special interest, and economists are more likely to see unions, whatever their size, as cartels that harm society.75

[F]rom the standpoint of economists—including many who are avowedly pro-union—unions are simply cartels that raise wages above competitive levels by capturing monopolies over who companies can hire and what they must pay.

Many unions have won higher wages and better working conditions for their members. In doing so, however, they have reduced the number of jobs available. That second effect is because of the basic law of demand: if unions successfully raise the price of labor, employers will purchase less of it. Thus, unions are the major anticompetitive force in labor markets. Their gains come at the expense of consumers, nonunion workers, the jobless, and owners of corporations.76

Corporations and corporate action are not viewed through the same lens, unless they form actual monopolies and engage in overt anticompetitive behavior.77 Few suggest any other way of seeing corporations.78

This is not a philosophical difference of opinion. The view that unions are cartels fits into an analysis of work that is based on common law concepts such as master and servant law and employer property rights in a job. This way of viewing the workplace sees unions as illegitimate and destructive to society. If NLRA policies and values are to flourish, unions must be legitimate institutions and be viewed as such. I explore here one


78. An interesting recent example is the documentary, The Corporation (Big Picture Media Corporation 2003), http://www.thecorporation.com; see also Pope, supra note 39, at 518.
aspect of that legitimacy—the roles unions play in fostering democracy and the NLRA as grounded in fundamental American values.

The NLRA does not stand alone. Its values fit with ideas that are fundamental to our country. The preamble to the United States Constitution sounds like NLRA values. It says that, if we are to have "a more perfect union," we must "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." So, too, does the Declaration of Independence when it says: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just Powers from the consent of the governed."

Unfortunately, human history suggests that democracy is gained only at great cost. Democracies face the ever-present danger of being lost by entropy to simpler—tyrannical—forms of governance. The philosophy and practice of democracy—the desire, right, and ability to participate in governing ourselves—must be learned, and must have institutions that support them. The question is: In what school is the grammar of democracy learned? How do we lay down the neural pathways that are receptive to it?

The NLRA's picture of work and its place in society differs from that which existed when it was enacted in 1935 as well as the image work plays in modern society. In the NLRA world, work and the workplace are to be infused with the values of a democratic society. They are supposed to help workers master the skills needed by citizens of a democracy. In our world, we surrender our roles as citizens of a democracy when we go to work. What follows are my thoughts on ways to reconceptualize this issue.

Our society—and perhaps all societies throughout human history—has only three formal institutions in which to learn the skills of governance. The first is the family. But the family is a troubling model when we are concerned with democracy. Differences in age and experience among family members may mean that the family is always innately hierarchical and fundamentally anti-democratic institution.

The second school for democracy could be, of course, school. In primary and secondary school we see patriotic symbols in abundance. We recite the Pledge of Allegiance, learn American history and civics, and run for office in student clubs. But schools are essentially nondemocratic institutions. Within a school, students, teachers, and the administration are

79. GARY CHAISON & BARBARA BIGELOW, UNIONS AND LEGITIMACY 8 (2002).
80. U.S. CONST. pmbl.
81. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
82. Germany in the 20th century replaced the Weimar Republic with a fascist dictatorship. In just a few years it went from being a tolerant country to a genocidal one.
engaged in maintaining control, being controlled, or scheming to subvert control. Little time is spent actually practicing the democratic skills of inclusive and effective participation in shaping one’s environment.

Both family and school teach the skills that we will need as workers, and work is the final major institution that socializes us. True, people work in many different ways and in many different workplaces. But the reality is that most workplaces in the United States are deeply antidemocratic. In any workplace, a few have the right to control what most do. The Supreme Court observed that this unequal power is supported by laws, judicial decisions undermining unionization, and the economic realities of employer-employee relations. The Court said that a single employee is helpless in dealing with an employer, because most employees are dependent on their wages. This means that, if the employer refuses to pay fair wages, the employee is, nevertheless, unable to leave the job or to resist arbitrary and unfair treatment.

Therefore, whether we look at the family, schools, or work, we see the same thing: a few control, most are controlled. Few of us work in a democratic institution. Management defines and decides. Despite years of quality circles and employee involvement, most would find the idea of truly running a workplace on democratic principles to be ludicrous. This is true both for traditional workplaces, as well as those that tout new managerial philosophies or practices. Even their terminology exposes the truth. “Management techniques,” is not the language of inclusion, responsibility, citizenship, or democracy. These systems remain, at heart, ways to maintain control and to eliminate the problem of people’s subverting control, something that is a nuisance to an employer who is trying to get work done.

So most of us spend our waking hours living under undemocratic, hierarchical conditions. Most of us work under these conditions, not out of

83. For an extended discussion on subjects related to the role of schools in socialization, see Cynthia L. Estlund, Working Together: The Workplace, Civil Society, and the Law, 89 GEO. L.J. 1 (2000).
85. Id.; see also Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (2000) (“[T]he individual unorganized worker is commonly helpless to exercise actually liberty of contract . . . and thereby to obtain acceptable terms and conditions of employment . . .”).
free choice, but out of economic necessity. We see this as the proper way for things to be. We assume managers are responsible and sober and have to maintain control over workers who are irresponsible and will only work under compulsion. In Robert Wagner's view,

The relation between employer and employee in modern industry—"the most important relationship" in the worker's life—had taken on the character of the authority relationship between sovereign and subject or citizen. In his introduction of the NLRA in the Senate, Wagner quoted Brandeis's charge that employers who sought legal sanction for their obstruction of worker organization were "seeking sovereign power"—seeking "to endow property with active, militant power which would make it dominant over men." The analogy between political and managerial power had lodged firmly in the progressive mind at the height of political appeals for industrial democracy during and after the First World War. Many corporate leaders, too, had come to justify their exercise of political influence by the sovereign-like authority they already wielded as "industrial statesmen" controlling the "vital institutions" of social life.87

Our traditional legal structures and assumptions see managers as deserving their positions, because they plan for the long-term well-being of the company. Workers need to be controlled, because, we assume, they think and act only in the short term. When they leave work, they leave the workplace behind them.88 Therefore, since society depends on corporate performance, we must give employers freedom to do what they see fit, while preventing workers from undermining those efforts. Of course, repeated experiences with corporate misfeasance, and its impact on employees and society in recent years,89 should call these assumptions about managers and workers into question.

Working at the NLRB provides a rare opportunity to move among many worlds of work and to meet a wide range of people. My years as an NLRB attorney taught me that this society does not always sort us out by merit. They showed me that assumptions about managers and workers tend not to be accurate. When I met with workers who had been discharged for their union activities, I was often impressed by how thoughtful and observant they were. Less often I had the opportunity to meet with company owners and management representatives during investigations. Many were also thoughtful. However, I also found managers and owners who were mismanaging their companies. This seemed most often to be the

88. Atleson explores this idea in a number of contexts in VALUES, supra note 73.
89. As I write this, a documentary about both corporate misfeasance and its impact on employees and the country, ENRON THE SMARTEST GUYS IN THE ROOM (HDNET FILMS 2005), is being shown around the country. See http://www.enronmovie.com (last visited June 10, 2005); Samuel Issacharoff, Reconstructing Employment Governing the Workplace: the Future of Labor and Employment Law, 104 HARV. L. REV. 607, 626 (1990).
case with small companies being run by the children of the founder. Many had contempt for their workers, the people whose labor created the company’s income. In one such case, I recall an employer who referred to his workers as trash and lowlife. During the investigation I had met with many of these workers. They were poor, without much formal education, powerless, and beaten down by hard work, but not only were they the people whose work kept the company going, they were keen observers of life in this company.

The NLRA warns us that the nondemocratic, totalitarian workplace endangers us all. Directly or through intimate interactions with others, this is the experience most of us have. Workers may shake the dust of the workplace off their boots, they may shower away the grease of a fast food restaurant, they may try to talk away the day’s stress with friends and family, but the reality is that our work lives become incorporated into our most intimate physical and mental selves. Over time, the undemocratic workplace grinds away at our belief that we have a right to participate in the decisions that affect our lives and societies.

On the other hand, we know there is something about union membership that helps create citizens of a democracy. We know that union members vote, volunteer, and participate in politics and civic life in percentages far higher than their peer unorganized workers. But now with only about 10% of the workplace unionized, we face an enormous citizenship deficit. The question then is how to bring to the workplace more of the dynamics that transform subjects into citizens.

Collective bargaining creates citizens by pushing workers to gain skills that matter, because they face issues that matter—wages, working conditions, the threat of injury, discharge, for example—all within the context of getting work done. Bargaining collectively means giving workers the power to say no and the ability to choose to say yes to what an employer wants. With collective power, workers can ask the employer to consider other ideas, goals, or methods. Unions can put on the brakes if more time and reflection are needed to solve a problem. Collective bargaining helps transform workers into citizens.

bargaining teaches the citizenship skills of assessing needs and goals and creating realistic strategies to achieve them. It teaches workers how to communicate, advocate, make decisions, listen, persuade, and compromise. Most important, it develops a sense of empowerment and an assurance of the right to participate.

The NLRA says that a lack of workplace democracy matters to our society.\(^9\) It pushes us to rethink the structure of the workplace and gives us processes that can change our acceptance of the status quo as natural. These can help us jettison concepts that developed under monarchy and that buttress institutions appropriate for monarchy. They can move us toward a more democratic society that invites all members of the society to have a seat at the table.\(^9\) The Declaration of Independence says that, among our unalienable rights, is the pursuit of happiness. In order to engage in the pursuit of happiness, one must have a basic level of economic well being. These include the right to make a decent living and the right to basic education, health care, food, housing, and clothing.\(^9\) Without these, society is composed of desperate, powerless people unable to take on the role of citizen.

B. NLRA Dispute Resolution—The Procedure of Friendly Adjustment of Disputes

In the popular mind, unions are associated with strikes, and strikes are associated with violence\(^9\) and not with a procedure based on “the friendly adjustment of disputes.” The perennial introduction of the Freedom from Union Violence Act\(^9\) and lobbying in support of it by the Cato Institute and

\(^9\) For a detailed discussion of Wagner’s ideas about the NLRA’s symbols and ideology as well as extensive useful citations, see Barenberg, supra note 67.

\(^9\) This is not the only view of the power the NLRA gives to unions and its impact on society. Professor Winter saw the NLRA as “special-interest legislation that permits a favored group to organize and act collectively against the rest of society.” Ralph K. Winter, Judicial Review of Agency Decisions: The Labor Board and the Court, 1968 SUP. CT. REV. 53, 58; see also Reinhold Fahlbeck, The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law, 15 BERKELEY J. EMP. & LAB. L. 307 (1994) (contending that American labor law has always been in such fundamental discord with American society that it is doomed).


\(^9\) PAUL F. CLARK, BUILDING MORE EFFECTIVE UNIONS 129-33 (2000). For a history of strikes, see JEREMY BRECHER, STRIKE! (rev. ed. 1997). Ironically, strikes have sharply declined. In 2004, there were 17 large strikes (a large strike involves more than 1000 workers) involving 171,000 workers and 3,344,000 days idle; in 1984, there were 62 large strikes involving 376,000 workers and 8,499,000 days idle; and in 1974, there were 424 large strikes involving 796,000 workers and 31,809,000 days idle. BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, MAJOR WORK STOPPAGES IN 2004, at 3-4 (2005), http://stats.bls.gov/news.release/pdf/wkstp.pdf.

allied institutions\textsuperscript{96} embody the idea of a connection of unions with violence. Mark Barenberg, no enemy of unions, says that events since the enactment of the NLRA have indeed led to “a more adversarial mode of unionization, even if workers achieved a substantial degree of de facto ‘mutualism’ in shop-floor decision-making.”\textsuperscript{97} If unions are associated with violence, then it seems that one of the ultimate purposes of the NLRA—labor peace—cannot be achieved. It also casts unions as illegitimate institutions unworthy of legal protection.\textsuperscript{98}

However, this only becomes an issue when the story of unions and disputes is reduced to the continued existence of strikes and which is based on a truncated understanding of labor peace. The NLRA was never meant to prevent disputes from arising.\textsuperscript{99} Union membership and collective bargaining under the NLRA were supposed to encourage practices fundamental to the friendly adjustment of disputes. Indeed, it would have been unrealistic to have made the attainment of labor peace a goal, and the NLRA’s drafters were realists as much as idealists.

Disputes arise in all human interactions, and the employment relationship is no exception. Indeed, the nature of work in our society provides fertile ground for disputes. Much of this conflict is rooted in the largely unacknowledged struggle over who owns a job, on what basis, and to what degree. Most people automatically see the employer as having ownership rights in a job, making it hard to even see that a legitimate dispute over those rights can exist. The employer’s very visible ownership rights are based on its financial investments and planning that create and sustain a job. However, employees naturally see themselves as having an ownership interest in a job based on their sweat equity investment. The

\begin{footnotes}

97. Barenberg, \textit{supra} note 67, at 1492. Factors have transformed a regime intended to promote “the procedure of the friendly adjustment of disputes” into an antagonistic one include labor policy put in place during the Second World War, the 1947 Taft-Hartley Amendments, and post-World War II administrative and judicial interpretations. \textit{Id}.

98. For a discussion of union legitimacy, see CHAISON & BIGELOW, \textit{supra} note 79.

99. See \textit{supra} text accompanying note 59.
\end{footnotes}
employee investment in a job tends to be long-term, complex, and personal. As a result, lurking almost out of sight is an emotionally tinged clash of rights over each job.

Second, for a moment, compare the employment relationship to commercial contract bargaining. In contract bargaining, the contract creates and governs the relationship. The seller has a choice as to which buyer to negotiate with and whether to negotiate at all or to walk away. In contrast, employee exit from a job is difficult. Workers accrue equity in their jobs that makes leaving increasingly difficult and costly as the years pass. Benefits, seniority entitlements, firm-specific skills, social ties, fear of the unknown, the emotional and practical difficulties of searching for a new job, and the cost and disruption of moving to a new job often tie a worker to a specific employer and job, even when the worker is unhappy there. Losing a job means losing all these things as well as income and status. As a result, employment disputes may easily involve high stakes, at least for workers.

Employers too bear risks from disputes. Unresolved disputes mean productivity is lost as time and energy are absorbed in battling. Even simmering disputes that do not result in outright conflict may lead to low employee commitment to the job, lost loyalty, and even conscious or unconscious sabotage. Conflict may even lead to an employer's loss of customers, income, or status.

Third, add to this that individual employment law does nothing to simplify the relationship or defuse conflict. As the Supreme Court observed in J.I. Case, although some parts of employment are contract-like, those contracts exist within an ongoing relationship. That pre-existing relationship is based on a mix of status, custom, and layers of informal and formal understandings that are constantly—and almost unconsciously—reshaped to meet new conditions. For both employer and employee, workplace disputes must be held in bounds or they risk destroying the job and all the stakeholders. At the same time, there is a highly emotional tinge to workplace differences that makes dispute resolution difficult.

The basic existence of a job, in all these dimensions, is not affected by collective bargaining. Collective bargaining does not—nor can it—do anything to alter the basic nature of a job and the factors that lead to conflict. It can, however, ameliorate problems with jobs and enlist employees in problem solving. On the other hand, collective bargaining may make inchoate disputes visible even as it provides a forum for resolving disputes. Employees are likely to differ from one another as to

100. Job insecurity may lead unorganized workers to want to unionize. See CLARK, supra note 94, at 33-34.
how a problem should be handled or even over whether a problem exists. Collective bargaining creates a vehicle for resolving these disputes but, in order to do so, employees must compromise their widely differing interests. All of these factors mean that trying to resolve workplace disputes is far from easy. In addition, there is a larger social dimension to workplace disputes. The NLRA states in section 1 that employment problems spill over the boundaries of the workplace and inevitably affect communities.

Against this background, Robert Wagner tried to create a system based in collective worker interests to encourage decision making by parties with equal power. Its focus is on the process of deciding how to distribute money and rights and not on driving toward quick solutions. Wagner stressed that norms of fairness, shared interests, and mutual trust could be nurtured by institutional structures cleansed of excessive power disparities. Wagner and his circle recognized that even if hierarchical organization solves certain strategic problems, it also produces cultural and psychic conflict over legitimacy, trust, and resistance—conflict that may significantly influence institutional performance.102

Wagner stressed processes, rather than achieving fixed goals. Focusing on process made room for employers and employees to “engage in a creative constructive function.” Mark Barenberg observes that “Wagner’s almost utopian optimism about social plasticity extended, significantly, to the malleability of the very consciousness that pragmatist thought identified as a dynamic element in social experience.”103

Although not commonly thought of in this way, NLRA bargaining is a form of alternative dispute resolution. This idea has been little explored. Labor arbitration has long been recognized as an important method for resolving workplace disputes. In United Steelworkers of America v. American Manufacturing Co.,104 Justice Douglas said that processing even frivolous claims may be therapeutic.105

103. Id. at 1413-14.
105. According to Justice Douglas:

Frivolous cases are often taken, and are expected to be taken, to arbitration. What one man considers frivolous another may find meritorious, and it is common knowledge in industrial relations circles that grievance arbitration often serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to read the typical arbitration clause as a promise to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract. The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance and by the dangers of excessive judicial intervention.

Id. at 568 n.6 (1960); see also Roger I. Abrams et al., Arbitral Therapy, 46 Rutgers L.J. 1751 (1994).
But the NLRA itself has fostered a less noticed, but equally important form of ADR: collective bargaining. Collective bargaining resolves conflicts both proactively and retroactively. The agreements that emerge from collective bargaining resemble legislation by resolving disputes on a broader and more foreword-looking basis than individual litigation. Collective bargaining provides flexibility that lets employees and employers legislate the legal regime that best fits the workplace, rather than depending on externally imposed laws to set standards. The give-and-take of collective bargaining requires taking a collective, social, and long-term view. It depends on being aware that a relationship is involved at the core of the dispute and that disputes must be resolved in a way that does not imperil the relationship. A consciousness of the parties’ relationship as the context within which the dispute exists is a quality ascribed to mediation, and this quality also exists within collective bargaining.

Collective bargaining cannot automatically resolve disputes peacefully. For it to achieve the positive aspects of ADR, it must exist within a relationship in which the parties have relatively equal bargaining power, a basic goal of the NLRA. Data from a current study of bargaining simulations confirms this insight. It finds that party perceptions of their own and their opponents’ bargaining power affect their choice of bargaining strategies. If the parties see their relative bargaining power as roughly equal, they are more likely to choose strategies that we would recognize as intended to reach a negotiated settlement. However, when they see bargaining power as highly skewed, they tend to opt for non-bargaining strategies.

Collective bargaining, including contract negotiations and formal and informal workplace dispute resolution, are ways of dealing with workplace problems that can prevent them from ever reaching the stage of a formal filing. We can see the value of collective bargaining by looking at the consequences of its loss. Decreased unionization has replaced collective bargaining with a greater legalization of the employment relationship. This


107. In a sense legislation is a form of ADR because it is a method of resolving disputes that is an alternative to litigation. It resolves them on a wider basis than an individual case. Steven H. Goldberg, “Wait a Minute. This Is Where I Came In.” A Trial Lawyer’s Search for Alternative Dispute Resolution, 1997 B.Y.U.L. Rev. 653, 679 (1997).

108. Waiting, supra note 59, at 276-77.


has, in turn, led to a more adversarial and individualistic form of workplace dispute resolution through a complex array of tort and contract doctrines, federal and state whistleblower and anti-retaliation statutes, and federal and state anti-discrimination laws. Litigating rights under these laws is expensive and slow.

Employers have reacted to these new common law and legislated rights by trying to cut off access to the courts. They use disclaimers and signed acknowledgments in employee handbooks in order to ensure that employees do not have just-cause employment. Employers have imposed pre-dispute arbitration agreements as a condition of employment in order to cut off access to courts and, in some cases, to try to eliminate legal rights and remedies altogether. As the courts have experienced an explosion of employment cases, they have tried to siphon cases off into other dispute resolution processes.

None of these can do what negotiations and the presence of a workplace steward can do. They bring no long-term relational view to solving problems. They do not encourage quick intervention. They cannot provide a low-level resolution of problems by the parties who are involved and who care about fostering the long-term relationship. In essence, they are merely ways of cleaning up after the divorce. These laws are not tailored for each workplace’s needs. Instead, they are standards imposed on employers and employees, and their remedies are expensive, slow, and therefore less available to all who are aggrieved.

We can use this post-NLRA experience to assess the NLRA’s insights about the value of the procedure of collective bargaining for resolving disputes. In addition, new tools for collecting and analyzing data give us the ability to test the value of collective bargaining as a form of ADR with procedures for the friendly adjustment of disputes. Among them are the use of behavioral economic games and social science experiments. These

113. Employment law is the fastest growing area of litigation in the US. Between 1970 and 1989, employment litigation in federal court alone increased by 2166% compared with a 125% increase in the overall civil caseload. Sharon E. Grubin & John M. Walker, Jr., Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts, 1997 ANN. SURV. AM. L. 11, 88 n.153; RICHARD BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 153 (1997). Evidence of this new trend can be found in the creation of new law school subjects. Employment law, a survey course that covers these cases, is now a standard part of the law school curriculum.
114. For an overview of these and related developments, see Befort, supra, note 38.
116. Recently, some economists have begun to use experiments to test these theories and to understand the processes of bargaining, see, e.g., Alvin E. Roth, Bargaining Experiments, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 253 (John H. Kagel & Alvin E. Roth, eds., 1995)
tools and the analyses they produce can play a critical role in assessing collective bargaining as creating a procedure for the friendly adjustment of disputes.

C. Freedom of Association

Freedom of association is one of the fundamental NLRA values and policies, mirroring the employer freedom of association that is exemplified by corporations. Both employers and employees can be encouraged to take advantage of freedom of association. Corporation law encourages employers to become collective through corporate immortality, limited liability, and tax benefits. The NLRA encourages employee collective association as a counterbalance to employer collectivity. The Supreme Court said that an employer who claimed it had a right to operate free from unionization—or as the employer put it, free from “arbitrary restraints”—failed to understand that employees have a correlative right to organize to seek redress for grievances and to negotiate their pay and working conditions with employers. However, employers tend not to see employee freedom of association as equivalent to that of the employer.

Moreover, employees do not receive the same advantages from becoming collective as employers do from corporate law. Employees who unionize face employer retaliation, but employees have no power or desire to retaliate against employers who choose to incorporate. In addition, while government offers employers who incorporate direct benefits, such as immortality and limited liability, employees who join together receive, at best, after-the-fact assistance from the NLRB in bandaging those injured by anti-union retaliation. Employers have often banded together in industry associations as well as a wide variety of political and advocacy groupings. Except for the AFL-CIO, employees have nothing comparable.

(summarizing bargaining experiments) and industrial organization, see, e.g., Charles A. Holt, Industrial Organization: A Survey of Laboratory Research, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS, supra, at 349 (summarizing experiments on industrial organization). In addition to testing traditional theories—and often discrediting traditional theories—experimental economists have also introduced new ideas, for example, whether bargainers try to be fair or behave altruistically, see, e.g., Alvin E. Roth, Bargaining Experiments, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS, supra, at 253, 270-74, as opposed to being motivated solely by self-interest, see e.g., Ernst Fehr & Simon Gachter, Fairness and Retaliation: The Economics of Reciprocity, 14 J. ECON. PERSPECTIVES 159, 159 (2000). For a theory that tries to reconcile both self-interest and reciprocity, see Gary E. Bolton & Alex Ockenfels, ERC: A Theory of Equity, Reciprocity, and Competition, 90 AM. ECON. REV. 166 (2000).


The Supreme Court summarized the purpose of the NLRA to say:

Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority.\(^2\)

Despite this, it is common to believe that employers have a right to intervene actively in employees' exercise of freedom of association when employees try to organize a union, while believing that employees have no comparable right to get involved in response to employers who form collective associations. An employer is free to invite other employers to join the Chamber of Congress or send money to the National Right to Work Foundation. But how do employers feel about the right of employees to ask one another to join a union? Daniel Yager, Senior Vice President and General Counsel of the Labor Policy Association, testified before Congress that a worker who asks a fellow worker to sign a union authorization card becomes "an interested party" whose actions are suspect and that such a card signing is illegitimate unless there is "governmental supervision."\(^1\)

Yager seems to be saying that he thinks a worker who tries to exercise the NLRA right to organize is behaving in an illegitimate way. He must know that the law says otherwise. The fact that Yager thinks it is appropriate to make such an argument before Congress is evidence of the perceptions that affect how NLRA rights are interpreted.

What can guide us in reinterpreting employee freedom of association? Can the meaning of employee freedom of association be measured by what is understood as legitimate employer freedom of association? If employers have a legitimate interest in intervening against workers who organize, should workers have a similar right with regard to employer organization? David Brody says:

Section 7 rights are weak rights, trumped every step of the way by property rights, by employer free speech, by liberty of contract. And while this hierarchy of rights is broadly felt in the law's devolution, it is imprinted, most importantly, on the case law governing free choice. Indeed, if in one dimension the representation election fixes the individual worker into place so that he or she can be efficiently coerced, in another dimension it fixes the unequal contest of rights into place so that the courts can efficiently legitimize those necessary powers of employer coercion.\(^2\)

\(^2\) Id. at 33-34.

\(^1\) The Right to Organize, FED. DOCUMENT CLEARING HOUSE, June 19, 2002, 2002 WL 1360236 (statement of Daniel V. Yager, Senior Vice President and General Counsel, the Labor Policy Association, before the Senate Health, Education, Labor and Pensions Committee).

\(^2\) Labor vs. the Law, supra note 17, at 14-15.
No correlative right for employers are imprinted in the words of the NLRA, but Brody is correct that courts tend to interpret it as though there were. In order to expand the understanding of employee freedom of association, judges must be persuaded that Congress intended NLRA freedom of association to be part of a process that could lead to improved wages and working conditions and their stabilization within and between industries. Understanding freedom of association as part of that process, and not simply as an end in itself, offers an opportunity to educate judges about the meaning of these rights. But, more important, it provides a means for judges and others to assess whether decisions in individual cases promote or undermine this policy.

Freedom of association is a right recognized under the First Amendment of the U.S. Constitution and in international law. Some of this applies to NLRA freedom of association; however, there are ways in which they differ. Section 1 of the NLRA intends that NLRA freedom of association not be an isolated individual freedom of choice to associate or not. Rather, it exists to promote collective bargaining. NLRA freedom of association has the larger meaning of making it possible for employees to bargain as equals with the employer—that is, to bargain collectively; to engage in mutual aid and protection; and to have an active part in improving and stabilizing their working conditions. It must be interpreted with that context in mind.

The 1947 Taft-Hartley amendment of NLRA section 7 added as a goal that an employee also has the right to refrain from concerted activities, that is, a right not to associate. This amendment creates a tension that makes a consistent interpretation of freedom of association more complicated. It grafted onto the NLRA’s transformative vision of the power relationship between employer and employee the goal of individual freedom of choice. This divided purpose affects the interpretation and application of the law, the prospects of employees, and the ability to achieve the NLRA goals that are still part of the law. Judges with widely divergent philosophies can find support in the law for outcomes at direct odds with one another.

It is important to bear in mind that the Taft-Hartley amendments did not remove or replace the NLRA policies. Unions and union supporters tend to react to the Taft-Hartley amendments as if they had outlawed unions. It is more accurate and more useful to see the Taft-Hartley amendments as limited because they must exist within the framework of NLRA rights. These amendments did not displace the core values of the

123. See supra text at notes 72-83. The use of international and constitutional law is discussed in chapter six of Taking Back the Workers’ Law, TAKING BACK, supra note 3.
124. For an in-depth exploration of the meaning of employee freedom of association, see SHELDON LEADER, FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY (1992).
125. See, e.g., Labor vs. the Law, supra note 17, at 12-13.
NLRA. Put another way, both before and after the Taft-Hartley amendments, nearly all of labor law is about how to help employees become collective in order to increase their bargaining power and outlawing certain employer actions—many of which would be legal without the NLRA—that impede gaining that power. There are ways these can fit together with a respect for individual rights. Unions' duty of fair representation has long required unions to take the rights of minority into consideration. Unions can also make room for the rights of minorities by taking to heart an insight gained from the civil rights movement: that inclusiveness promotes the well being of society. Unionization may be stronger and more democratic for borrowing lessons learned in the larger society.

American unions are rightly concerned by the decline in the percentage of workers who are union members. It is important to bear in mind, though, that it is not numbers alone that make unions strong. Participation and inclusion also matter. For example, New Zealand laws before 1991 required union membership and dues payment; so over 40% of workers were union members and dues payers. Those high membership numbers, however, were deceptive and lulling. At least some union representatives responded to compulsory membership by failing to pay attention to their members. The result was a thin unionism in which most workers were members only because the law required them to be. This became clear when a law passed in 1991 eliminated compulsory membership and dues. Membership plummeted from above 40% in 1991 to below 20% less than five years later. Even when a more favorable law was passed, unions have continued to struggle. The point is that U.S. unions may be in better

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128. Other factors have also led to this decline. The post-1991 laws provided for minority representation. Employers have used minority representation to play members off against one another. The story of this and related events is told in Ellen Dannin, Working Free: The Origins and Impact of New Zealand's Employment Contracts Act (1997).

This problem of minority unions was one that concerned Robert Wagner. He told Congress that the provisions for majority rule were fundamental, that "Without them the phrase 'collective bargaining' is devoid of meaning and the very few unfair employers are encouraged to divide their workers among themselves." 79 Cong. Rec. 2372 (1935).

In addition, some New Zealand unions consolidated in order to have more resources; however, they lost strength through the process of integrating different organizational cultures. The Council of Trade Unions pushed through a rationalization of union structures and created industry-focused unions. This resulted in the loss of union membership for groups like clerical workers who had just a few members in each of many workplaces. Industry unions did not understand their needs.
shape because individuals can opt out of membership. At a minimum it
gives unions an incentive not to take members for granted.

But individual choice also creates problems. Some things can be
bargained for on an individual basis, while others cannot. Michael
Gottesman describes the problem of negotiating a new benefit:

Indeed, there would seem to be two ingredients essential to negotiating for
the benefit: (1) the employees (or at least a large number of them) must get
together and agree that they all wish to spend an agreed-upon sum to
purchase this benefit; and (2) there must be some means to impose the fair
share of the costs of the benefit upon those employees who would not be
willing to spend the necessary sum (or who would attempt to “free ride”)
but who would inevitably enjoy the benefit were it purchased. There are
only two ways that these conditions for an efficient exchange can be met,
and both require rejecting the traditional market approach: through
governmental imposition of the benefit (as by the Occupational Safety and
Health Act) or through creation of a system of collective employee
bargaining in which the collective decision can be imposed upon
nonconsenting employees by requiring them to contribute their pro rata
share of the purchase price (as by unionization under the NLRA.)

Recent economic experiments confirm that free riding can undermine
collective behavior. It can lead to a norm where most people become non-
cooperators. Experiments have found that non-cooperation steadily leads
away from the optimum result. The positive news is that most people are
not committed free riders. But most people are not willing to cooperate
under all circumstances. Instead, most people are reciprocators. They will
cooperate if others will. This means that a few free riders can destroy
cooperation. Reciprocation is a socially useful but finely balanced quality.
So if society's needs are to be protected, reciprocation needs to be
supported with incentives and penalties. Research suggests that the
strongest way to get cooperation is by penalizing free riders.

130. Michael H. Gottesman, With Goest Labor Law: Law and Economics in the Workplace, 100

Rev. 71, 75-76 (2003).

132. Id. at 78.

133. Kahan says that some “fraction of the population (consisting, perhaps, of those who've been
trained in neoclassical economics)” are free riders who will always shirk. Id. Others “(maybe those
who've read too much Kantian moral philosophy)” will always cooperate. Id. Most are reciprocators,
whose cooperation depends on the behavior of others. Among reciprocators are those who will bolt as
soon as they see any free riding. Therefore, the committed free riders undermine reciprocity and
cooperation. As a result, “a state of affairs once characterized by a reasonably high degree of
cooperation could tip decisively toward a noncooperative equilibrium in which only the angelic,
Kantian, unconditional cooperators are left contributing (probably futilely) to the relevant public good.”
Id. at 79.

Therefore, Kahan argues that incentives for reciprocity must be buttressed by penalties aimed
at the committed free riders. “In the face of a credible penalty, however, the committed free riders fall
The NLRA's protection of both freedom to associate and freedom not to associate makes it difficult to institute those incentives and penalties. This conflict can be seen in recent NLRB and court decisions struggling with issues of union membership and dues. Courts can be helped in deciding these issues by expanding their focus from freedom to associate—or not—to consider how those rights promote all NLRA policies. In other words, does the decision further and not undermine other NLRA policies, such as promoting collective bargaining and improving wages and working conditions. For example, a recent dues case was tried and decided in favor of the union by providing data that showed how dues were connected with increased levels of organization that then led to improved wages and working conditions, and thus more effective collective bargaining.

D. Mutual Aid or Protection

The NLRA protects far more than just the right to organize a union or collective bargaining. It safeguards the right of employees to associate in order to make common cause with one another. Section 7 protects employee rights to engage in concerted activities for mutual aid or protection, with no requirement that a union be in the picture. The breadth of section 7 rights is affirmed in, and supported by, the definition of "employee" in section 2(3): "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . . ." While the NLRA limits representation elections to the boundaries of one employer, section 2(3) extends section 7 rights to all employees, regardless of their employer or their form of representation. Thus, the NLRA gives employees broad rights—as a class—to make common cause with one another:

[Section 2(3)'s definition of employee] covers, in addition to employees of a particular employer, also employees of another employer, or former employees of a particular employer, or even applicants for employment. . . . To limit protection against discrimination only to

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135. See, e.g., United Food and Commercial Workers Union, Local 1036 v. NLRB, 307 F.3d 760 (9th Cir. 2002), cert. denied, 537 U.S. 1024 (2002).
employees of a particular employer, would permit employers to discriminate with impunity against other members of the working class, and would serve as a powerful deterrent against free recourse to Board processes. An employee who had filed charges against his own employer could be blacklisted by other employers and denied employment for filing charges against his former employer.139

Section 2(3) is written broadly in order to further the NLRA's intermediate goal of stabilizing working conditions within and between industries.140 This goal can only be achieved if employee rights extend beyond the four walls of one employer.141 In addition, section 2(3) recognizes the history of common law courts' attacks on worker attempts to make common cause with one another in order to achieve industry-wide terms of employment.142 Section 2(3) embodies the understanding that, when workers at a competitor are not organized, this diminishes employee/union bargaining power at an organized employer. The result is depressed wages and working conditions. When an industry or an area is organized, wages can be taken out of competition so that employers can compete elsewhere, for example, on product or service quality. The NLRA supports this reality in its policy of promoting "the stabilization of competitive wage rates and working conditions within and between industries."143 In other words, the NLRA gives employees the right to define their own interests, to define them broadly, and to make common cause with one another to advance their collective interests.

The NLRA's broad definition of employee also promotes and protects employee solidarity. Mutual aid or protection infuses the whole of the

140. For a discussion of intermediate rights, see supra, text accompanying note 61.
141. The Board noted that:
   The policy which it expressed in defining "employee" both affirmatively and negatively, as it did in § 2(3), had behind it important practical and judicial experience. The broad definition of "employee," . . . expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer."
142. The need to spell this out and secure a broad right to make common cause can only be appreciated in the context of history. The best source—and a highly readable one—is CHARLES O. GREGORY & HAROLD A. KATZ, LABOR AND THE LAW (3d. ed. 1979).
143. Congress "adopted a definition of 'labor dispute' for the Wagner Act that eliminated even the "same industry" limitation imposed by Norris-LaGuardia." Fischl, supra note 73, at 852. This issue of mutual aid or protection and the ability of employees to make common cause with one another is now being fought out over the issue of who must pay union dues and in what amount. The NLRA requires the assessment of "uniform" dues, but the Supreme Court has created a number of exceptions and limitations. One limitation that wholly ignores NLRA policies for mutual aid or protection and worker solidarity leading to the elimination of wage competition within and between industries is the requirement that dues dissenters only have to pay dues for actions that are sufficiently local. See RAY, ET AL., supra note 51, at 429; see supra text at notes 122-23. For a discussion of the history of requirements of local versus solidarity motives, see RAY, ET AL., supra note 51, at 387-89.
NLRA. It is closely related to freedom of association and is a half-way house to self-organization and full collective bargaining. Employee solidarity has little value if limited to employees of a single employer. The broad definition protects employees who distribute union newsletters at work that call for support for minimum wage workers when these workers are paid well above minimum.\footnote{Eastex, Inc. v. NLRB, 437 U.S. 556 (1978). This was a major break in philosophy with the Norris-LaGuardia Act, which protects labor disputes whether the act is done "singly or in concert." 29 U.S.C. § 104. The NLRA, in contrast, protects only concerted acts, because only in this way can it encourage employees to take the steps that can lead to collective bargaining. Encouraging employees to seize power to protect themselves, rather than relying on law as their sole protector, distinguishes the NLRA from anti-discrimination laws such as Title VII.} The NLRA protects steps toward collective action because, without those steps, employees can never secure the right to bargain collectively.\footnote{Lynd, supra note 61, at 1423-30; Waiting, supra note 59, at 1429-30.} In other words, the single employee is protected under the NLRA, but only in order to promote collective action. Thus, "the Act reduced certain individual values to secondary status."\footnote{James J. Brudney, \textit{Reflections on Group Action and the Law of the Workplace}, 74 TEX. L. REV. 1563, 1565 (1996) [hereinafter \textit{Reflections}].} Congress made group—collective—action the central process to attain all its other ends. As a result, the NLRA is at odds with American traditions of individualism.\footnote{The following quotes acknowledge the fundamental conflict between mutual aid and protection and the American cultural value of individualism:}

\begin{quote}
Indeed, the basic purpose of labor statutes is to provide the legal structure for employees to organize so as to reduce competition in the labor market. In this respect, labor law is a departure from a central precept of American law and social values—the promotion of individual competition and opposition to restraints on trade.
\end{quote}

\begin{quote}
Fahlbeck, supra note 92, at 315.
This creation of collectively defined rights and responsibilities represented a notable shift from previous conceptions that economic decisionmaking was primarily, if not exclusively, a matter of individual responsibility. Even if the Wagner Act was not intended to trigger a radical restructuring of American capitalism, the establishment of group action as the governmentally preferred method of ordering workplace relations was no mean feat. The significance of the change is reflected in the tenacity of business community resistance both to passage and initial implementation.
\end{quote}

\begin{quote}
\textit{Reflections}, supra note 146, at 1565-66 n.10-11 (footnotes omitted)
The political and cultural shift towards laissez faire individualism diminishes the power of the strike as well. Strikebreakers feel less social or moral constraint about crossing picket lines. In a dog-eat-dog world, there is less public sympathy when the small dogs are getting devoured. There is also less of a sense of corporate responsibility towards maintaining the workforce—an erosion of a sense of loyalty to employees—than in the era of the standard paradigm strike.
\end{quote}

actions for mutual aid or protection are protected under the NLRA.148

Another is the Lechmere149 Court’s limiting the definition of who is an employee to employees of a single employer. In doing so, it effectively overruled section 2(3) and thus destroyed protected employee interests and rights.150

Courts have been far more likely to insist upon actual proof of employee self-interest than has the Board. The Board has taken the position that employees who help others are literally engaged in “concerted activit[y] for the purpose of ... mutual aid or protection,” regardless of their actual or apparent reasons for doing so. Unfortunately, the Board has failed to explain to the courts the basis for its interpretation. As a result, the courts have continued to make self-interest a prerequisite to section 7 protection.151

At least part of the solution is obvious. Judges must be assisted in understanding the content of mutual aid and solidarity and its role in promoting NLRA policies. The courts need to be shown that a focus on self-interest or even selflessness as an element of mutual aid or protection stymies NLRA policies152 and eliminates section 7 rights and protections. This, in turn, leaves workers unprotected and less able to assert their rights to self-organization.153

The social sciences offer evidence that can be used to flesh out the meaning of mutuality. For example, behavioral economics experiments have systematically found that people have a natural inclination to altruism coupled with a demand for just treatment.154 If the NLRA is to be

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148. Waiting, supra note 59, at 300-01 (It is not clear how receptive the courts of appeals would be to a broad application of NLRA section 7 rights to nonunion employees); Fischl, supra note 74, at 798-800.

149. Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992); see also supra, text at notes 99-102.


151. Fischl, supra note 73.

152. For relevant cases, see id. at 800-01.

153. Research by other scholars has pinpointed specific areas in which the courts have limited the NLRA by requiring self-interest or by limiting the protected interests of employees. These include (1) strikes in solidarity with other workers, including cross-border solidarity, James Atleson, The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity, 52 BUFFALO L. REV. 85 (2004); (2) employees who honor picket lines, cases in which the fruitless search for direct protester self-interest has frequently undermined the workers’ claims for section 7 protection, Fischl, supra note 73, at 800-09; (3) access issues during organizing campaigns, Teaching Labor Law, supra note 150, at 98-108 (discussing Lechmere and the limitation of employees’ protected interests); (4) definitions of who has protected employee status, Fischl, supra note 73, at 821-26; (5) bargaining rights concerning retirees, id. at 836-43; (6) the definition of community of interest, including the assessment of the right of professionals and borderline supervisors to vote, George Feldman, Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law, 37 ARIZ. L. REV. 525 (1995); (7) protections and rights of professionals and borderline supervisors, id.

154. For a comprehensive description of the experiments involved, see Alvin E. Roth, Bargaining Experiments, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS, supra note 116, at 253; see also
interpreted in a way that will be maximally supportive of collective interests, it must be based solely on an interpretation that does not require or forbid self-interest.

Not all judges are deciding cases in a way that shows they do not value employee mutual aid or protection. For example, rather than requiring specific authorization to establish concerted activity, the Sixth Circuit asked only "whether the employee acted with the purpose of furthering group goals." 155 In addition, outside the area of labor law, judges have been actively creating state tort law doctrines concerning whistleblowers and workers discharged in violation of public policy 156 to protect people who commit selfless acts of solidarity on behalf of the faceless public. 157 Judges also extend protections for acts of mutual aid and support under Title VII. 158 The fact that judges have created these doctrines suggests that they value certain acts of solidarity and may thus be receptive to supporting NLRA mutualism without a showing of self-interest.

Staughton Lynd argues that the NLRA opts for the value in which the well-being of the individual is not antagonistic with the well-being of the group: 159

In a family, when I as son, husband, or father, express love toward you, I do not do so in order to assure myself of love in return. I do not help my son in order to be able to claim assistance from him when I am old; I do it because he and I are in the world together; we are one flesh. Similarly in a workplace, persons who work together form families-at-work. When you and I are working together, and the foreman suddenly discharges you, and I

Kahan, supra note 131, at 71-72. The jurisprudence of the concept of mutuality can include questions, such as: What is the content and purpose of NLRA mutuality? Is it based on a rational, self-centered quid pro quo—that by helping you today I am assured that you will help me tomorrow? If so, does this mean that if actions entail some risk of retaliation and harm to oneself, they do not constitute mutuality? Or is it based in some more basic sense of human beings as have a natural affinity to community and mutuality? Is mutuality based on a selfless sense of justice and injustice, feelings of concern for fellow employees, loyalty, and generosity, feelings otherwise referred to as solidarity? See Fischl, supra note 73; see also George Feldman, Unions, Solidarity, and Class: The Limits of Liberal Labor Law, 15 BERKELEY J. EMP. & LAB. L. 187 (1994).

156. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 698-709 (2d ed. 1999).
157. For a comprehensive look at whistleblowers, including how they have fared under the law, see C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER (2001).
158. Flowers v. Columbia College Chicago, 397 F.3d 532 (7th Cir., 2005) (contract employee protected for complaints about discrimination by employer not his own); Konits v. Valley Stream Central H.S. District, 394 F.3d 121 (2d Cir. 2005). Ironically, the current NLRB majority recently limited the circumstances in which they will protect mutual aid or protection. Holling Press, 343 NLRB No. 45 (Oct. 15, 2004). In that case, the NLRB found no protection for an employee who asked fellow workers to testify on her behalf concerning a supervisor's sexual harassment, because they characterized her request as being solely for her own self-interest. The recent drift of the NLRB is explained by new appointees to the Board who have been actively changing NLRA interpretations in a number of areas.
159. Lynd, supra note 61, at 1424-30; Waiting, supra note 59, at 1426.
find myself putting down my tools or stopping my machine before I have had time to think—why do I do this? Is it not because, as I actually experience the event, your discharge does not happen only to you but also happens to us?\textsuperscript{160}

This is the understanding needed by the judges who decide NLRA cases if we are to take back the Workers' Law.

\textit{E. Improving and Stabilizing Wages and Working Conditions}

The NLRA promotes improving and stabilizing wages and working conditions across industries. The NLRA was enacted during the Great Depression. "The desirable effect of high wages on consumption and work motivation was a tenet not only of New Deal economic thought, but of the popular 'new economics' of the 1920s."\textsuperscript{161} Decades later, that view seems to have lost favor. Today we see employers always in search of lower wages and governments and institutions actively assisting them through privatization\textsuperscript{162} and globalization.\textsuperscript{163} The change in values has been so complete, it is hard to be taken seriously in arguing that far too many jobs today do not pay living wages.\textsuperscript{164} As a result, now moral, social, and economic arguments for improving wages and working conditions seem unreasonable.

Consider a few of the sorts of arguments we are likely to hear these days:\textsuperscript{165}

(1) Supply-side economic policy argues that overall social wealth is greater if tax cuts are targeted to ensure that the richest have greater income. Examples would include cutting taxes on profits from stocks and eliminating the estate tax. But could it instead be argued that income should be distributed among workers (who are the majority) rather than shareholders (who are the minority), because we are better off as a society with a more equitable allocation of income?

\textsuperscript{160} \textit{Id.} at 1427.
\textsuperscript{161} Barenberg, \textit{supra} note 67, at 1417.
\textsuperscript{162} Advocates of privatization include the federal government, see \textit{OFFICE OF MGMT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76} (1999), \textit{available at} http://www.whitehouse.gov/omb/circulars/a076/a076.html, and states, such as California, see Department of General Services, California Strategic Sourcing Initiative, http://www.pd.dgs.ca.gov/StratSourcing/default.htm (last visited June 8, 2005); see also the California Performance Review, http://cpr.ca.gov (last visited June 8, 2005), which advocates privatization and a focus on transforming citizens into customers.
\textsuperscript{163} The conservative Reason Public Policy Institute, for example advocates privatization and "offshore outsourcing." Outsourcing Resource Center, http://www.rppi.org/outsourcing/index.shtml (last visited June 8, 2005).
\textsuperscript{164} SKLAR, \textit{supra} note 58 (2001).
\textsuperscript{165} These are borrowed from Gottesman, \textit{supra} note 130, at 2790-93 (1991); see also CASS SUNSTEIN, \textit{THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER} (2004).
(2) The investments most workers make through their jobs to the welfare of their companies are harder to see than are dollar investments made by shareholders and others. Therefore, increasing wages for workers is a way to repair the consequences of decades of short-sighted decisions that valued monetary investments while undervaluing the contribution employees make to the success of the enterprise.

(3) Society is better off when workers receive a living wage (as opposed to depending on welfare or other subsidies), because those workers and society will have a greater sense that work engenders self-respect. They will be better citizens, and this will be a better society in which to live.

(4) Employees who receive good wages feel more self-esteem and more buy-in and commitment to their jobs and society. Thus, we would all be better off economically and morally if we live in a society where all members of society receive living wages.

Robert Wagner would have supported these ways of thinking about work, wages, and the good of society. These are the sorts of economic and social ideas embodied in the NLRA. Wagner linked the idea that high wages lead to increased consumption and higher work motivation "to aggressive support for collective bargaining as the means to permanent economic redistribution and growth." Union members can and should make these connections clear in all their actions. In fact, a campaign to take back the Workers’ Law can only succeed if it is part of an active educational campaign. That campaign must expand on the values and policies of the NLRA. Education can take place in many ways. One is the way in which unions conduct their activities, in the face they present to the public.

Union members are often portrayed as greedy, selfish, and overpaid, as employers seek wage concessions. Collective bargaining and unions can—and should—send a message that we are all in this together. A recent example as to how this can be done involved a California Carpenters Local that was bannering and handbilling an employer. In addition to the standard language about area wages and rat employers, its handbills said:

Shame on Cadillac SAAB for contributing to erosion of area standards for carpenter craft workers. M&M Interiors is a sub contractor for Carignan Construction on Cadillac SAAB’s dealership project located in the city of

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166. Barenberg, supra note 67, at 1417.
Thousand Oaks. M&M Interiors does not meet area labor standards for all its carpenter craft workers, including fully paying for family health benefits and pension.

Carpenters Local 209 objects to substandard wage employers like M&M Interiors working in the community. In our opinion the community ends up paying the tab for employee health care and low wages tend to lower general community standards, thereby encouraging crime and other social ills.

Carpenters Local 209 believes that Cadillac SAAB has an obligation to the community to see that area labor standards are met for construction work at all their projects, including any future work. They should not be allowed to insulate themselves behind “independent” contractors. For this reason Local 209 has a labor dispute with all the companies named here.  

Talking only about union concerns can seem self-serving, even if, in fact, improving their pay helps the whole community. That effect will not be obvious to most people. Here, the Carpenters’ banner spells out the connection between low pay and its impact on the community. It painted the employer as the one who was selfish and greedy and union members as protecting the wider society. In doing this, the banner and handbills embodied and demonstrated NLRA language and values, such as solidarity. The workers reached beyond their own struggle and showed how it linked with the community at large. In addition, they showed that what happens in the private workplace affects the society outside the employer’s walls.

Put into language drawn more directly from the NLRA, the banner and handbills were consistent with the idea that stable wages within and among industries takes wages out of competition and also promotes union representation and bargaining power. If all of an employer’s competitors provide the same wages and benefits, then an employer has less incentive to resist or escape union representation. The alternative is that union representation and working conditions can only be maintained by the strike threat. Strikes may be exciting, but they become a weak threat when an employer’s competitors are not organized. In that case, a lone organized employer may feel compelled to cut wages and working conditions in order to compete with unorganized employers. The employer may feel that the need to do this is sufficiently compelling that it is worth taking a strike, even if it loses money during its pendency.

The NLRA policies for improving and stabilizing wages and working conditions are intermediate NLRA policies. They are to be the fruit of organizing and collective bargaining, and they are to lead to labor peace and


169. Bellace, supra note 73, at 18-19.

170. For a discussion of intermediate NLRA policies, see supra text at note 61.
the free flow of commerce. These policies recognize that employers resist unions for many reasons. Certainly seeking higher wages makes union organization only more difficult when wages have not been taken out of competition. Management hostility and opposition may be based on its fears that efficiency and profits will be lowered and that management will lose its prerogatives of freedom of action and flexibility. Joel Rogers argues:

What is most critical is to see that salvation lies in the removal of cost from competition, not the removal of cost per se. Assuming no reduction in demand for its product, an individual firm suffering a cost disadvantage vis-à-vis competitors should be indifferent as between the elimination of cost and its generalization to rivals.

It is possible that those fears and opposition may not be rational, however. Recent economic experiments have shown that, when employers pay higher wages, their workers reciprocate by voluntarily working harder. If these findings play out in the real world, they would vindicate the NLRA goals.

171. See Issacharoff, supra, note 89, at 625-26. An example of the problem created by an unorganized employer can be found in NLRB v. Adkins Transfer Co., Inc., 226 F.2d 324 (6th Cir. 1955). The court of appeals there found the employer committed no violation when it terminated two maintenance employees and closed their department because they had joined the Teamsters. Essentially, the court accepted the employer’s claim that it acted because it believed it would not be able to make a profit in that one department if it was organized. A reading of the entire opinion leads to the conclusion that Adkins’ competitors were organized. The case is a counterfactual to the point being made here, because the level of organization should have made organization easy but did not. We do not know why this was the case. Putting that known unknown aside, there are many grounds on which to criticize the employer. Relevant here is that the court’s decision allowed this employer to undercut other employers, thus creating a wedge to undermine unionization.


173. Kahan, supra note 131, at 74-77 (reviewing the findings of a number of behavioral experiments on reciprocity).

The prevalence of this sort of strong reciprocity is supported by a considerable body of evidence. Much of it is experimental in nature. So-called “public-goods experiments” — laboratory constructs designed to simulate collective-action problems—have consistently shown that the willingness of individuals to make costly contributions to collective goods is highly conditional on their perception that others are willing to do so. Empirical studies of real-world behavior corroborate this finding. For example, individuals have been shown to reciprocate the disposition of others to give (or not) to charity, to refrain (or not) from littering, and to wait their turn (or not) in lines. Indeed, individuals behave like reciprocators even in markets: econometric and other forms of field research, for example, suggest that when firms compensate their workers more generously workers reciprocate by voluntarily working harder.

Id. at 74 (footnotes omitted).
V.
MAKING NLRA VALUES AMERICA’S VALUES

There is no conclusion to this article. Instead, there is only an invitation. The NLRA we know today is not that intended by its drafters. The NLRA we have today is far less effective in protecting worker rights than it should have been—or yet can be. The values embedded in the NLRA’s policies have had little role in shaping our society. As a result, this is a society with less economic and social democracy and less sense of community feeling and solidarity than might have been hoped for seventy years ago when Congress passed the NLRA.

It does not have to be this way. This is an invitation now, at last, to take the NLRA’s potential and vision and make them live. Taking Back the Workers’ Law provides a detailed analysis and plan for litigation and education to transform our society. No one person can do this work alone, so this invitation is extended to all who want to engage in this campaign on any level. For some this will involve the technical aspects of developing a litigation strategy to, at last, give content and meaning to NLRA policies and values. Others will develop an educational strategy to build a society based on values of democracy, community, interdependence, justice, and fair treatment. This is an invitation to engage in hard work on many fronts.

But nothing is more American than to join together for the good of our country.

We need to make the NLRA’s values America’s values. We are all now engaged in a Great War, one that is being fought on many fronts using many weapons. The war is between those who support collective values and well-being for all and those who support unbridled individualism; between those who value workplace and social democracy and those who promote workplace and governmental totalitarianism. The outcome of this war of ideas and values will determine whether this is a society in which unions and other communal institutions survive and even thrive. The NLRA was enacted to be the Workers’ Law, and now, seventy years later, it is time to fight battles on many fronts in order to give it that status. This is the defining struggle of our time. It is not possible to sit it out. We participate with our every action and inaction.

I can think of no better way to honor the National Labor Relations Act on its seventieth anniversary than to put its policies into practice, to create a society imbued with the values of the NLRA—values of industrial and social democracy, equality, solidarity, social and economic justice, fair wages and working conditions, and industrial and social peace.