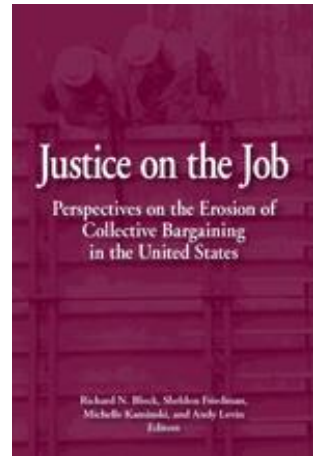

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Members-Only Collective Bargaining: A Back-to-Basics Approach to Union Organizing

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Members-Only Collective Bargaining

A Back-to-Basics Approach to Union Organizing

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My purpose and concern in this chapter is to call attention to a critical missing link in the U.S. system of industrial relations. That link is members-only minority-union collective bargaining, which is a natural preliminary stage in the development of mature, majority-based exclusivity bargaining. What follows is an abbreviated version of some of the key elements of that thesis, which is more fully developed in my recent book, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*.¹ Minority-union bargaining was commonly practiced immediately before and after enactment of the Wagner Act² (the National Labor Relations Act) in 1935, and as I demonstrate in that book, it was not Congress' intent to deny protection to such bargaining under that act. During the early years following its passage, such bargaining prevailed widely. The decisive provisions of the act, which were not affected by either the Taft-Hartley³ or Landrum-Griffin⁴ amendments, are still fully in effect today. Under those provisions, in workplaces where no exclusive bargaining agent has yet been "designated or selected . . . by the majority of the employees" in an appropriate bargaining unit pursuant to Section 9(a)⁵ of the act, minority employees are entitled "to bargain collectively through representatives of their own choosing."⁶ But as the industrial relations community is well aware, latter-day conventional wisdom assumes the contrary. This is so despite the absence of any decisional authority to support such a negative conclusion, for neither the National Labor Relations Board (NLRB) nor the courts have ever held that an employer has no duty to bargain with a nonmajority union for its members only.⁷ Indeed, that conventional wisdom has become so entrenched that it has not been questioned by most labor law

scholars, almost all of whom have assumed that the majoritarian/exclusivity concept—which so uniquely characterizes U.S. labor law—implies a prohibition on all minority-union bargaining even where no majority representative has been selected. Although many scholars have criticized that system, only two have unequivocally contended that in the absence of a designated majority representative, minority unions have legally enforceable collective bargaining rights. They are E.G. Latham⁸ and Clyde Summers,⁹ who expressed their views in law review articles separated by more than half a century.¹⁰

Immediately after passage of the act, Latham wrote that under what “appears to be a reasonable construction of [the pertinent] sections, the employer may be bound to bargain with minority groups until . . . ‘proper majorities’ have been selected.”¹¹ Summers, writing in 1990, continued where Latham had left off. After reviewing the statutory language and the historical role of minority unions, Summers concluded that “[t]he plain words of section 7, section 8(1) and section 8(5) would seem to require an employer, in the absence of a majority union, to bargain collectively with a non-majority union for its own members.”¹² I have added my voice to that of Latham and Summers as to the intended meaning of the act regarding such bargaining. Statutory text provides that such minority bargaining is fully protected by the act, and legislative history supports that conclusion.

My analysis begins by focusing on the 14-word phrase in Section 7 that declares that “employees shall have the right to . . . bargain collectively through representatives of their own choosing.” This simple but elegantly worded declaration is the substantive mandate that grants the right of collective bargaining to all employees covered by the act. Until a majority of the employees in an appropriate bargaining unit select an exclusive representative under Section 9(a), this right to bargain prevails, for there is no other provision in the act that diminishes that right. This 14-word phrase has a clear and long-established meaning, the evolution of which can be traced through a direct line of succession beginning with identical text contained in a proclamation by President Wilson in World War I,¹³ then to the preamble of the Norris-LaGuardia Act of 1932,¹⁴ then to the corresponding phrase in Section 7(a) of the Depression-era National Industrial Recovery Act (NIRA) of 1933,¹⁵ and finally to the Wagner Act in 1935—the language in the statute today. Even the accompanying unfair-labor-practice text in Section 8(a)(1),

“to interfere with, restrain, or coerce employees in the exercise of [that] right,” is the same as the corresponding prohibitory language in those earlier sources.¹⁶ This juxtaposition of text in its various legislative incarnations confirms that the substantive law here in issue—albeit not its enforcement procedure—has been continuously in effect in one or more manifestations since 1932. Thus, when Congress passed the Wagner Act it was reenacting the substantive bargaining requirements that had prevailed under the “Blue Eagle” of the NIRA, where the critical statutory language in Sections 7 and 8(1)¹⁷ had already acquired a recognized meaning.¹⁸

Historically, including the years immediately preceding passage of the Wagner Act, collective bargaining as an institution was intertwined with the concept of union membership,¹⁹ for unions normally bargained only on behalf of their members.²⁰ Union recognition by an employer usually occurred only after the union’s membership was strong enough to demand and receive recognition—which more often than not resulted from a strike or threat of a strike. Union membership was the *sine qua non* of collective bargaining, whereas majority selection by the employees was not a requisite for bargaining and it played little or no role in the process.²¹

Even closed-shop agreements fitted the connection of membership to collective bargaining. When a union’s membership was large enough to represent an effective voice for most if not all of the involved employees, union leaders would usually perceive a need to ensure job security for their members and protection for the bargaining process, which only a closed-shop agreement could provide. On the other hand, when a union was not strong enough to obtain a closed shop or even full recognition, it often settled for a members-only collective agreement,²² for this was considered a logical step in an organizational process that would eventually lead to total employee recognition.

During the pre-Wagner Act years, strikes and boycotts or threats of such activity were usually a union’s only means of securing recognition, for employers vigorously opposed dealing with outside unions. Under the NIRA, the collective bargaining process mandated by Section 7(a) required only three factors: 1) a union representing a group of employees, 2) a demand for recognition and bargaining, and 3) an employer who was expected to respond by engaging in good-faith negotiations. It quickly became apparent under that statute, however, that almost all

employers vigorously resisted union recognition unless it was forced upon them by strikes or boycotts. for there was no adequate enforcement mechanism to require compliance with the law.²³ The Wagner Act was designed to correct those procedural deficiencies but not to change the substantive law.²⁴

In conducting my research I was fortunate to discover a reliable description of the essential characteristics of employer–employee relations prevailing at that stage in the nation’s labor history. In November 1933, the National Industrial Conference Board (Conference Board)²⁵ conducted an extensive empirical study to determine the nature of collective bargaining as it was practiced immediately following enactment of Section 7(a) of the NIRA.²⁶ That study covered the fields of manufacturing and mining. These proved to be the most appropriate industries to investigate for they included the companies mainly impacted by Section 7(a) and were also the ones that would ultimately be most affected by the Wagner Act.

The data²⁷ show that a variety of bargaining arrangements existed during this period. 45.7 percent of employees dealt with their employers on an individual basis, 45 percent dealt through employee-representation plans (i.e., company unions), and 9.3 percent dealt through independent labor unions. 68.9 percent of the reporting companies engaged in no bargaining at all—i.e., neither with an independent union nor a company union. The remaining 31.1 percent engaged in bargaining with either an independent union or a company union or with both, including arrangements whereby employees in many of the companies also engaged in individual bargaining. This group of 31.1 percent of the reporting companies consisted of 1,030 of the 3,314 responding companies in a representative sample of 10,335 companies. Two hundred and thirty of those companies bargained with independent unions representing 189,756 employees on an exclusive basis, and 186 bargained with independent unions representing 51,100 employees on a nonexclusive basis.

Accordingly, of the latter total of 416 companies that bargained with independent unions, 55 percent did so on an exclusive basis and 45 percent bargained on a members-only-basis. The 51,110 union employees who were not involved in exclusive representation—i.e., the union employees in the companies that engaged in members-only bargaining—were thus working, in varying combinations and job catego-

ries, alongside 124,101 other employees who were either wholly non-union or were represented by company unions. Together, those workers comprised a total of 175,211 employees, which may be compared to the slightly higher number of 189,756 employees covered by exclusive union representation. Extrapolating from the survey group to the nationwide employee populations of companies in manufacturing and mining, one arrives at totals of approximately 189,260 union employees covered by members-only collective bargaining, as compared with approximately 702,800 union employees covered by exclusive collective bargaining. In other words, of all union members employed in manufacturing and mining in 1933, approximately 21 percent were represented by independent minority unions that engaged in members-only bargaining. And, as noted above, the percentage of companies that bargained with these minority unions was considerably higher, comprising 45 percent of all the companies that engaged in some form of collective bargaining. These data dramatically portray the eclectic nature of trade-union representation in the manufacturing and mining industries when Section 7(a) was enacted and thus confirm that members-only bargaining through independent minority unions was a common phenomenon in those industries; there is no reason to believe that manufacturing and mining were unique in this regard. Although the findings by the Conference Board may seem surprising today, that same general information was common knowledge at the time.²⁸ Thus, on the eve of congressional consideration of the Wagner bill, minority-union bargaining was a highly visible part of the industrial relations landscape.²⁹

Indeed, under Section 7(a) of the NIRA, majority status was not a prerequisite for collective bargaining. The National Labor Board, an executive agency that President Roosevelt had created to implement Section 7(a), routinely found breaches of the duty to bargain with less-than-majority unions. That agency only used elections to determine majority status when there was a dispute between two unions claiming representation—one of which was usually a company union—or when an employer questioned a union's claim of majority representation, or when a substantial number of employees requested it; otherwise, majority status was deemed irrelevant.³⁰

The legislative history of Wagner's first attempt, his 1934 Labor Disputes bill,³¹ as well as his ultimately successful 1935 National Labor Relations bill, demonstrates that the bargaining provisions in both bills

were intended to protect minority-union bargaining. The 1934 bill—S. 2926—was silent regarding majority representation,³² clearly indicating that an employer had a duty to bargain with any union that represented its employees, whether a majority union or a minority union.³³ And the history of the enactment of the 1935 bill—S. 1958—positively indicates that minority-union bargaining preliminary to mature majority-based exclusive bargaining would be fully protected by the statutory text. Although many aspects of that history support this conclusion,³⁴ one feature not previously recognized is especially revealing—in fact, it is the “smoking gun” that confirms such intent behind the passage of Section 8(5).³⁵

The bill Senator Wagner introduced in the Senate on February 21, 1935, S. 1958,³⁶ was intentionally designed to be substitute legislation that would correct the enforcement shortcomings of Section 7(a). It achieved this by codifying, clarifying, and slightly strengthening the substantive rights contained in Section 7(a) and by incorporating and giving statutory status to the majority-rule concept that the old NLRB had previously adopted by decision and practice; specifically, the old NLRB *Houde*³⁷ decision required bargaining exclusivity after selection of a majority representative but left standing the requirement to bargain with minority unions prior to such majority designation.³⁸ To administer and enforce those rights and corresponding duties, the bill created a new labor board that was “styled National Labor Relations Board to provide continuity with the existing agency.”³⁹ Thus, the new bill was not intended to create new law but rather to reestablish old law, adding only clarity and teeth. Recognition of that purpose is of prime importance to the construction of the act for, as Professor William Eskridge points out, “when Congress borrows a statute, it adopts by implication interpretation placed on that statute, absent express statement to the contrary.”⁴⁰

It should be noted that the original Wagner bill did not contain a separate Section 8(5) duty-to-bargain unfair labor practice. Wagner and Leon Keyserling, his legislative assistant and primary author of both bills,⁴¹ were of the opinion that such a specific provision was unnecessary because the employer’s duty to bargain was adequately covered by the broad collective-bargaining requirement contained in Section 7—i.e., the vintage 14-word phrase previously noted—under which a refusal to bargain represented an *interference* with the workers’ right to

bargain collectively, hence was enforceable under Section 8(1). Wagner's testimony to that effect, which expressly cited the *Houde* decision, was unequivocal:

The right of employees to bargain collectively implies a duty on the part of the employer to bargain with their representatives. [T]he incontestably sound principle is that the employer is obligated by the statute to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable with counter proposals; and to make every reasonable effort to reach an agreement.⁴²

Section 9(a), with its specification of exclusivity *when and if* employees choose a majority representative, which was—and still is—the only limitation on the bargaining requirement, provided that

representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . .

The bargaining requirement, however, was contained only in Section 7 and in the unfair-labor-practice enforcement mechanism in Section 8(1).

The inclusion of a separate duty-to-bargain unfair labor practice—Section 8(5)—was an afterthought that was not intended to change the substantive bargaining requirements of the original bill. In fact, that provision was not added until two and a half months after S. 1958 had been introduced. Francis Biddle, chairman of the old NLRB under the NIRA, had lobbied long and hard for its inclusion. Although Wagner finally agreed to the inclusion, he and the Senate committee in its report, and later also the House committee in its report, made it expressly clear that all four separate unfair-labor-practice provisions following Section 8(1)—including the new Section 8(5)—would “*not . . . impose any limitations or restrictions on the general guarantees of [Section 8(1)], for they were designed only to amplify and spell out specifically the most troubling unfair labor practices.*”⁴³ They were thus meant to reinforce those unfair labor practices, not to diminish them.

Regarding the meaning of the belated amendment, a previously unrecognized aspect of the history of Section 8(5) shows unequivocally that it was not intended to exclude the requirement of a duty to bargain

with a minority union where there was not yet an exclusive Section 9(a) majority union. I found this historical feature in a post-introduction draft of S. 1958 (third draft) that had been prepared between February 21 and March 11, 1935. It contained various proposed amendments, including the one relevant to this inquiry. (This draft had been in the possession of Leon Keyserling and was published in 1989 by Professor Kenneth Casebeer.⁴⁴) After S. 1958 had been introduced and referred to the Senate Committee on Education and Labor on February 21, 1935, Biddle presented two versions of Section 8(5)—contained in this third draft—for the committee’s consideration, i.e., alternative texts of this proposed new unfair-labor-practice provision. They show conclusively that the addition of Section 8(5), which was added to S. 1958 when it was reported by the Senate Education and Labor Committee on May 2, was never intended to confine an employer’s bargaining duty to majority-unions only. Here, verbatim, are the two versions from this draft:

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

or, (5) *To refuse to bargain collectively with employees through their representatives, chosen as provided in Section 9(a).*⁴⁵

By adopting the first version, Biddle, Keyserling (hence also Wagner⁴⁶), and the Senate committee were consciously choosing language that would assure that the duty to bargain with a majority union would not exclude the duty to bargain with a minority union prior to the establishment of majority representation.⁴⁷ Patently, had the drafters intended to exclude such nonmajority bargaining they would have selected the second version, for it would have unequivocally limited the bargaining obligation under Section 8(5) to majority unions “chosen as provided in Section 9(a).” Here was the smoking gun.

The subject of minority-union bargaining prior to the designation of majority representation was not even an issue in the congressional debates. Although minority-union members-only bargaining was common knowledge and the history of the legislative drafts demonstrates that the draftsmen were well aware of the need to protect such bargaining, it was not viewed as a controversial issue. There was, however, considerable controversy about the ultimate configuration of mature bargaining. Proponents of the bill believed that *majority-rule* bargaining—the bill’s solution to the problem of dual unionism—would mean more effective

bargaining, hence that was unequivocally the goal sought by Wagner and his supporters.⁴⁸ On the other side of that debate, the employer lobby advocated plurality bargaining, opposed majority rule as a denial of the rights of minorities, and asserted that the board's authority to determine the bargaining unit would lead to a closed shop.⁴⁹ In that context, employers clearly defended the right of minority unions to engage in collective bargaining.

The debates focused on the anticipated presence of multiple unions and on whether a minority union should have bargaining rights after a majority union had been chosen. There was no discussion about minority-union bargaining prior to the establishment of majority representation, and numerous statements by the proponents of the bill showed full recognition that the majority rule provided by Section 9(a) would apply to bargaining only after employees had selected their majority representative.⁵⁰ There was never a question voiced about the nonapplicability of that restriction prior to majority selection. And although elections were looked upon as one of the best means to settle disputes over union representation, the disputes that were generally anticipated concerned the choice of which union would represent the employees, not whether the employees would be represented.

Legislative history therefore confirms what the nonambiguous language of the statute requires. That text, standing alone, establishes that in workplaces where employees have not yet selected a majority representative, an employer has an affirmative duty to engage in good-faith bargaining with a nonmajority union that seeks to negotiate only on behalf of its employee members.⁵¹ This is a fundamental right of constitutional proportions. As the Supreme Court characterized Section 7 in *NLRB v. Jones & Laughlin Steel Corp.*⁵² (its first case construing the NLRA), "the right of employees to self-organization and to select representatives of their own choosing for collective bargaining . . . is a *fundamental right* . . ." ⁵³ As I demonstrate in *The Blue Eagle at Work*, such right of association is protected by the First Amendment to the U.S. Constitution.⁵⁴ Indeed, the Supreme Court declared in the *Gissel*⁵⁵ case in a comparative reference to an employer's freedom of expression under Section 8(c),⁵⁶ which the Court said "merely implements the First Amendment,"⁵⁷ "an employer's rights cannot outweigh the *equal rights* of the employees to associate freely, as those rights are embodied in §7 and protected by §8(a)(1) . . ." ⁵⁸ Furthermore, the right of employees

in a less-than-majority union to engage in collective bargaining is also a fundamental human right that is recognized by international law to which the United States is a party.⁵⁹

What then is the state of the currently recognized law on this issue? Although there have been no decisions explicitly holding that an employer has a duty to bargain with a minority union on a members-only basis where there is not presently a Section 9(a) representative, several cases from both the Supreme Court and the Labor Board actually point in that direction. Indeed, these cases confirm the legality of such bargaining and resulting contracts under Sections 8(a)(1), 8(a)(2), and 8(a)(3).⁶⁰ Furthermore, there are no NLRB or court decisions holding that such minority-union bargaining is not required by the act.⁶¹ Although latter-day conventional wisdom assumes that the only bargaining duty countenanced by the act is bargaining with a majority union in an appropriate unit, such conventional wisdom, like the emperor, has no clothes.

Immediately after passage of the act in 1935, however, conventional wisdom indicated otherwise. For several years following its enactment, no legal questions were raised as to the scope of the act's bargaining requirements, either as to members-only minority-union bargaining or majority-exclusivity bargaining.⁶² As previously noted, both types of bargaining had prevailed under the old NIRA and now both prevailed under the new NLRA. By 1938, a year after the Wagner Act was declared constitutional,⁶³ members-only contracts were perhaps as common—if not more common—than majority-exclusivity contracts,⁶⁴ and their coverage may have been even more extensive. Both unions and employers in large numbers found members-only agreements pragmatically useful. At places where unions had organized a substantial number—but less than a majority—of a company's bargaining-unit employees and majority support did not seem likely or easily attainable, membership-based contracts were welcomed and many were signed. Such contracts were viewed as a preliminary stage in the organizational and collective bargaining process. When the unions achieved majority status these contracts were almost always replaced by conventional exclusive-recognition agreements. Although employers generally resisted unionization of their employees, there seems to be no indication of any employer contending that it had no legal duty to bargain with a minority union for its members only. Numerous companies engaged in such

bargaining and signed members-only agreements—often readily—for they considered this limited form of recognition a lesser evil than exclusive recognition inasmuch as the latter was usually accompanied by a demand for a closed shop.

On March 2, 1937, U.S. Steel recognized the CIO's Steel Workers Organizing Committee (SWOC) as bargaining agent for employees who were its members,⁶⁵ and that agreement became the model for the steel industry.⁶⁶ By December 15, 1937, of the 445 contracts entered into by the SWOC, 85 percent provided for members-only recognition,⁶⁷ and “[o]n the basis of number of employees embraced, the model agreement had a coverage of 98 percent of all those working under contracts with the union.”⁶⁸ Eventually these members-only agreements were replaced by exclusive agreements.⁶⁹ What happened in steel was also happening in many other workplaces in U.S. industry.⁷⁰

General Motors (GM) was a part of this pattern, though reluctantly. Following a series of sit-down strikes, pressure from the White House, and dogged mediation by Michigan's governor Frank Murphy, GM on February 11, 1937, agreed to recognize the United Automobile Workers (UAW) as the representative of its members only.⁷¹ On March 24, Chrysler followed suit with similar recognition. The members-only agreement thus emerged as a critical part of the UAW organizing program. By 1938, of the 537 auto industry contracts signed by the UAW, 343—i.e., 64 percent—were members-only agreements.⁷² These agreements were considered useful stepping stones on the path to majority membership and mature collective bargaining.⁷³ By 1942 nearly all the plants where the UAW had first achieved recognition on a members-only basis were now locked in for “sole bargaining rights.”⁷⁴

Not surprisingly, however, by the early 1940s, members-only agreements had become increasingly rare and were soon forgotten, for unions were now taking the path of least resistance and bypassing that early bargaining stage, seeking instead—and in most cases achieving—majority-bargaining rights directly through NLRB representation procedures. During the board's first decade, unions were successful in winning recognition in over 85 percent of their representation cases.⁷⁵ NLRB elections thus became habit-forming in a relatively short period of time.

Although unions originally favored board elections out of sheer convenience, reliance on the election process, especially during and af-

ter World War II, now became routine, with concomitant unawareness of the true scope of bargaining offered by the statute. As for employers, they had no reason to question dependence on the election process, for they were learning that elections provided an ideal forum in which to mount offensive campaigns against union representation. NLRB elections therefore became the centerpiece of the statute and eventually the established norm. In due time, the interplay of the employers' self-interest and the unions' acquiescence in relying on elections effectively repressed all institutional memory of minority-union bargaining.

Today, with the prospect of restoring that memory, it is time for the labor movement to return to its roots, to return to organizing on the basis of members-only collective bargaining, for this may be labor's best opportunity to reverse the precipitous decline of union membership in the private sector. Such organizational efforts will of course have to be accompanied by appropriate legal action designed to reaffirm and articulate the original and correct interpretation of the law.⁷⁶

How will this less-than-majority organizational process differ from conventional organizing usually designed to culminate in an election? The differences, which are substantial, concern both form and substance. From the very beginning, the emphasis in a union's organizational campaign will be on building a union, not on winning an election. This process will call for a totally different mind-set. For example, a membership-based campaign will not seek or solicit union-authorization cards—rather, it will seek and offer genuine union membership, just as unions did before they became addicted to the election process. Employees who join and pay dues⁷⁷ to a developing union will know they are making a meaningful commitment to the organization. To accommodate the resulting new categories of membership, unions that engage in member-based organizing will probably adjust their dues structures accordingly, perhaps by instituting a multitiered plan. Payment of union dues, even though nominal in amount, will mean that pro-union employees will have “put their money where their mouth is,” and having paid their dues there will be no doubt as to their voluntary choice of union representation.⁷⁸

The position of union steward in the new organization will be especially important, for that person will have an early role to play in dealing with the employer. Acting pursuant to the long-standing rule in the *Weingarten*⁷⁹ case, i.e., in a *recognized union* setting, the union steward

will be the person called upon to aid an employee in need of assistance at a potentially disciplinary interview, for since the board's 2004 decision in *IBM Corporation*,⁸⁰ an unrepresented employee in a nonunion workplace is no longer entitled to the assistance of an ordinary coworker at a *Weingarten* interview. Accordingly, the newly organized union should make known to every employee in the workplace that its union steward is available to aid union members, both old and new, who are called in for investigatory interviews that might result in disciplinary action. The law requires that if the employer proceeds with such an interview, the steward must be permitted to attend and participate if the member requests the steward's presence. The steward of this new union—who ideally will be an experienced and well-respected employee—will thus be the logical person to provide a targeted employee with support and representation in the interview. And because the *Weingarten* rule does not require the employer to give employees any notice of their right to representation, not even to the employee slated for the interview, for the “right arises only in situations where the employee requests representation,”⁸¹ it will behoove the organizing union to make known to all employees that this guaranteed right is available to all represented employees. As a practical matter, the right can also be made available to any nonunion employee who takes advantage of expedited union membership that is likely to be offered by the union steward.

This brings me to the collective-bargaining role that distinguishes how a developing union will henceforth operate at its organizational stage, as compared with the manner in which most unions presently conduct their organizing campaigns. Once the new union has achieved sufficient size and structure—and only good judgment and experience, and perhaps good luck in the absence of experience, will indicate when that has occurred—the new union will notify the employer (preferably in writing) of its existence, of its representational status for its members, and of any immediate requests for negotiations on their behalf. This initial notification might also introduce a request to bargain about a limited number of general subjects that it deems urgent or worthy of prompt attention—for example, employee discipline and grievance procedures, bulletin board space, or any other pressing issue requiring early resolution.

After the company has thus been notified of the union's representational status and members-only recognition has been requested, the

union's chief function will be simply to act like a union, which means concentrating on representing its members regarding a multiplicity of work-related issues. This should prove to be of assistance not only to existing members, but also should serve to attract new members. As Freeman and Rogers have pointed out, workers who experience union membership, especially current membership, overwhelmingly tend to favor union representation.⁸² Employees who have participated personally in the developing union will be its strongest advocates, and their enthusiasm is likely to be contagious. The organizational process is thus merged with the representational process.

The raw material for the new union's initial forays into collective bargaining will be the numerous changes in employment conditions that frequently arise in any workplace, i.e., the routine employment decisions that nonunion employers typically make unilaterally, though sometimes with nominal input from affected employees. Where employees are represented by a bargaining agent—which will now be the case for minority-union members—any such unilateral change in employees' working conditions or status will almost always represent a *per se* refusal to bargain.⁸³ Such separate potential bargaining situations may now be actively addressed by the new union.

As these ad hoc incidents arise concerning changes in bargainable subjects that might affect one or more union members, it will be the union's responsibility to provide assistance and voice to the person or persons affected, for, as the Supreme Court stressed in *Conley v. Gibson*,⁸⁴ “[c]ollective bargaining is a continuing process”⁸⁵ that involves day-to-day adjustments in working conditions—it is not a condition that occurs only when a bargaining contract is being negotiated.⁸⁶ Inasmuch as good-faith bargaining requires negotiating to *impasse* as a precondition to unilateral implementation,⁸⁷ if time is a factor the employer will have some legal incentive to reach a mutually satisfactory resolution of the issue. Usually, however, if a union has little or no means to pressure an employer—which will probably be the case for almost all less-than-majority unions at the organizational stage—success at ad hoc bargaining, if there is any, will depend largely on the reasonableness of the union's proposals and the persuasiveness of its spokesperson. That person will probably be an outside union representative whose physical presence inside the workplace will in itself convey a powerful message to wavering nonunion employees. This mini-bargaining process may

thus bring its own reward even if the meetings prove to be no more than meet-and-confer sessions. In many cases, however, especially during the early stages of this unfamiliar procedure, the process will undoubtedly require the support—whether explicitly or implicitly—of NLRB enforcement; lawful economic pressure may also be required.

Bargaining while organizing will certainly not be trouble-free. Nevertheless, this direct participation by employees and their union should provide a more potent response to an employer's effort to spread its antiunion message through captive audiences and one-on-one contact. But without an election goal, and with its obligation to bargain continuing regardless of the union's lack of majority, the employer may eventually find its antiunion presentations less effective and perhaps even counterproductive.

In workplaces where members-only organizing and bargaining is finally accepted—which will undoubtedly require considerable time, a good deal of patience, and persuasive legal education—ad hoc bargaining episodes will probably continue until the parties jointly decide to initiate serious negotiations for a comprehensive agreement or the union on its own feels that it has sufficient members (albeit less than a majority) to exercise enough bargaining clout to request full contract negotiations. When a collective bargaining contract is finally agreed upon, it will apply to union members only; but it will be a legally enforceable agreement.⁸⁸ In all probability, the company will make the same economic benefits available to comparably situated nonunion employees, which will be its right and undoubtedly its preference. The contractual grievance procedure, however, will be applicable to union members only.⁸⁹

When a minority union finally achieves majority membership, it will of course need to demonstrate that fact in order to become the employees' exclusive bargaining representative. It may be anticipated, however, that many unions will have no need to resort to elections or other external means to prove majority status, for their visible growth with members-only bargaining will have achieved a *fait accompli* that convinces the employer that an election or other verification would serve no useful purpose. In other workplaces, however, an election may be needed to confirm the new union's majority, although such a union may well be advised not to proceed to an election until it is actively functioning as a viable labor organization. This was the election pat-

tern that commonly occurred during the early years following passage of the Wagner Act, especially in the steel and automobile industries.⁹⁰ That pattern may now be repeated, but not universally. Considering the endemic nature of most U.S. employers' deep-seated opposition to unions and the aversion of some workers toward unions, it is likely that some minority unions will not develop into majority unions—at least not promptly, and in many cases never. Even so, the workers in those unions will be exercising their right “to bargain collectively through representatives of their own choosing” notwithstanding that a majority of their coworkers have not chosen to join with them. These minority-union employees will at least have some degree of union protection and benefits—though with limited bargaining power. Yet their status need not necessarily be viewed as temporary or incomplete. Union members and nonmembers ought to be able to work side-by-side with each other without special problems, provided the employer does not interfere with the exercise of freedom of choice to belong or not to belong to a labor union, and provided the union in turn recognizes that its existence does not require absolute majority status. Minority unionism is not uncommon in many other countries, especially in Europe.

This brings to a conclusion my brief restatement of the law regarding minority-union bargaining and my thumbnail descriptive forecast of the organizational and bargaining procedures that minority unions may now follow. I am not suggesting, however, that once the law recognizes the right of minority unions to bargain for their members only prior to establishment of Section 9(a) representation that union organizing will be easy. Nor am I predicting that employers will cease fighting unions and thereafter abandon their efforts to maintain a union-free environment. But when employers realize that henceforth workers will require neither a majority union nor an election to be entitled to engage in collective bargaining, a major incentive for mounting aggressive anti-union campaigns will have vanished. Furthermore, employers will no longer have election targets with finite campaign timelines in which to persuade, promise, intimidate, or punish employees to discourage them from voting for union representation. Nevertheless, many employers will probably persist in discharging and otherwise discriminating against union employees, and undoubtedly many will continue to issue threats and promises-of-benefits to discourage unionization. But at some point in time, compliance with the NLRA may actually be-

come the established norm. That was Senator Wagner's intended goal. Despite the debilitating administrative and judicial constructions that have been inflicted on the act over the years, its core provisions remain intact. With the prospect of a resumption of members-only organizing and bargaining, democratic rights may finally be reclaimed in the U.S. workplace.

Notes

This chapter conforms generally to the Bluebook legal style of citation. For the latest edition, see *The Bluebook: A Uniform System of Citation*, 18th ed. (Cambridge, MA: Harvard Law Review Association, 2005).

1. Cornell University Press, Ithaca, NY (2005) (hereinafter *BLUE EAGLE AT WORK*). In addition to a more thorough exposition of the statutory and historical bases for the thesis, the book also presents applicable constitutional and international human-rights dimensions, detailed guidelines for the legal establishment of members-only, minority-union bargaining, and an alternative rationale premised on NLRB permissive construction of the National Labor Relations Act. The book also provides an in depth exploration of the anticipated changes in the process of union organizing and bargaining, a review of the variety of employee groups likely to be created or affected by these unfamiliar phenomena, and the impact that such changes will likely have on employer-employee relationships.
2. 49 Stat. 449 (1935), 29 U.S.C. §§ 151-69 (as amended).
3. 61 Stat. 136 (1947).
4. 73 Stat. 519 (1959).
5. 29 U.S.C. §159(a).
6. §7. 29 U.S.C. §157.
7. See Ch. 9 in *BLUE EAGLE AT WORK*, *supra* note 1.
8. E.G. Latham, *Legislative Purpose and Administrative Policy under the National Labor Relations Act*, *GEO. WASH. L. REV.*, 433 (1936) (hereinafter Latham).
9. Clyde Summers, *The Kenneth M. Piper Lecture: Unions Without Majority-A Black Hole?*, 66 *Chi-Kent. L. Rev.* 531, 539 (1990) (hereinafter Summers).
10. While not questioning the basic thesis, Alan Hyde and Matthew Finkin take the position that because of the passage of time legislative action would be required to reaffirm the true meaning of the law, and even Summers suggests that "it may be much too late to open this question . . ." *Id.* at 538. See Alan Hyde, *After Smyrna: Rights and Powers of Unions that Represent Less than a Majority*, 45 *Rutgers L. Rev.* 637, 639 n. 8 (1993); Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 *CHI.-KENT L. REV.* 195, 198 n. 18 (1993) (hereinafter Finkin). I am obviously in disagreement with these overly pessimistic concerns.
11. Latham, *supra* note 8 at 453.
12. Summers, *supra* note 9 at 539.

13. U.S. BUREAU OF LABOR STATISTICS, BULLETIN NO. 287, NATIONAL WAR LABOR BOARD 32, quoted in Raymond S. Rubinow, SECTION 7(A): ITS HISTORY, INTERPRETATION AND ADMINISTRATION (Office of National Recovery Administration, Div. of Review, Labor Studies Section, 11 (1936).
14. 29 U.S.C. §§101-115.
15. Ch. 90, §7(a), 48 Stat. 195 (1933).
16. Except for immaterial changes in syntax.
17. The present §8(a)(1).
18. The only substantive change in the bargaining requirement in the Wagner Act was contained in §9(a), which was a reaffirmation of the non-statutory practice of the two earlier labor boards that had operated under §7(a), to wit, that once a majority of the employees in an appropriate bargaining unit select a union to represent them, that union becomes the *exclusive* representative for all the employees in that unit. See BLUE EAGLE AT WORK, *supra* note 1 at chs. 1 & 2.
19. See Minier Sargent, *Majority Rule in Collective Bargaining Under Section 7(a)*, 29 ILL. L. Rev. 275, 280 (1934) (hereinafter Sargent) (“For many years it has been customary for each employee to select his own union or organization to act for him in collective bargaining”). See also Finkin, *supra* note 10 at 197 (“[T]he tradition of American ‘trades unions’ throughout the nineteenth and the early twentieth century was to bargain only for their members; but this was coupled to the demand that employers hire union members exclusively . . .”).
20. For example, as noted in the REPORT OF THE UNITED STATES INDUSTRIAL COMMISSION, H. Doc. 7, V73 No. 179, 830, 861-64, 898-900 (1902), the Iron Molders Union’s agreements in the stove industry contained members-only provisions, as did agreements in the glass industry.
21. Milton Derber, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865–1965 94 (1970); THE TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS: A SURVEY OF EXPERIENCE IN LEADING AMERICAN INDUSTRIES (Harry A. Millis, Research Director) 689 (1942)
22. See Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 Duq. L. Rev. 779, 804 (1992); THE TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS: A SURVEY OF EXPERIENCE IN LEADING AMERICAN INDUSTRIES (Harry A. Millis, Research Director) 689 (1942).
23. Lloyd K. Garrison, *The National Labor Boards*, 184 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 145 (1936).
24. On the day of its introduction, Wagner told the Senate: “The national labor relations bill which I now propose is novel neither in philosophy nor in content. It creates no new substantive rights.” 2 LEGISLATIVE HISTORY OF THE NLRA, 1935 (1949), (hereinafter 2 LEGIS. HIST.) at 1312. That concept of intent behind the Wagner bill has been widely recognized, e.g., see Melvyn Dubofsky, THE STATE AND LABOR IN MODERN AMERICA 127 (1994).
25. Presently known as “The Conference Board.” The organization was founded in 1916. See <http://www.conference-board.org/whoweare>.
26. National Industrial Conference Board, Inc., INDIVIDUAL AND COLLECTIVE BARGAINING UNDER THE N.I.R.A.—A STATISTICAL STUDY OF PRESENT PRACTICE (1933)

- (hereinafter Conference Board).
27. *Id.* at 16, Table II. Senator Wagner was well aware of the Conference Board study, for he referenced it in a New York Times article on March 11, 1934 (made a part of the Congressional Record during consideration of his Labor Disputes bill, S. 2926, March 12, 1934), 1 LEGISLATIVE HISTORY OF THE NLRA, 1935 (1949), (hereinafter 1 LEGIS. HIST.) at 23.
 28. Sargent, *supra* note 19 at 275, 285 (1934).
 29. A 1935 BLS study confirms that a large number of employers dealt with both trade unions and company unions in roughly the same proportions as found earlier by the Conference Board study. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 634, CHARACTERISTICS OF COMPANY UNIONS 1935 191, 203 (1937).
 30. This construction of Section 7(a) was illustrated in several cases, including decisions subsequent to Denver Tramway, 1 NLB 64 (1934), where the board established the principle of majority rule applicable to a union that proves its majority in a board-ordered election. *See* National Lock Co., 1 NLB (Part 2) 15 (1934); *Bee Bus Line Co.*, 1 NLB (Part 2) 24 (1934); *Eagle Rubber Co.*, 1 NLB (Part 2) 31 (1934). *See also* discussion in BLUE EAGLE AT WORK, *supra* note 1 at 37–39.
 31. *See* ch. 2 in BLUE EAGLE AT WORK, *supra* note 1.
 32. *Id.* at 236.
 33. *Id.*
 34. *Id.* at 44–45, 56, 69–71, & 74–75.
 35. The present §8(a)(5).
 36. 1 LEGIS. HIST. at 1295.
 37. Houde Engineering Corp., *id.* at 35.
 38. *See* BLUE EAGLE AT WORK, *supra* note 1 at 48–52 & 70.
 39. Irving Bernstein, TURBULENT YEARS, A HISTORY OF THE AMERICAN WORKER 1933–1941 326 (1971) (hereinafter Bernstein TURBULENT YEARS). The reference is to the National Labor Relations Board, created by Exec. Order No. 6073, June 29, 1934.
 40. The “Borrowed statute” rule. William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION, *Appendix 3, The Rehnquist Court's Cannons of Statutory Construction*, 323, 324, (1994), *citing* *Molzof v. United States*, 112 S. Ct. 711, 716 (1992); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).
 41. *See* note 46 *infra*.
 42. 1 LEGIS. HIST. at 1419. Several weeks later Wagner reaffirmed that position. 2 LEG. HIST. at 2102. For the same view reconfirmed by Keyserling in an interview in March, 1986, *see* Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 330 (1987) (hereinafter Casebeer *Holder of the Pen*). These views were consistent with the key decision of the old NLRB, *Houde Engineering Corp.*, 1 NLRB (old) 35 (1934), as well as several other cases cited therein. *See* BLUE EAGLE AT WORK, *supra* note 1 at 73, n. 86.
 43. Senate Committee Report, 2 LEGIS. HIST. at 2309. Emphasis added. *See also* Wagner statement and House Committee Report, *id.* at 2333 and 2971, respectively.

44. Kenneth Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 *INDUS. REL. L. J.* 73, 120 (1989) (hereinafter Keyserling drafts). The proposed changes in this draft are reproduced by Casebeer in the Appendix to his article, *id.* at 130–131, though under the misleading heading, “*NLRA Draft 2 - February 15, 1935 - New Preamble, Amendments in Committee Annotated by L. Keyserling in Margin.*” The document is clearly a *third draft*, not the second draft (the second draft was S. 1958 as introduced on February 21, 1935), nor are all of the changes “amendments in Committee”—some were and some were not. (The original of this draft is in the collection of the Leon Keyserling papers in the Lauinger Library of Georgetown University, which graciously provided me with a photocopy.) In his description of the draft earlier in his text, *id.* at 86, Professor Casebeer does explain that the draft “represents the National Labor Relations Act as introduced February 15, 1935, together with amendments of the Committee on Education and Labor annotated by Keyserling as to their source or sponsor.” That clarification, however, is also partially inaccurate, for only some of the inserted proposals were ultimately adopted by the committee. The photocopy in my files shows that it is a revision superimposed on an officially printed version of S. 1958 introduced on Feb. 21, 1935 (which is the calendar day, though it also bears the session date of Feb. 15, 1935). All of the changes on the document appear either in handwriting or as typed copy on inserted flaps—the latter being how the two versions of §8(5) noted here appear, but with the handwritten identification: “Biddle.” (There are also other handwritten marginal designations elsewhere in the document showing the sources or sponsors of the changes, except—presumably—when Keyserling was himself the source or sponsor.) Comparisons of the proposed changes inserted in the document with the written proposals attributed to various sources by the Senate Committee in its March 11, 1935, *Comparison of S. 2926 and S. 1958*, 1 *LEGIS. HIST.* at 1319–71, and also the changes that were incorporated in the bill as reported by the committee on May 2, 1935, show that this was a preliminary and tentative committee mark-up of the original bill, i.e., a working draft composed during committee consideration between Feb. 21 and March 11, 1935. Most but not all of those changes were incorporated in the bill as reported, which demonstrates the preliminary nature of the draft’s mark-up status, and—more important—that every change or proposed change included in this draft occurred within the Senate committee and thus had the consideration of that committee.
45. Emphasis added.
46. Although Keyserling was the primary draftsman of all of Wagner’s public statements and materials—including his speeches, his legislative bills, and also key committee reports—the Senator was kept fully advised at all stages of the work and was in total agreement with the final product. Casebeer *Holder of the Pen*, *supra* note 42 at 295, 302–303, 341–343, and 361; Casebeer *Keyserling Drafts*, *supra* note 44 at 76; Bernstein *TURBULENT YEARS*, *supra* note 39 at 340. *See also* Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 *GEO. WASH. L. REV.* 199, 215 (1960).

47. It was nevertheless essential to include reference to §9(a) in order to ensure that where there was a majority designation in an appropriate bargaining unit, the representative would be bargaining exclusively on behalf of all employees in that unit, and an employer's recognition or bargaining with any other union would not be permitted—which was the ultimate bargaining objective of the statute.
48. 1 Legis. Hist. 1419; Summers, *supra* note 9 at 539 (“[t]he history of the majority rule principle shows that its purpose was not to limit the ability of a non-majority union to represent its own members, but to protect a majority union’s ability to bargain collectively.”).
49. Irving Bernstein, THE NEW DEAL COLLECTIVE BARGAINING POLICY 109 (1950). See BLUE EAGLE AT WORK, *supra* note 1, at 35–36 and 50–52.
50. E.g., see BLUE EAGLE AT WORK, *supra* note 1 at 70 and 79.
51. See ch. 5, *id.*, for a detailed analysis of the statutory text.
52. 301 U.S. 1 (1937)
53. *Id.* at 33. Emphasis added. See generally BLUE EAGLE AT WORK, *supra* note 1 at ch. 8. See also James A. Gross, *Worker Rights as Human Rights: Wagner Act Values and Moral Choices*, 4 U. Pa. J. Lab. and Emp. L. 479 (2002); Roy J. Adams, *Choice or Voice? Rethinking American Labor Policy in Light of the International Human Rights Consensus*, 5 EMPLOYEE RTS. AND EMP. POL’Y J. 521 (2001).
54. For treatment of the constitutional issue, see BLUE EAGLE AT WORK, *supra* note 1 at ch. 6.
55. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).
56. 29 U.S.C. §158(c).
57. 395 U.S. at 617.
58. *Id.* Emphasis added.
59. See INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (adopted in 1966, entered into force in 1976, ratified by U.S. in 1992); 42 U.S.C. §1983 (1994); 6 I.L.M. 368; INTERNATIONAL LABOUR ORGANIZATION DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, International Labour Conf., 86th Sess. (June 1998), available at <http://www.ilo.org/public/english/standards/decl/declaration/text>. For details of these obligations, see BLUE EAGLE AT WORK, *supra* note 1 at ch. 8.
60. *NLRB v. Jones and Laughlin Steel Corp.*, *supra* note 52; *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236-37 (1938); *International Ladies Garment Workers v. NLRB* (Bernhard-Altman Texas Corp.), 366 U.S. 731, 736, 741-43 (1961); *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 29 (1962); *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984); *Solvay Process Co.*, 5 NLRB 330 (1938); *The Hoover Co.*, 90 NLRB 1614, 1618 (1950); *Consolidated Builders, Inc.*, 99 NLRB 972, 975 (1952). In *Consolidated Edison*, where the board had previously dismissed an unfair labor practice charge under §8(2), the Supreme Court found that minority-union members-only bargaining and contracts did not violate Sections 8(1) and 8(3). And in the *Solvay*, *Hoover*, and *Consolidated Builders* cases, the board found members-only bargaining to be lawful under Sections 8(a)(1) and 8(a)(2). See BLUE EAGLE AT WORK, *supra* note 1 at 93-97.
61. See BLUE EAGLE AT WORK, *id.* at ch. 9.

62. The only legal question of serious consequence raised by employers at that time concerned the Act's constitutionality, which the Supreme Court put to rest in *NLRB v. Jones & Laughlin Steel Corp.*, *supra* note 52. See James A. Gross, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 183–88 (1974).
63. *NLRB v. Jones & Laughlin Steel Corp.*, *id.*, decision rendered on April 12, 1937.
64. *Union Recognition as Shown in Contracts*, 1-A L.R.R.M. (BNA) 781 (1938). Of the 23 “typical” contracts reported, 13 (57 percent) were members-only agreements, whereas only 8 (35 percent) were exclusive agreements (2 were ambiguous as to coverage).
65. Bernstein TURBULENT YEARS, *supra* note 39 at 465.
66. See Robert R. R. Brooks, AS STEEL GOES, . . . : UNIONISM IN A BASIC INDUSTRY, 166–167 (1940) (hereinafter Brooks).
67. *Collective Bargaining Contracts and Industrial Practices: Bargaining in the Steel Industry*, 3 LRRM (BNA) 553 (1939).
68. *Id.*
69. Brooks, *supra* note 66 at 166; however, in 1940 the union's contracts with U.S. Steel were still “for members only.” *Id.* at 248.
70. Here is a snapshot-view of union organizational status during that period: “Most unions seek a closed, union or preferential shop, but newly organized ones usually have difficulty in winning any one of these from employers traditionally opposed to unionism. Ten years ago most agreements provided for the closed shop. In recent years there have been more exceptions than at any time since the 1880s; unions were willing to take what they could get in order to secure a foothold in areas previously closed to them. For example, *many agreements in the 1930s with new industrial unions in the mass production industries stated that the union was to bargain for members only. However, as collective bargaining gained more general acceptance and as unions won National Labor Relations Board elections, these “membership” agreements were generally replaced by contracts designating the union as exclusive representative of all employees . . .*” THE TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS: A SURVEY OF EXPERIENCE IN LEADING AMERICAN INDUSTRIES (Harry A. Millis, Research Director) 24 (1942). Emphasis added.
71. Sidney Fine, SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936–1937 266–312 (1969) (hereinafter Fine).
72. *Bargaining in the Automobile Industry*, 2 L.R.R.M. 952–53 (1938).
73. For example, following NLRB election victories in 1940, the UAW was officially certified as exclusive bargaining agent for 130,000 workers at GM and for 50,000 workers at Chrysler. 5 NLRB Ann. Rep. 18–19, 141, 151 (1941). See also Fine, *supra* note 71 at 329.
74. W. H. McPherson, *Automobiles*, in HOW COLLECTIVE BARGAINING WORKS 571, 595 (Harry A. Millis ed., 1942)
75. 2 NLRB ANN. REP. 25-26 (1937); 3 NLRB ANN. REP. 39, 49 (1939); 4 NLRB ANN. REP. 43, 53 (1940); 5 NLRB ANN. REP. 17-18, n. 6, 29 (1941); 6 NLRB ANN. REP. 37, Table 19 (1942); 7 NLRB ANN. REP. 90, Table 18 (1943); 8 NLRB

- ANN. REP. 37, 38, 90, Table 18 (1944); 9 NLRB ANN. REP. 88, Table 13 (1944); 10 NLRB ANN. REP. 4 (1946). See BLUE EAGLE AT WORK, *supra* note 1 at 86.
76. See BLUE EAGLE AT WORK, *supra* note 1 at ch. 10.
77. Our Canadian neighbors have long recognized that “[t]he usual method of which trade unions establish representativeness in order to acquire bargaining rights is through evidence of membership.” H.W. Arthurs, D.D Carter, H.J. Glasbeek, LABOUR LAW AND INDUSTRIAL RELATIONS IN CANADA 189 (2nd ed. 1984).
78. Compare Linden Lumber Div., *Summer & Co. v. NLRB*, 419 U.S. 301 (1974).
79. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), in which the Supreme Court upheld an NLRB rule that an employee in a unionized workplace who is called in by management for an investigatory interview that the employee reasonably fears may result in disciplinary action has a statutory right to refuse to submit to such an interview without union representation.
80. 341 NLRB No.148 (June 9, 2004), which reversed *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92, *aff’d in pertinent part*, 268 F. 3d 1095 (D.C. Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 4231 (U.S. June 10, 2002). Inasmuch as the *Weingarten* rule is based on the right to engage in concerted activity for “mutual aid or protection” pursuant to §7—not on the duty to engage in collective bargaining under §8(a)(5)—the Board held in *Epilepsy Foundation*, as it had previously ruled twelve years earlier in *Materials Research Corp.*, 262 NLRB 1010 (1982), (which was overruled three years later by a different Board in *Sears, Roebuck & Co.*, 274 NLRB 230 (1985)), that employees in nonunion workplaces are entitled to *Weingarten*-like protection. It held that “where employees are not represented by a union [they have a] right to have a coworker present at an investigatory interview” that the employee reasonably believes could result in disciplinary action. In reversing *Epilepsy Foundation* in *IBM Corporation*, the current Board distinguished between the status of a coworker and a union representative (steward), noting that “[t]he union representative typically is accustomed to dealing with the employer on a regular basis [whereas a] coworker is unlikely to bring such skills to an interview because he has no experience as the statutory representative of a group of employees.” 341 NLRB No.148, slip op. at 5.
81. *Weingarten*, *supra* note 79 at 256. Emphasis added.
82. Richard B. Freeman and Joel Rogers, WHAT WORKERS WANT 69 (1999).
83. *NLRB v. Katz*, 369 U.S. 736 (1962). See also *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (“[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change in an existing term or condition of bargaining.”).
84. 355 U.S. 41 (1957).
85. *Id.* at 46.
86. Examples of mandatory subjects of bargaining likely to arise on an ad hoc basis would include changes in wages and hours of work, discharges and discipline, work-rule changes, safety and health issues, and changes in vacation and holiday pay. These are but a few, for a comprehensive list of mandatory subjects would be lengthy. For discussion and authorities regarding these and other mandatory

- subjects of bargaining, see BLUE EAGLE AT WORK, *supra* note 1 at 194–195.
87. “Upon impasse, the employer may make unilateral changes in working conditions, but unilateral changes implemented before a genuine impasse has been reached violate the Act.” Patrick Hardin and John E. Higgins, Jr., eds. THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 926 (4th ed. 2001).
 88. See *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962).
 89. For treatment of NLRB changes in the collective bargaining process likely to result from members-only bargaining, see BLUE EAGLE AT WORK, *supra* note 1 at 211–217.
 90. See *supra* at notes 69 and 73–74.

Justice on the Job
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