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"Better Than a Strike": Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act

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The strike is the essence of collective labor activity. Indeed, the labor movement had its very origin in concerted work stoppages.[1] By striking—joining together to withhold their labor—workers seek to enhance their power to bargain over the terms of the labor contract. Even Adam Smith, the progenitor of classical market economics, observed that in industrial disputes employers have the advantage over individual employees because capital and labor have unequal capacities to "hold out"—that is,

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[1] E.T. Hiller, *The Strike: A Study in Collective Action* vii (Chicago, 1928).

to refrain, respectively, from buying or selling labor power.[2] At least since Smith's time, the strike has been the characteristic form of industrial struggle, deployed by workers to redress the asymmetries of bargaining power.[3] The term itself derives from the collective decision of British sailors in 1768 to "strike" the sails of their ships and thereby halt commerce in and out of London.[4]

In 1935 Congress inscribed the right to strike into federal law with the passage of the National Labor Relations Act (NLRA).[5] According to the United States Supreme Court, the Act was intended to establish a system of collective bargaining between employers and employees "with the right to strike at its core."[6] The right to strike was critical because the Act merely mandated negotiation—not agreement—between employers and unions. The theory was that the specter of employees exercising their newfound right to strike would impel employers to sign contracts with unions. The strike, the Supreme Court observed, is "an economic weapon which in great measure implements and supports the principles of the collective bargaining system."[7] Notably, however, virtually all collective bargaining agreements now include a no-strike pledge through which labor relinquishes the right to strike in exchange for all the contractual commitments made by employers regarding wages, hours, and working conditions. Paradoxically, then, the right to strike undergirds a system of collective bargaining designed to avert continual industrial conflict.

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[2] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 66 (Random House, 1937) (originally published 1776). Smith further explained, "It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute . . . . A landlord, a farmer, a master manufacturer, or merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week . . . ." Id.

[3] At the very birth of this nation in 1776, printers ordered a "turn-out" to secure a wage increase in a New York City still occupied by the British. See Florence Peterson, *Strikes in the United States*: 1880-1936, BLS Bull 651 at 12 (1937).

[4] See Marcus Rediker, *Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates, and the Anglo-American Maritime World, 1700-1750* 110 (Cambridge, 1987) (discussing seamen as the first modern mass wage earners and the prototype of mass factory labor).

[5] National Labor Relations Act (Wagner Act), Pub L No 74-198, ch 372, 49 Stat 449 (1935), codified at 29 USC §§ 151-69 (1988).

[6] *Business Employees v Missouri*, 374 US 74, 82 (1963).

[7] *NLRB v Erie Resistor Corp.*, 373 US 221, 234 (1963).

Since the NLRA's passage, however, the potency of the strike has been annihilated. Such is the recent conclusion of both labor and management. Employer spokesmen contend that the strike no longer represents labor's "ultimate weapon" because employers have ceased to be "intimidated by the threat of a strike,"[8] and the AFL-CIO protests that the strike often winds up being "a weapon for *management*."[9] Statistics support these observations: In 1992 there were fewer major work stoppages than in any year since the Bureau of Labor Statistics began maintaining strike data in 1947.[10] At the same time, the proportion of agreement-making has dropped so that over half of the workers choosing union representation have no collective bargaining agreement after five years.[11] A complex set of economic and social factors has eroded the strike threat, foremost among them a prolonged recession, growing international competition, declining union membership, a long-term trend toward less labor-intensive industry, and the growing ratio of salaried to hourly employees.[12] But the law has played an equally decisive role.[13]

The right to strike has been gutted by the federal courts and the National Labor Relations Board (NLRB). Due to restrictions

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[8] Mark A. de Bernardo, Director of the Chamber of Commerce's Labor Law Action Center, quoted in Kirk Victor, *Striking Out in the '80s*, 21 Natl J 18, 20 (Jan 7, 1989).

[9] Industrial Union Department, AFL-CIO, *The Inside Game: Winning with Workplace Strategies* 22 (1986) (emphasis added). The Industrial Union Department was formed when the CIO and AFL merged. See Arthur J. Goldberg, *AFL-CIO: Labor United* 98-101 (McGraw-Hill, 1956). A high-ranking AFL-CIO official recently described striking as a "suicide mission." Charles McDonald, Executive Secretary to the Secretary-Treasurer, quoted in *More In-Plant Actions Expected in Wake of UAW's Failed Strike At Caterpillar*, Daily Labor Rep A7-8 (May 8, 1992).

[10] Bureau of Labor Statistics, *Major Work Stoppages, 1992*, 45 Compensation and Working Conditions 158-59 (Mar 1993).

[11] Statement of Lane Kirkland before the Commission on the Future of Worker-Management Relations 24 (Nov 8, 1993) (on file with U Chi L Rev) (citing a study that found that no first agreement was reached after one-third of the union election victories in 1987 and no second agreement was reached in one-fourth of the remaining cases). The steady decline in the rate at which newly certified unions reach agreements with employers is traced in Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv L Rev 351, 354-55 (1984) (86% between 1955 and 1960, 78% in 1970, and 63% in 1980).

[12] Charles R. Perry, Andrew M. Kramer, and Thomas J. Schneider, *Operating During Strikes: Company Experience, NLRB Policies, and Government Regulations* 1-2 (Pennsylvania, 1982).

[13] To emphasize the law's role is not to imply that the efficacy of strikes rests solely on formal legal rights, for strikes were waged with success prior to the advent of legal protection. See, for example, Bruce Levine, et al, 1 *Who Built America: Working People and the Nation's Economy, Politics, Culture, and Society* 337, 342 (Pantheon, 1989) (describing a successful strike by female mill operatives in 1834 and a successful general strike in Philadelphia in 1835).

on its scope and content, the strike guarantee now appears illusory. Two interrelated legal doctrines account for the hollow protection afforded to strikers. The first doctrine admits the lawfulness of permanently replacing strikers, undermining the rule that employers may not fire striking employees.[14] This "striker replacement" doctrine is currently the subject of intense congressional debate and has also received much scholarly attention.[15] Legislation is pending that would amend the NLRA to bar permanent replacement of strikers, but its enactment is far from certain.[16] Meanwhile, many unions have responded to the striker replacement rule by jettisoning strikes in favor of non-workplace strategies such as consumer boycotts and public relations campaigns—strategies that have achieved a measure of success but that render labor dependent on third parties to influence the collective bargaining process.[17]

The second erosive doctrine governs the forms of strike protected by the NLRA. It has elicited far less scholarly commentary,[18] but under its sway the courts and the Board have sharply restricted the range of protected strike activity.[19] Most sit-down strikes, slowdowns,[20] refusals to perform specific tasks, and intermittent strikes are unprotected by the NLRA.[21] In other words, the law does not recognize a right to strike if the strike blurs the clear-cut boundary between working and stopping work, a restriction that dramatically circumscribes the range of protected strike activity. In order to maintain the NLRA's protection while continuing to exert pressure on their employer, strikers must leave the workplace, wholly abandon

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[14] See text accompanying notes 48-57.

[15] See note 49.

[16] See text accompanying notes 94-97.

[17] See text accompanying notes 101-15.

[18] See note 60.

[19] See text accompanying notes 58-93.

[20] This Article places slowdowns in the category of strikes, defining a strike as any concerted withholding of labor even if the withholding is not complete.

[21] The standard reference work in the field suggests that sit-down strikes, which involve the workers taking possession of the premises and excluding others, are illegal, and that partial and intermittent strikes are unprotected. Charles J. Morris, et al, eds, 2 *The Developing Labor Law* 1016-18 (ABA, 2d ed 1983).

At this point, it may be useful to clarify the terms "protected," "unprotected," and "illegal," which will be used throughout this Article. The NLRA shields workers engaging in protected conduct against both employer retaliation and state intervention. Unprotected conduct is not synonymous with illegal conduct; it is not prohibited by federal law, but employers may discipline employees for engaging in it. Whether unprotected conduct may be regulated by the states is a question that cannot be answered categorically.

their work, and remain on strike until a settlement is reached, the strike is broken, or the strikers as individuals cross the picket line. As a consequence, workers are constrained to wage a form of strike that leaves them highly vulnerable to permanent replacement.

The law restricting the form of protected strikes constitutes the point of departure for this Article. This jurisprudence puts in question the very definition of the strike. Attention to a problem as basic as the form of the strike, I will argue, compels a reinterpretation of the legal status of collective work stoppages. Because the prospects for legislative reform are limited, a new theory of the strike must be developed within the framework of existing law.

Contrary to prevailing wisdom, this Article will argue that current law can be read to protect one form of collective work stoppage short of a traditional, full-scale, open-ended strike: repeated grievance strikes.[22] These are strikes aimed at discrete grievances, deployed repeatedly, and typically of short duration. Their protection is key to the continuing viability of the NLRA framework for four reasons. First, they may impel employers to fulfil their legal duty to bargain in a good-faith effort to reach agreement. Second, unlike traditional work stoppages, grievance strikes are ignited by the immediate needs of employees and, therefore, potentially constitute more spontaneous and finely-tuned expressions of labor discontent. Third, grievance strikes may prove not only more effective for organized labor but also less disruptive of production than open-ended strikes. Finally, by preserving the strike as an expression of labor discontent, the protection of grievance strikes may avert more destructive forms of expression. The status of such strikes is currently an open—even an unexamined—question under the law.[23] Cursory

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[22] This argument is limited to grievance strikes in the absence of a contract (either before a first contract or during a hiatus between contracts). It concedes that grievance strikes are unprotected if they violate a contractual no-strike pledge or concern grievances that the parties have agreed to submit to binding arbitration.

[23] Writing in 1967, Julius Getman found, "One of the central unanswered questions about the scope of section 7 [of the NLRA] is the extent to which lawful economic pressure for a legitimate purpose may be held unprotected." Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U Pa L Rev 1195, 1210 (1967). "Considerable confusion exists," he continued, " . . . concerning the extent to which unorthodox pressure tactics—neither violent nor unlawful—may be held unprotected in circumstances in which traditional forms of economic pressure would be held protected." Id at 1232. See also Archibald Cox, *The Right to Engage in Concerted Activities*, 26 Ind L J 319, 335 (1951) ("no very satisfactory rationalization" for decisions in this area). This confusion has not been dispelled in the last 25 years.

scrutiny might suggest that they fall under the broader rubric of unprotected "intermittent" or "partial" strikes. My argument is that they do not.

This argument—that the NLRA can and should be read to protect repeated grievance strikes—would breathe new life into the right to strike. It differs from other reform agendas, for it neither depends on the enactment of much-needed statutory amendments nor advocates the abandonment of strikes as futile. Rather, this Article argues that existing law contains precedents for protecting repeated grievance strikes, and that reliance on those precedents would not only provide a powerful counterweight to the striker replacement doctrine, but would also give labor a form of economic weapon better suited to teaching employers the value of collective bargaining agreements.

This Article distinguishes among the forms of strikes that the Board and courts have grouped together under the category of "partial strikes"—strikes that stop short of a total work stoppage lasting for an indefinite length of time.[24] In particular, it challenges the accepted dogma that all intermittent strikes are unprotected. The Article juxtaposes two distinct lines of cases

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Trade unions and their advocates have recently shown interest in a variety of nontraditional, "in-plant" strike tactics, but unions have not identified grievance strikes as a promising tactic. Rather, unions have focused on "working-to-rule." In a "work-to-rule" campaign, workers refuse to perform any tasks voluntarily or exercise any independent judgment and instead simply follow the letter of their employers' work rules. See Louis Uchitelle, *Labor Draws the Line in Decatur*, NY Times C1 (June 13, 1993) (describing "in-plant" tactics at Caterpillar in Peoria, Illinois and A.E. Staley Manufacturing Company in Decatur, Illinois); Louis Uchitelle, *Labor Has a Big Job for Its New Friend Clinton*, NY Times E5 (June 27, 1993) (quoting an AFL-CIO official who suggests that if permanent replacement of strikers is not barred, unions will increasingly adopt other tactics such as working-to-rule); Industrial Union Department, *The Inside Game* (cited in note 9); Robert A. Bush, Michael Gottesman, and Michael J. Stapp, *In-Plant Tactics* (outline prepared for AFL-CIO Lawyers' Coordinating Committee Conference, Chicago, May 10-12, 1988) (on file with U Chi L Rev).

[24] See, for example, *Henricks Realty*, 119 LRRM 1308, 1309 (Advice Memorandum, May 31, 1985) ("[T]he Board has consistently held that a work stoppage that is intermittent or recurrent constitutes an unprotected, partial strike."). Scholars have also lumped these forms of strikes together. See, for example, Julius G. Getman, *The Protected Status of Partial Strikes After* Lodge 76*: A Comment*, 29 Stan L Rev 205 (1977). But see Richard Mittenthal, *Partial Strikes and National Labor Policy*, 54 Mich L Rev 71, 71-72, 95-100 (1955) (distinguishing intermittent and partial strikes and arguing that some intermittent strikes should be protected, but leaving it to the Board to decide which).

This Article uses the term "partial strike" to mean the refusal to perform specific tasks or to work at specific times or on specific days (for example, refusals to work overtime or on weekends). It uses the term "slow-down" to mean the refusal to perform work at the ordinary or expected pace. It uses the term "intermittent strike" to mean repeated short strikes not involving the refusal to perform specific tasks or to work at specific times or on specific days.

that place brief strikes in opposing legal positions. The landmark 1949 Supreme Court case of *International Union, U.A.W.A., A.F.L., Local 232 v Wisconsin Employment Relations Board* (*Briggs-Stratton*) held that brief, "intermittent strikes" were not fully protected by the NLRA,[25] a ruling based on no precise definition of the category of intermittent strikes and for which the Court provided scant rationale. The doctrine articulated in *Briggs-Stratton* and its progeny, I will argue, stands in tension with another line of cases emanating from the equally important 1962 Supreme Court decision in *NLRB v Washington Aluminum Co.* that gave protection to a single brief strike protesting substandard working conditions or airing other grievances.[26] Subsequent decisions extended the protective canopy of *Washington Aluminum* to cover a second brief strike if a new grievance arose. This Article argues that the logic of *Washington Aluminum* not only should govern repeated strikes over discrete grievances, but also should be extended from non-union shops, where it is usually applied, to organized workplaces.

My argument, of course, raises the question of where to locate the boundary between unprotected intermittent strikes and protected grievance strikes. I contend that the distinction between these two sets of principles reduces to a question of motive: whether workers engage in a sequence of brief strikes motivated by discrete grievances or whether the strikers instead aim to pressure their employer to come to terms on a collective bargaining agreement. Obviously, this is a difficult question to answer, as strikers' motives will almost always be mixed. This Article draws on existing Board doctrine that distinguishes between economic strikes and unfair labor practice strikes in order to propose a standard for differentiating between unprotected intermittent strikes and protected grievance strikes.

In making a case for the protection of repeated grievance strikes, the Article levels a doctrinal critique more sweeping in its implications than the admittedly pragmatic reading of the law advanced here. The critique justifies overturning past precedent. The task of this Article, however, is to prosecute an argument, built on existing precedent, that significantly extends the scope of the right to strike. If the law were to evolve in the proposed direction, the Article concludes, the strike would become a more supple instrument, one available to a broader range of workers,

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[25] 336 US 245 (1949).

[26] 370 US 9 (1962).

but still entailing significant risks. The law would thus restore the possibility of conflict in order to create the conditions for meaningful cooperation within the framework of the collective bargaining system.

I. THE "ULTIMATE WEAPON IN THE LABOR ARSENAL"

Only since the passage of the NLRA in 1935 has the right to strike been recognized in American law. Well into the nineteenth century the strike constituted a criminal conspiracy under Anglo-American common law.[27] And even after American courts held that this form of concerted labor activity was not unlawful per se, the strike was denied affirmative protection. "Neither the common law nor the fourteenth amendment confers the absolute right to strike," declared Justice Louis Brandeis for the United States Supreme Court in 1926.[28] If the law regarded strikes with ambivalence, so too did social scientists, including the nation's first labor economists. A century ago strikes were deemed the "insurrections of labor."[29] Although recognized in some quarters as initially useful in improving labor's position, it was predicted that strikes would disappear as employees transcended "the necessity of such a brutal resort."[30] The history of American labor in the twentieth century, of course, has belied such predictions. Strikes have remained labor's final resort,[31]

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[27] Adam Smith cited "laws which have been enacted with so much severity against the combinations of servants, labourers, and journeymen." Smith, *Wealth of Nations* at 67 (cited in note 2). In this country, strikers were indicted for criminal conspiracy until the 1890s. See Victoria C. Hattam, *Courts and the Question of Class: Judicial Regulation of Labor under the Common Law Doctrine of Criminal Conspiracy*, in Christopher L. Tomlins and Andrew J. King, eds, *Labor Law in America: Historical and Critical Essays* 44, 47-48 (Johns Hopkins, 1992).

[28] *Dorchy v Kansas*, 272 US 306, 311 (1926). In 1922, Moorfield Storey, a corporate lawyer and first president of the National Association for the Advancement of Colored People, wrote an article to dispel the notion that there was a right to strike. Moorfield Storey, *The Right to Strike*, 32 Yale L J 99 (1922). See generally William B. Hixson, Jr., *Moorfield Storey and the Struggle for Equality*, in Lawrence M. Friedman and Harry N. Scheiber, eds, *American Law and the Constitutional Order: Historical Perspectives* 331 (Harvard, 1988). "[T]he law gives no right to strike," Storey insisted. 32 Yale L J at 100. Both state and federal courts frequently issued injunctions against strikes beginning in the 1880s and continuing until passage of the Norris-LaGuardia Act in 1932. See Felix Frankfurter and Nathan Greene, *The Labor Injunction* 49 (MacMillan, 1930); William Forbath, *Law and the Shaping of the American Labor Movement* 61-62, 117-33 (Harvard, 1991).

[29] Francis Amasa Walker, *The Wages Question* 390 (MacMillan, 1877). For more on Walker's political economy, see Amy Dru Stanley, *The Bonds of Contract: Wage Labor and Marriage After the Civil War* ch 2 (forthcoming 1994).

[30] Walker, *Wages Question* at 391.

[31] The year 1919 witnessed the largest strike wave in American history until the

and perhaps never with greater legal consequence than in the year prior to the enactment of the NLRA.[32]

A. The Pivot of the Collective Bargaining System

The enactment of the NLRA in 1935 established an unprecedented federal right to strike. Abrogating centuries of common law, the NLRA's central § 7 entitled workers to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[33] It is evident from the congressional debates that strikes were encompassed in this section as the paradigmatic form of concerted labor activity.[34] In fact, Congress expressly provided, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to

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post-war strikes of 1946. See James R. Green, *The World of the Worker: Labor in Twentieth Century America* 93, 194 (Hill and Wang, 1980).

[32] In 1934, according to labor historian Irving Bernstein, a series of strikes "ripped the cloak of civilized decorum from society." Irving Bernstein, 2 *A History of the American Worker: Turbulent Years, 1933-1941* 217 (Houghton Mifflin, 1970) ("*Turbulent Years*"). Amidst strikes by auto parts workers in Toledo, truck drivers in Minneapolis, longshoremen in San Francisco, and textile workers in New England and the South, Congress debated legislation that would become the NLRA in 1935. Id at 217, 323-24.

[33] 29 USC § 157 (1988). The NLRA covers only employees of private employers. 29 USC § 152(2). Most government workers still have no, or at most a sharply restricted, right to strike. See generally Harry T. Edwards, R. Theodore Clark, Jr., and Charles B. Craver, *Labor Relations Law in the Public Sector: Cases and Materials* 643-71, 710-20 (Michie, 4th ed 1991). But where no right to strike exists and collective bargaining is permitted, state laws often provide for other means of encouraging agreement, such as mediation and fact finding, or require agreement upon terms established through interest arbitration. See generally id at 727-98.

[34] The Act's principal sponsor, Senator Robert F. Wagner, explained that it would be necessary to make it "clear that employees could refrain from working." National Labor Relations Act of 1935, Hearings on S 2926 before the Committee on Education and Labor, 73d Cong, 2d Sess 11 (1934), reprinted in National Labor Relations Board, 1 *Legislative History of the National Labor Relations Act* 41 (US GPO, 1949) ("*Legislative History*").

strike."[35] Both the National Labor Relations Board and the federal courts have repeatedly held strikes to be protected.[36]

In the guarantee of labor's right to strike lay something of a paradox, however. It was as an instrument of "industrial peace" that Congress afforded protection to the weapon of the strike.[37] Seeking to reconcile two opposing traditions, legislators paid deference both to the strike's significance for labor and to the law's long-standing antipathy to such forms of concerted activity. Ironically, in entitling workers to strike, Congress contrived to "combat the strike crisis."[38] The NLRA's principal author, Senator Robert F. Wagner, explained that by giving workers the right to "refrain from working if that should become their only redress[,] . . . this bill will prevent strikes."[39]

The nub of this seemingly contradictory theory was the legitimation of the strike as the pivot of the collective bargaining system created by the NLRA, a system designed to promote binding contracts between labor and management.[40] Congress did

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[35] National Labor Relations Act, § 13, 49 Stat at 457, codified as amended at 29 USC § 163 (1988). This section of the NLRA was amended by the Taft-Hartley Act of 1947 to add the words "or to affect the limitations or qualifications on that right." Taft-Hartley Act § 101, Pub L No 80-101, 61 Stat 137, 151 (1947), codified at 29 USC § 163 (1988). But Taft-Hartley did not qualify the right to strike except by prohibiting strikes for secondary purposes, 29 USC § 158(b)(4), and requiring notice before strikes to modify or upon termination of a collective bargaining agreement. 29 USC § 158(d). The only other relevant portion of the Taft-Hartley Act implicitly sanctioned permanent replacement of strikers by alluding to "[e]mployees engaged in an economic strike who are not entitled to reinstatement," in providing that such employees remained eligible to vote in representation elections for 12 months after the commencement of the strike. 29 USC § 159(c)(3). As the Supreme Court recognized in *NLRB v Erie Resistor*, "[w]hile Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant." 373 US 221, 234 (1963).

[36] See, for example, *California Cotton Cooperative Ass'n*, 110 NLRB 1494, 1556 (1954); *Erie Resistor*, 373 US at 233.

[37] S Rep No 573, 74th Cong, 1st Sess 1 (1935), reprinted in 2 *Legislative History* at 2300 (cited in note 34). The "first objective" of the Act, the Senate Report stated, is "to promote industrial peace." Id. The Act aimed to accomplish this objective by making "collective action [of employees] an instrument of peace rather than of strife," according to the House Report. HR Rep No 969, 74th Cong, 1st Sess 7 (1935), reprinted in 2 *Legislative History* at 2917, quoting *Texas & New Orleans Railway Co. v Railway Clerks*, 281 US 548, 570 (1930). The Act's declaration of purpose stated that it aimed to avoid "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce." 29 USC § 151.

[38] 78 Cong Rec 10351, 10352 (1934), reprinted in 1 *Legislative History* at 1117 (reprinting an article from The New York Times of June 3, 1934 by Senator David I. Walsh, Chair of the Senate Labor Committee).

[39] Hearings before the Senate Committee on Education and Labor, reprinted in 1 *Legislative History* at 41 (cited in note 34). Here, Wagner was disputing the charge that the Act "places a premium on discord by declaring that none of its provisions shall impair the right to strike." Id at 40.

[40] Robert Dubin writes, "Collective bargaining is the great social invention that has

not expect the process of bargaining itself inevitably to produce agreement. Therefore, it not only mandated good-faith bargaining, but also protected labor's use of certain kinds of economic pressure—most importantly, strikes. The strike threat induces employers to proceed beyond legally mandated negotiation[41] and to sign collective bargaining agreements; for after negotiating to impasse, it is lawful for an employer unilaterally to alter wages, hours, and other terms and conditions of employment.[42] The Supreme Court has stated that "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[43] More specifically, the Court has found that of the various types of economic pressure applied during collective bargaining, the strike "is the ultimate weapon in the labor arsenal for achieving agreement upon its terms."[44] In order to obtain an agreement, workers ordinarily give up their right to strike, granting to management the one objective it cannot unilaterally exact—an enforceable pledge not to interrupt production and to submit all grievances to binding arbitration.

Strikes, or at least credible threats to strike, are thus integral to the system of collective bargaining endorsed in the NLRA.[45] "In all of labor's history," Justice Douglas wrote in 1949, "no 'concerted activity' has been more conspicuous and important than the strike; and none was thought to be more essential to recognition of the right to collective bargaining."[46] Even the National Association of Manufacturers, in recent testimony before the Senate Labor Subcommittee, has acknowledged that the right to strike "is the centerpiece of US labor law."[47]

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institutionalized industrial conflict." Robert Dubin, *Constructive Aspects of Industrial Conflict*, in Arthur Kornhauser, Robert Dubin, and Arthur M. Ross, eds, *Industrial Conflict* 37, 44 (McGraw-Hill, 1954).

[41] 29 USC § 158(a)(5). In 1947 Congress made clear that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 USC § 158(d).

[42] *NLRB v Katz*, 369 US 736, 747-48 (1962).

[43] *NLRB v Insurance Agents' Int'l Union*, 361 US 477, 489 (1960).

[44] *NLRB v Allis-Chalmers Mfg. Co.*, 388 US 175, 181 (1967).

[45] For the NLRA's policy on collective bargaining generally, see 29 USC § 151.

[46] *International Union, U.A.W.A., A.F.L., Local 232 v Wisconsin Employment Relations Board (Briggs-Stratton)*, 336 US 245, 266 (1949) (Douglas dissenting).

[47] Prohibiting Discrimination Against Economic Strikers, Hearings on S 55 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 103d Cong, 1st Sess 60 (1993) (executive summary of statement of Jerry J. Jasinowski, President of the National Association of Manufacturers).

Notwithstanding the strike's centrality to the collective bargaining system, the NLRB and the federal courts have erected formidable obstacles to labor's capacity to mount credible strike threats. Rules narrowing the forms of strike protected by the NLRA have dovetailed with those allowing permanent striker replacement, leaving individual workers with vastly diminished legal protections and unions with little substantive leverage in the bargaining process. Both Congress and the labor movement have recognized that the instrumentality of the strike is in crisis. Thus far, however, neither statutory proposals nor tactical reforms have served to revive or replace the strike threat.

B. *Mackay* Meets *Fansteel*

The NLRA affords workers the right to strike and bars employers from interfering with, restraining, or coercing workers in the exercise of that right.[48] The Board and the courts, however, have hedged this right with the doctrine of permanent striker replacement. Both of these tribunals have also greatly restricted the forms of protected strikes, thereby blocking workers from fashioning strikes so as to limit their exposure to permanent replacement. In particular, the Board and the courts have denied protection to "partial" and "intermittent" strikes that militate against the ready hiring of striker replacements.

1. The meaning of protection.

Almost as soon as the right to strike was written into federal law, the principles of its subversion were articulated. Dicta in the 1938 Supreme Court case of *NLRB v Mackay Radio & Telegraph Co.* established the foundation for the now-settled principle that employers can permanently replace striking workers.[49] Under

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[48] 29 USC § 158(a)(1). It also prohibits discrimination against employees who exercise the right. 29 USC § 158(a)(3).

[49] 304 US 333, 346 (1938) ("The assurance . . . to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice . . . ."). See also *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964) (applying the rule derived from *Mackay*).

Workers who strike in response to their employer's unfair labor practices are not subject to replacement. See, for example, *Head Division, AMF, Inc.*, 228 NLRB 1406, 1417 (1977), enf'd, 593 F2d 972, 979 (10th Cir 1979). This is somewhat paradoxical, since workers have another means of seeking redress for unfair labor practices—filing a charge with the NLRB—but no other means of gaining economic concessions.

The scholarly literature on the replacement issue is vast. See George M. Cohen and Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, 43

this principle, strikers cannot lawfully be fired, but if their jobs are taken by replacement workers who are promised permanent status, the strikers retain only a right to be recalled should a position open up in the future.[50]

The ominous implications for labor contained in the *Mackay* doctrine have been extended in several recent Supreme Court cases.[51] In 1983, the Court held that federal law does not preempt state law actions by permanent replacements who are displaced pursuant to a strike settlement agreement.[52] Thus, not only may employers permanently replace strikers, but in so doing, they may also impose on themselves significant economic disincentives, in the form of potential liability to replacement workers, to signing strike settlement agreements providing for the rehiring of striking workers.[53]

Proceedings of NYU Annual Conference on Labor 109 (1990); Brendan Dolan, Mackay Radio*: If It Isn't Broken, Don't Fix It*, 25 USF L Rev 313 (1991); Samuel Estreicher, *Strikers and Replacements: Introductory Comments*, 43 Proceedings of NYU Annual Conference on Labor 17 (1990); Samuel Estreicher, *Strikers and Replacements*, 38 Labor L J 287 (1987); Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U Ill L Rev 547; Comment, *The* Mackay *Doctrine and the Myth of Business Necessity*, 50 Tex L Rev 782 (1972); Walter Kamiat, *Strikers and Replacements: A Labor Union Perspective*, 43 Proceedings of NYU Annual Conference on Labor 23 (1990); Michael H. LeRoy, *The* Mackay Radio *Doctrine of Permanent Striker Replacements and the Minnesota Picket Line Peace Act: Questions of Preemption*, 77 Minn L Rev 843 (1993); Michael H. LeRoy, *Changing Paradigms in the Public Policy of Striker Replacements: Combination, Conspiracy, Concert and Cartelization*, 34 BC L Rev 257 (1993); Peter R. Nash and Jonathan R. Mook, *Strike Replacement Legislation: If It Ain't Broke, Don't Fix It*, 16 Employee Rel L J 317 (1990/91); Note, *Replacing* Mackay*: Strikebreaking Acts and Other Assaults on the Permanent Replacement Doctrine*, 36 Rutgers L Rev 861 (1984); Daniel Pollitt, Mackay Radio*: Turn it Off, Tune it Out*, 25 USF L Rev 295 (1991); Douglas E. Ray, *Some Overlooked Aspects of the Strike Replacement Issue*, 41 U Kan L Rev 363 (1992); David Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 Labor Law 137 (1991); William C. Zifchak, *Strikers, Replacements, and S. 2112: Full Employment Law for Organized Labor?*, 43 Proceedings of NYU Annual Conference on Labor 53 (1990).

[50] *Laidlaw Corp.*, 171 NLRB 1366, 1369-70 (1968), enf'd, 414 F2d 99, 105 (7th Cir 1969).

[51] Although *Mackay* was decided in 1938, a convincing case has been made that because of more recent decisions and other changes in the law, such as those wrought by the Taft-Hartley amendments and an altered political landscape, employers only began routinely to hire permanent replacements in the 1980s. The Report of the Senate Committee on Labor and Human Resources on the striker replacement bill makes this case most fully. See Workplace Fairness Act, S Rep No 102-111, 102d Cong, 1st Sess 6-16 (1991).

[52] *Belknap, Inc. v Hale*, 463 US 491, 510-11 (1983). Recent developments in the state law of employment have also rendered promises made to replacements more enforceable. See Finkin, 1990 U Ill L Rev at 555 (cited in note 49).

[53] Finkin, 1990 U Ill L Rev at 555-56. In fact, *Belknap* does more to provide leverage for employers than to protect replacements. For well-counseled employers can permanently replace strikers under federal law without incurring any obligations to the replacements under state law. Only employers who wish to foreclose any realistic possibility of a strike settlement involving strikers returning to work (or who face both a tight labor

Moreover, in two recent holdings, the Supreme Court has heightened the pressure on strikers to break ranks, while limiting their ability to make an enforceable pledge not to do so. The Court held in 1989 that strikers unilaterally offering to return to work at the end of a strike are entitled neither to displace replacements who were promised permanent jobs, nor to displace less-senior strikers who crossed the picket line to return to work in the midst of the strike.[54] In 1985, the Court held that pledges by union members not to quit the union during a strike were unenforceable.[55] Nor is it lawful, the Court ruled, for a union to discipline departing members who cross a picket line, even if they voluntarily joined the union knowing they were thereby bound to maintain their union membership when a strike was imminent and to participate in properly called strikes.[56] Thus, employees are barred from entering into binding agreements against breaking ranks in the event of a strike, and they have heightened incentives to break ranks in order to protect their own jobs during a strike. The Court's holdings[57] have rendered a traditional strike an extremely risky enterprise for most workers who wish to act collectively to improve their lot.

2. The scope of protection.

The *Mackay* rule has been the subject of much scholarly inquiry,[58] but the full significance of the threat of permanent replacement can only be understood by tracing another line of

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market and extremely well-schooled potential replacements) will choose to make enforceable promises of permanence. See S Rep No 102-111 at 10 n 3 (cited in note 51).

[54] *TWA, Inc. v Flight Attendants*, 489 US 426, 432-34, 436-39 (1989). This decision was actually made under the Railway Labor Act, Pub L No 69-257, ch 347, 44 Stat 577 (1926), codified at 45 USC §§ 151-88 (1988), but it would appear to apply equally under the NLRA, to which the *TWA* Court drew explicit analogies.

[55] *Pattern Makers v NLRB*, 473 US 95, 108-10 (1985).

[56] Id at 101, 115-16; *NLRB v Textile Workers* ("*Granite State Joint Board*"), 409 US 213, 216 (1972). Apart from this rule, the relationship between union members and their union is a contractual one, in which the contract is the union's constitution. Thus a union is ordinarily free to fine or otherwise discipline a member who violates its constitution, so long as it accords the member the procedural rights set out in the Labor Management Reporting and Disclosure Act. 29 USC § 411(a)(5) (1988). A probing analysis of these doctrines is found in David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 NYU L Rev 1268, 1311-19 (1988).

[57] Furthermore, in a number of recent decisions, the Board has expanded the circumstances under which a striker will be deemed permanently replaced and has narrowed striker rights to reinstatement. See Ray, 41 U Kan L Rev at 381-98 (cited in note 49).

[58] See note 49.

cases: those involving what the Board and the courts have grouped together under the category of "partial strikes."[59] In these cases, the Board and the courts have stripped virtually all but the most conventional form of strike of even the limited protection still afforded by the NLRA.[60] This set of rules has undercut the capacity of unions to shield their members from replacement.

The fountainhead of this jurisprudence is the 1939 case of *NLRB v Fansteel Metallurgical Corp.*, which raised the question of whether sit-down strikes were protected by the NLRA.[61] The collision of the NLRA's promise with the reality of virulent employer resistance to union recognition led to a wave of such strikes after 1935.[62] Sit-down strikes were effective because they

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[59] See note 24.

[60] Legal scholars who have criticized the unprotected status of certain forms of strikes have focused on rulings denying protection to sit-down and partial strikes. Karl Klare and James Atleson have focused on sit-down strikes. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 Minn L Rev 265, 322-25 (1978); James B. Atleson, *Values and Assumptions in American Labor Law* 45-47 (Massachusetts, 1983). Atleson has also shown how the Board's and courts' reluctance to protect slowdowns rests on assumptions about "the employer's 'prerogative' to control the pace and programming of work." *Values and Assumptions* at 59. Julius Getman has unsuccessfully argued that such strikes are protected, though on different grounds than those suggested here. Getman, 29 Stan L Rev at 205-07 (cited in note 24). See also Getman, 115 U Pa L Rev at 1235 (cited in note 23). Getman's argument is rebutted in Kenneth T. Lopatka, *The Unprotected Status of Partial Strikes After* Lodge 76*: A Reply to Professor Getman*, 29 Stan L Rev 1181 (1977).

Other than these works, the literature on partial strikes is relatively sparse, particularly in recent years. See Marc J. Bloch and Scott A. Moorman, *Working to Rule and Other Alternative Job Actions*, 9 Labor Law 169 (1993); Comment, *The Partial Strike*, 21 U Chi L Rev 765 (1954); John R. Doll and Daniel N. Kosanovich, *Workplace Job Action: An Effort to Reshape the Balance of Power*, 9 Labor Law 149 (1993); Comment, *Employer Responses to Partial Strikes: A Dilemma?*, 39 Tex L Rev 198 (1960); H. Burr Kelsey, *Partial Strikes*, 6 Proceedings of NYU Annual Conference on Labor 281 (1953); Richard Mittenthal, *Partial Strikes and National Labor Policy*, 54 Mich L Rev 71 (1955); Note, *Effect of LMRA on States' Power to Enjoin 'Installment' Strikes*, 49 Colum L Rev 858 (1949); Note, *Labor Law: Illegal Strikes: Strikes by Installment: Discharge*, 31 Cornell L Q 247 (1945); Note, *Partial Strikes as Unprotected Activity Under the LMRA*, 39 Minn L Rev 764 (1955); Note, *Partial Strikes under the NLRA*, 47 Colum L Rev 689 (1947); Note, *Labor Law—State Regulation of the Right to Strike—What Constitutes a Strike or Concerted Activity under the National Labor Relations Act*, 23 S Cal L Rev 272 (1950); James A. Prozzi, *Partial Strikes and the National Labor Relations Act*, 37 Labor L J 315 (1986).

[61] 306 US 240, 247 (1939).

[62] The tactic was not wholly novel. The International Workers of the World led a "folded arms" strike at General Electric in 1906. Bernstein, *Turbulent Years* at 499 (cited in note 32). But in 1936 alone, there were 477 such strikes involving 398,117 workers. Id at 500. See also Henry M. Hart, Jr. and Edward F. Prichard, Jr., *The* Fansteel *Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 Harv L Rev 1275, 1322-23 (1939) (citing figures showing sit-down strikes peaked in 1937, when employers' legal resistance to compliance with the NLRA was also at its peak).

prevented employers from operating their plants; by refusing to leave the premises, strikers literally blocked the hiring of permanent or temporary replacements. Sit-down strikes resulted in union recognition in several key industries.[63] But in *Fansteel*, which concerned a metallurgical corporation in North Chicago, Illinois, the Supreme Court held that sit-down strikes fell outside the protection of the NLRA.[64]

The *Fansteel* sit-down strike was called in response to management's refusal to recognize any independent union and in response to its harassment of a union official. Employees occupied two of the plant's key buildings and barricaded the doors. Despite notification by the company's counsel that every person remaining in the buildings was discharged, an injunction issued by a state court requiring the strikers to vacate the premises, and the effort of the county sheriff and approximately 100 deputies to enforce the order using axes, battering rams, and tear gas, the strikers remained in the buildings for nine days until the sheriff succeeded in forcibly ejecting them.[65]

The NLRB found that by interfering with its employees' attempt to form a union, the Fansteel management had committed unfair labor practices in violation of the NLRA. Ruling that these unfair labor practices had caused the strike, the Board ordered the company to reinstate the strikers with backpay.[66] But the Court of Appeals refused to enforce the order and the Supreme Court affirmed.[67]

In *Fansteel*, the Supreme Court framed the issue as whether the state law of trespass deprived the strikers of protection or whether the newly minted federal right to strike overrode state law. The premise of the Court's holding, therefore, was that the sit-down strike violated state law. The Court reasoned that the "ousting of the owner from lawful possession" was tantamount to an assault on company officers or the "seizure and conversion of

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[63] Most notable was automobile manufacturing, where a 43-day sit-down strike, led by the United Automobile Workers at General Motors's Fisher Body plant in Flint, Michigan, convinced the industrial giant to recognize the union. The story of the Flint strike is told in Sidney Fine, *Sit-down: The General Motors Strike of 1936-1937* (Michigan, 1969); Henry Kraus, *The Many and the Few: A Chronicle of the Dynamic Auto Workers* (Plantin, 1947).

[64] 306 US at 256.

[65] Id at 248-49; *Fansteel Metallurgical Corp. v NLRB*, 98 F2d 375, 377-78 (7th Cir 1938).

[66] 306 US at 251.

[67] Id at 251, 253-54.

its goods, or the despoiling of its property . . . ."[68] The Court deemed the sit-down strike a "high-handed proceeding without shadow of legal right."[69] Nonetheless, the Court also recognized that the NLRA had been enacted, in part, to abrogate state laws restricting strikes and other concerted labor activity.[70] The question, then, was whether Congress intended the Act's protection of strikes to preempt state trespass law.[71] Notably, the Court's answer to this question depended on the definition of a strike.

The *Fansteel* Court limited the legal meaning of a strike to the naked act of stopping work. It found that Congress "recognized the right to strike" and that employees could "cease work at their own volition" when employers failed to meet their demands.[72] But a sit-down strike, the Court held, was "not the exercise of 'the right to strike,'" precisely because this particular form of strike did not entail "a mere quitting of work."[73] Rather, the sit-down strike was an unlawful interference with property rights: "an illegal seizure of the buildings."[74] According to the Court's definition, a strike protected by the NLRA must involve both stopping work *and* vacating the employer's premises, an action that clears the way for replacement workers.[75]

The Court's decision in *Fansteel* could have been read to preserve fully the right to strike—that is, simply to confine the ambit of that right to the act of stopping work. It could have been read, therefore, to uphold the discharge of the strikers solely on the grounds that their refusal to leave the premises constituted an illegal interference with the employer's cognizable property interest.[76] Indeed, such a reading would have accorded with the

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[68] Id at 253.

[69] Id at 252.

[70] Id ("This conduct on the part of the employees manifestly gave good cause for their discharge unless the [NLRA] abrogates the right of the employer to refuse to retain in his employ those who illegally take and hold possession of his property.").

[71] The Court would not necessarily have had to reach this question in order to uphold the Board's order. It could have held that the NLRA protects sit-down strikers from discharge but not from punishment under state trespass law. Given the state of the Court's labor law preemption doctrine at this time, this was a possible holding. See *Briggs-Stratton*, 336 US at 256-57 (holding the NLRA did not prevent a state agency from enjoining intermittent strikes even if it did protect intermittent strikers from discharge).

[72] 306 US at 256.

[73] Id.

[74] Id.

[75] The Court also held that the Board did not have the authority to reinstate the strikers as a means of remedying the employer's unfair labor practices, which had caused the strike. Id at 256-59.

[76] This interpretation is supported by later cases holding that employers violate the law when they fire sit-down strikers, not for failing to vacate the premises, but for strik-

Court's own reasoning. But later courts, rather than bracketing *Fansteel* as involving questions of federal preemption and trespass, read it to open up the wider question of whether all forms of strikes were equally protected under the NLRA.

Later courts interpreted *Fansteel* to stand for the sweeping proposition that not all work stoppages—even those unaccompanied by other acts and otherwise lawful—were protected.[77] This interpretation drew into question the nature of every strike, rendering the right to strike contingent on adjudication of the propriety of specific forms of work stoppages. The Supreme Court decisively embraced this construction in the 1949 *Briggs-Stratton* case.[78] In this landmark case the Court ruled that a series of short, unannounced strikes were not fully protected by the NLRA, thus upholding a state administrative injunction against the strikes. The Court found that although the strikers did nothing but stop work, the strikes could be enjoined because the stoppage was intermittent rather than continuous. The Court held that the NLRA did not indiscriminately recognize the right to strike. Citing *Fansteel*, it rejected the "rule . . . that every type of concerted activity is beyond the reach of the states' adjudicatory machinery."[79]

Like sit-down strikes, the intermittent strikes enjoined in *Briggs-Stratton* offered tactical advantages to labor. According to the union at the Briggs & Stratton Corporation, the "new tech-

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ing. See, for example, *Molon Motor and Coil Corp.*, 302 NLRB 138, 139 (1991), enf'd, 965 F2d 523, 526-27 (7th Cir 1992). In fact, the Board has sometimes adopted a more nuanced approach to sit-down strikes. See, for example, *Pepsi-Cola Bottling Co.*, 186 NLRB 477, 478 (1970), enf'd, 449 F2d 824, 828-29 (5th Cir 1971) (holding a sit-down strike protected when it lasted only a few hours, did not continue beyond normal working hours, and when no attempt was made to bar company officials from premises). But see *Waco, Inc.*, 273 NLRB 746, 746 (1984) (upholding the discharge of employees who refused to leave a lunchroom for three and one-half hours).

[77] See, for example, *NLRB v Montgomery Ward & Co.*, 157 F2d 486, 496 (8th Cir 1946) (employee refusal to process order from a struck plant unprotected); *Home Beneficial Life Ins. Co. v NLRB*, 159 F2d 280, 284 (4th Cir 1947) (insurance agents' refusal to report to office before beginning work unprotected); *C.G. Conn, Ltd. v NLRB*, 108 F2d 390, 397 (7th Cir 1939) (refusal to work overtime unprotected). In this area, as in others, the courts gave the NLRA a much narrower reading than the Board did during the period between the passage of the NLRA and its amendment by the Taft-Hartley Act in 1947. See generally Mittenthal, 54 Mich L Rev at 79-85 (cited in note 60) (reviewing the pre-1947 cases in which courts refused to enforce Board orders in this area); Note, *Strikes Under the Labor Act*, 10 Geo Wash L Rev 358, 365-68 (1942) (criticizing the Board's protection of partial strikes).

[78] *International Union, U.A.W.A., A.F.L., Local 232 v Wisconsin Employment Relations Board (Briggs-Stratton)*, 336 US 245, 255-56 (1949).

[79] Id at 257.

nique" of short, repeated work stoppages more effectively interfered with production and imposed greater economic pressure than a traditional strike where, "[a]fter the initial surprise of the walkout, the company knows what it has to do and plans accordingly."[80] Not only were the intermittent strikes more effective against the employer, they were also less costly to the employees, who were not continuously out of work and without pay. Nor could the employer administer the hiring of striker replacements as easily as during a single protracted strike.[81] In the words of union representatives, the intermittent work stoppages were "better than a strike."[82] In the eyes of the Supreme Court, however, they were not fully protected by the NLRA.

The ramifications of the Supreme Court's decision in *Briggs-Stratton* were evident a year later when the NLRB extended the category of unprotected work stoppages to encompass slowdowns. In *Elk Lumber Co.*, the Board held that it was lawful for an employer to fire employees who collectively reduced their work rate in response to a pay cut.[83] As a form of labor protest, slowdowns share certain characteristics with sit-down strikes and intermittent strikes. As in a sit-down strike, employees engaged in a slowdown remain at the workplace, and, as in intermittent strikes, they continue to perform some work. In a slowdown, therefore, strikers are not exposed to replacement and preserve a right to some pay; in fact, they never stop work entirely. Yet the Board ruled that a failure to work unstintingly, as opposed to a complete work stoppage, is unprotected.

The unprotected status of work stoppages that fall short of a total strike is not limited to intermittent strikes and slowdowns.

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[80] Id at 249.

[81] The tactical advantage of short strikes was illustrated recently by the success of a planned 10-day walkout of American Airlines flight attendants. See Donna K.H. Walters, *Flight Attendants Test Tactics of Limited Strikes*, LA Times A1 (Nov 22, 1993) (noting that the strike was "designed to disrupt the airline during its busiest period . . . while giving American little chance to train and hire strike-breaking replacements"). The strike ended after President Clinton intervened to convince the airline to accept the union's offer to arbitrate the dispute. Gwen Ifill, *Strike at American Airlines; Airline Strike Ends as Clinton Steps In*, NY Times A1 (Nov 23, 1993).

[82] 336 US at 250.

[83] 91 NLRB 333, 337 (1950). This holding squared Board doctrine with earlier decisions of the courts of appeal. See Mittenthal, 54 Mich L Rev at 85-86 (cited in note 60). Compare earlier Board decisions in *Pinaud, Inc.*, 51 NLRB 235, 235-36 (1943) (refusal to perform tasks of striking co-workers protected); *Mt. Clemens Pottery Co.*, 46 NLRB 714, 716 (1943), enf'd as modified, 147 F2d 262, 267 (6th Cir 1945) (refusal to work overtime and early departure from work protected under some circumstances); *Niles Fire Brick Co.*, 30 NLRB 426, 435 (1941), enf'd, 128 F2d 258 (6th Cir 1942) (refusal to perform tasks of workers' spokesperson protected when in response to unfair labor practices).

Rather, it extends to other forms of stoppages that can be termed partial strikes.[84] These include concerted refusals to perform particular tasks,[85] to start work at a designated time,[86] to work overtime,[87] and to work on weekends[88]—all of which have been held to be unprotected.[89] The partial strike cases imply that employees are entitled to cease work for an indefinite period of time to protest excessive hours, but if they merely stop work at the end of each regularly scheduled work day, the employer may legally fire them. The Board has explicitly held that although employees have a right to strike, "[t]he strike or stoppage must be complete, that is, the employees must withhold all their services from their employer."[90]

The line of cases emanating from *Fansteel* has thus tied the right to strike exclusively to an absolute and uninterrupted form of work stoppage.[91] This narrow definition of the protected

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[84] Even before *Elk Lumber*, the appellate courts had embraced this conclusion. See note 77.

[85] See, for example, *Home Beneficial Life*, 159 F2d at 284 (refusal to report to office before beginning field work); *Audobon Health Care Center*, 268 NLRB 135, 136-37 (1983) (refusal to cover duties of absent employees); *Vik Koenig Chevrolet*, 263 NLRB 646, 649-50 (1982) (refusal to perform duties related but not identical to those of strikers).

[86] See, for example, *Henricks Realty*, 119 LRRM at 1309 (cited in note 24).

[87] *C.G. Conn*, 108 F2d at 397; *Lake Development Mgmt. Co.*, 259 NLRB 791, 797 (1981); *Decision, Inc.*, 166 NLRB 464, 479 (1967); *Valley City Furniture Co.*, 110 NLRB 1589, 1594-95 (1954), enf'd, 230 F2d 947 (6th Cir 1956). See also *GAIU Local 13-B*, 252 NLRB 936, 938 (1980), enf'd, 682 F2d 304, 307-08 (2d Cir 1982) (holding a union violates the NLRA by disciplining members for refusing to participate in refusal to perform overtime, which is unprotected).

[88] See, for example, *Omni Int'l Hotel*, 242 NLRB 248, 254-55 (1979); *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1807 (1954).

[89] Concerted defiance of employer instructions may be characterized as an unprotected partial strike even if it does not involve the withholding of labor. See, for example, *Bird Engineering*, 270 NLRB 1415 (1987) (stating employees who refused to comply with an employer's instruction not to leave the facility during their lunch break were unprotected). The only exception is when the tasks the employees refuse to perform were previously performed voluntarily. See *Riverside Cement Co.*, 296 NLRB 840, 841 (1989) (refusal to provide own tools protected when voluntary); *Paperworkers Local 5 (International Paper)*, 294 NLRB 1168, 1172-73 (1989) (refusal to work out of unit protected when voluntary); *Jasta Mfg. Co.*, 246 NLRB 48, 49 (1979), enf'd, 634 F2d 623 (4th Cir 1980) (refusal to perform voluntary overtime protected); *Prince Lithograph Co.*, 205 NLRB 110, 111 (1973) (refusal to work overtime protected if voluntary under expired contract); *Dow Chemical Co.*, 152 NLRB 1150, 1152 (1965) (refusal to work on weekends protected when voluntary).

[90] *Audobon Health*, 268 NLRB at 137.

[91] This does not mean that all employees must begin a traditional strike at the same time; employees can engage in an escalating or progressive strike, where more employees join the strike over time, so long as each employee, once on strike, strikes totally and continuously. See *Lundy Packing Co.*, 223 NLRB 139, 157 (1976), enf'd in part, 549 F2d 300 (4th Cir 1977).

strike contravenes the multiplicity of ways in which workers may collectively withhold their labor, rendering the strike a brittle instrument of labor protest rather than one continually capable of being deployed in new ways so as to meet changing circumstances in the workplace. Together with *Mackay*'s allowance of permanent striker replacement, *Fansteel* and its progeny have virtually gutted the right to strike.[92] Strikes are the "lifelines to which employees cling as a last resort in their efforts toward mutual aid and protection," one member of the NLRB has stated.[93] Under current law, however, these "lifelines" stand in danger of being severed.

C. Political and Tactical Responses

The legal developments restricting the right to strike have prompted two principal responses from advocates of the existing collective bargaining system. Most prominent is the demand for amending the NLRA to overturn *Mackay*. Equally significant, however, is the tactical shift of many unions impatient with the pace of legislative reform or skeptical about its prospects. In place of strikes as a means of economic pressure, unions are increasingly adopting an array of non-workplace tactics known as corporate campaigns.

Nullification of the *Mackay* doctrine is labor's chief legislative priority.[94] In 1992, the House passed legislation barring striker replacement, but the Senate rejected the bill when supporters fell three votes short of the cloture needed to end a filibuster.[95] The Clinton administration has endorsed such an amendment, which again passed the House in June 1993.[96] But

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[92] These doctrines have led to what Matthew Finkin has aptly termed "the enervation of the economic strike." Finkin, 1990 U Ill L Rev at 547 (cited in note 49). Focusing only on *Mackay* and its progeny, Finkin concludes, "As a result of these decisions . . . the strike may no longer be a credible tool of agreement making for those employees for whom the labor market presents little or no obstacle to their replacement." Id at 549. The effect, he writes, is "to nullify the statutory regime of collective bargaining for those employees." Id.

[93] *Pacific Telephone and Telegraph Co.*, 107 NLRB 1547, 1556-57 (1954) (Murdock dissenting).

[94] During the 1992 AFL-CIO Convention, President Lane Kirkland indicated support for the proposed Workplace Fairness Act (which would bar permanent replacement), and that support of the Act would be the Federation's "acid test" for political candidates. Bloch and Moorman, 9 Labor Law at 172 n 8 (cited in note 60).

[95] *Senate Vote Kills Bill to Restrict Use of Permanent Striker Replacements*, Daily Labor Rep A9 (June 17, 1992).

[96] Uchitelle, *Labor Has a Big Job* at E5 (cited in note 23).

prospects for Senate passage of the newly renamed "Cesar Chavez Workplace Fairness Act" remain uncertain.[97]

In the absence of federal reform, several states have attempted to alter the *Mackay* rule. For example, Minnesota passed the Picket Line Peace Act in 1991, which made it illegal for employers to hire permanent replacements for striking workers.[98] But a federal court swiftly struck down the Act as preempted by the NLRA.[99] Similar efforts to protect strikers in other states have met the same fate.[100]

In light of the failure of statutory reform so far, the labor movement has become increasingly wary of relying on the traditional strike.[101] Over the last decade, therefore, it has developed alternatives to striking, the primary one being the exertion of economic pressure on employers through a "corporate campaign."[102] Corporate campaigns encompass a broad array of tac-

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[97] Id (reporting that three to four more votes are needed to end an expected filibuster in the Senate).

[98] 1991 Minn Laws, ch 239, § 1, codified at 13A Minn Stat Ann § 179.12(9) (West 1993).

[99] *Employers Ass'n, Inc. v United Steelworkers of America*, 803 F Supp 1558, 1563-65 (D Minn 1992). But see *Midwest Motor Express v International Brotherhood of Teamsters, Local 120*, 494 NW2d 895, 898, 900 (Minn App 1993), review granted, 1993 Minn LEXIS 198 (1993). See generally LeRoy, 77 Minn L Rev at 843 (cited in note 49).

[100] See, for example, *Chamber of Commerce v New Jersey*, 445 A2d 353, 361-62 (NJ 1982) (striking down a state strikebreaker law as preempted).

[101] "Up until just a few years ago, the strike was the most effective weapon in the arsenal of any labor union," the AFL-CIO's Industrial Union Department advised affiliated unions in 1986. Industrial Union Department, *The Inside Game* at 4 (cited in note 9). However, in the last 25 years, "[a]n increasing number of employers . . . have been able to construct game plans that turn the strike weapon against the very workers it has historically served." Id at 4-5.

[102] Of course, unions have always used pressure tactics such as consumer boycotts. But in a corporate campaign, unions seek to systematically analyze and exploit these alternative forms of pressure. Ray Rogers is generally credited with organizing the first corporate campaign against textile manufacturer J.P. Stevens. Aaron Bernstein, *The Unions are Learning to Hit Where it Hurts*, Bus Week 112 (Mar 17, 1986). Rogers now runs an organization bearing the name Corporate Campaign, Inc. Mark Liff, *Ray Rogers and His "Tools to Confront Power with Power,"* Crain's NY Bus 13 (March 10, 1986). Notably, Rogers formed Corporate Campaign in 1981, the same year that President Reagan fired striking air-traffic controllers, an event that is generally credited for emboldening employers to replace strikers permanently. Jonathan Tasini, *For the Unions, a New Weapon*, NY Times F24 (June 12, 1988). The AFL-CIO's Industrial Union Department maintains an office to mount corporate campaigns. Bernstein, *The Unions Are Learning* at 112. Unions affiliated with the AFL-CIO, such as the Teamsters, have also established special departments to conduct corporate campaigns. See Robert L. Rose, *Unions Hit the Corporate Campaign Trail*, Wall St J B1 (March 8, 1993). In 1985, the Industrial Union Department published a handbook on such campaigns for union staff entitled, *Developing New Tactics: Winning with Coordinated Corporate Campaigns* (1985). The handbook was intended to help unions persuade employers through the application of

tics.[103] For example, unions might take unfavorable information about a company to its creditors or prospective securities purchasers.[104] Employees might encourage consumers to boycott their employer's products, as in the case of the United Farm Workers' famous grape boycott;[105] or they might file wage and hour or health and safety complaints with government agencies.[106] Legislators might be encouraged to conduct hearings into corporate misconduct.[107] Hospital unions might inform regulatory agencies about inadequate patient care and excessive administrative costs.[108] And exercising their rights as stockholders

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pressures beyond the workplace. Id at 1. The labor movement's substitution of corporate campaigns for strikes was summed up in a 1984 headline in Business Week, "The Picket Line Gives Way to Sophisticated New Tactics." Bus Week 116 (Apr 16, 1984).

[103] The most comprehensive study of corporate campaigns describes and analyzes ten major campaigns. Charles R. Perry, *Union Corporate Campaigns* (Pennsylvania, 1987). For a general overview, see Lawrence Mishel, *Strengths & Weaknesses of Non-Workplace Strategies*, 7 Labor Research Rev 69 (Fall 1985). Specific campaigns are discussed in Ken Gagala, *A Wobbly-Bred Campaign in Minnesota*, 7 Labor Research Rev 81 (Fall 1985) (describing United Food and Commercial Workers Local P-9 campaign against George A. Hormel Co.); Susan Kellock, *Time & Timing in Corporate Campaigns:* IBEW 1466 vs. Southern Ohio Electric, 7 Labor Research Rev 91 (Fall 1985); Jane Slaughter, *Corporate Campaigns: Labor Enlists Community Support*, in Jeremy Brecher and Tim Costello, eds, *Building Bridges: The Emerging Grassroots Coalition of Labor and Community* 47 (Monthly Review Press, 1990) (describing the United Paperworkers' campaign against International Paper). See also Presentation of Susan Kellock, *Economic Warfare in the 1980's: Strikes, Lockouts, Boycotts and Corporate Campaigns*, 9 Indus Rel L J 82, 88-89, 93-95, 103-110 (1987). For analyses of the legality of corporate campaigns, see C. Edward Fletcher III, *The Corporate Campaign—Labor's Ultimate Weapon or Suicide Bomb?*, 65 NC L Rev 85 (1986); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 Tex L Rev 889, 889-914, 944-73 (1991) (analyzing the legality of one key tactic—the consumer boycott).

[104] The Teamsters, after discovering that Ryder System Inc.'s school bus division had suffered an extraordinary number of accidents, made the finding public and made the information available to securities analysts in the industry. Jamie Beckett, *Labor Unions Try New Weapons*, San Fran Chron C1 (Nov 12, 1992).

[105] See Frank Bardacke, *Cesar's Ghost: Decline and Fall of the U.F.W.*, 257 The Nation 130, 131 (1993).

[106] See, for example, Richard Korman and David B. Rosebaum, *Campaigns Try to Discredit Growing Nonunion Firms*, 228 Engineering News-Record 21 (May 18, 1992) (describing Western States Pipe Trades' campaign against nonunion contractors, including union charges that the contractors had violated prevailing wage laws); *Steelworkers Wage Corporate Campaign at Ravenswood with Aid from AFL-CIO*, Daily Labor Rep A9 (Apr 20, 1992) (describing Steelworkers' corporate campaign against Ravenswood Aluminum Co., including the filing of complaints with Occupational Safety and Health Administration that led to inspections and fines).

[107] Representatives of the Hospital and Service Employees' Union, SEIU Local 399, appeared at congressional oversight hearings during the Union's contract dispute with Kaiser Permanente and provided testimony that Kaiser was not meeting its obligations to provide care for the indigent while enjoying exemption from federal taxation. *SEIU Takes Contract Fight with Kaiser to Capitol Hill*, Daily Labor Rep A2 (May 28, 1993).

[108] The Service Employees International Union and United Food and Commercial

in their employer's company, employees might even bypass management to air their grievances directly with other company owners.[109] As the AFL-CIO explained the rationale of the corporate campaign: "*staying on the job and working from the inside* may be more appropriate and effective" than a strike.[110] The object is to exploit "vulnerabilities in all of the company's political and economic relationships—with other unions, shareholders, customers, creditors, and government agencies—to achieve union goals."[111]

Although corporate campaigns have proven effective in many instances, they cannot fully replace a credible strike threat for three reasons. First, their efficacy depends on the action of third parties, such as consumers, legislators, and law enforcement agencies.[112] Conceivably, key third parties may be indifferent, otherwise occupied, or even hostile, thereby hobbling a corporate campaign. In a strike, by contrast, the shopfloor actions of employees have a direct impact on employers.

Second, labor cannot fully control many of the tactics used in a corporate campaign. Although a union can promise to end a

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Workers published studies criticizing patient care and administrative costs at a chain of nursing homes run by Beverly Enterprises. *The Picket Line Gives Way to Sophisticated New Tactics*, Bus Week 116 (Apr 16, 1984). The studies were made available to regulatory agencies and Beverly shareholders.

[109] For example, at an annual shareholders meeting of a chain of nursing homes, unions attempting to organize the employees sponsored a resolution to set up a committee to monitor patient care. Id. Similarly, the Teamsters threatened to sponsor a resolution condemning the personnel policies of Lucky Stores' management. Jamie Beckett, *Labor Unions Try New Weapons*, San Fran Chron C1 (Nov 12, 1992).

[110] Industrial Union Department, *The Inside Game* at 5 (cited in note 9).

[111] Industrial Union Department, *Developing New Tactics* at 1 (cited in note 102). A less favorable definition appeared in a story on corporate campaigns in the Chicago Tribune: "The most important new technique replacing the militancy of yesteryear goes by the euphemism 'coordinated corporate campaign'—a combination of well-publicized vilification, financial blackmail and pressure tactics designed to soil and ostracize the targeted company." *Strikes Give Way to Smear Tactics*, Chi Trib B7 (May 31, 1986).

[112] See Mishel, 7 Labor Research Rev at 74 (cited in note 103) ("Corporate campaigns necessarily imply a reliance on other organizations . . . and individuals for support in pressuring employers."). While community support is often key to the success of a strike, and workers do not remain passive during a corporate campaign, the relative prospects of the two tactics and the experiences of workers who adopt them are distinct because workers are the principals in strikes. It should also be noted that the law has helped to move workers off center stage in corporate campaigns. The Supreme Court's decision in *NLRB v Local Union No. 1229, IBEW*, 346 US 464 (1953), renders non-striking workers who publicly attack their employer or its products vulnerable to discipline under the doctrine of product disparagement or disloyalty. See generally Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign*, 73 BU L Rev 291 (1993); Comment, *The NLRA and the Duty of Loyalty: Protecting Public Disparagement*, 60 U Chi L Rev 643 (1993).

strike if management makes specific concessions, it cannot promise that legislators will withdraw a bill, or that an agency will terminate an investigation or audit. Consequently, although corporate campaigns may inflict considerable pressure, an employer may have no incentive to reach agreement with the union once the strategy is deployed.[113]

Finally, an employer's vulnerability to a corporate campaign is only tangentially related to the grievances of its employees. An employer's dumping of toxic waste, for instance, while it makes the employer a prime target for a corporate campaign, may have no relationship to the grievances employees are seeking to remedy.[114] Whereas employers receptive to union demands may have vulnerabilities readily exploited through a corporate campaign, anti-union employers may not.[115]

For these reasons, the corporate campaign should be conceived of as the strike's complement, not its substitute. In tandem, the deployment of non-workplace and workplace forms of pressure would enhance labor's position at the bargaining table. But if the collective bargaining system is to remain a viable aspect of American political economy, labor must develop new forms of collective work stoppages that are protected by existing law.

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[113] As the president of Manpower Plus, a management consulting firm, commented, "You can ultimately destroy the employer if you make the right kind of charge. It's like bringing down your own house." Audrey Freedman, quoted in Beckett, *New Weapons* at C1 (cited in note 104). See also Mishel, 7 Labor Research Rev at 75 (cited in note 103). This may still be a lesson to the next employer, and tactics that drive an employer out of business may be sensible for unions operating in a market composed of many small employers, particularly if the tactics are aimed at the nonunion competitors in such a market.

[114] Of course, workers may have an interest in matters other than wages, hours, and working conditions. For example, workers may have a keen interest in preventing their employer from using their labor for anti-social ends. But these interests are often not recognized by the law. See Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U Pa L Rev 921 (1992).

[115] Of course, the same is true of strikes to some extent. Employer vulnerability and the ability of employees to strike differ for reasons unrelated to employee resolve. The Bureau of Labor Statistics perceptively observed in 1938 that, while strikes are "an important indicator, . . . strike statistics can never exactly measure industrial unrest" because "[d]iscontent may be greatest precisely when and because workers exist so precariously that they have no hope of bettering their immediate position through the use of economic weapons." Peterson, BLS Bull 651 at v (cited in note 3).

II. "BEYOND THE PALE OF PROPER STRIKE ACTIVITY"

Whether strikes are protected under the current construction of the NLRA clearly turns on their form. Close examination of the non-traditional strike cases reveals, however, that both the Board and the courts have failed to articulate a comprehensive theory that justifies stripping such strikes of protection. As a consequence, no distinct line separates protected from unprotected strikes. This confusion is most evident in the case of intermittent strikes.

A. The Unprotected Status of Intermittent Strikes

The Supreme Court's 1949 *Briggs-Stratton* decision was the first federal ruling on the legal status of intermittent strikes.[116] After a deadlock in negotiations to renew a collective bargaining agreement between a Wisconsin manufacturer and the United Automobile Workers (UAW), the UAW implemented a new strategy of repeatedly holding union meetings during working hours and encouraging all employees to attend. The meetings were called without prior notice and the employer was not informed how long they would last. The union held 26 meetings in four months, neither making any specific demands, nor telling the employer what concessions might prevent the work stoppages.[117] Briggs & Stratton sought relief against these short strikes before the Wisconsin Employment Relations Board, which enjoined the meetings and barred the union from "engaging in any other concerted effort to interfere with production . . . except by leaving the premises in an orderly manner for the purpose of going on strike."[118] After unsuccessful appeals to the state courts, the union argued in the United States Supreme Court that the Board's order conflicted with the right to strike guaranteed by the NLRA.[119] But the Court upheld the injunction "against repeated disruption of production."[120]

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[116] 336 US 245. In an earlier case, the Third Circuit Court of Appeals considered two brief strikes occurring on the same day. *NLRB v Condenser Corp.*, 128 F2d 67, 77 (3rd Cir 1942). But the court held the strikes unprotected not because there were two of them, but on the untenable ground that employees cannot strike in the middle of a work day when their employer has promised to discuss their grievance after working hours. Id.

[117] 336 US at 248-49.

[118] Id at 250.

[119] Id at 252.

[120] Id at 256.

What the *Briggs-Stratton* Court failed to explain was the wrong embodied in repeated work stoppages. Nor did it indicate whether all such stoppages were subject to state regulation. These silences notwithstanding, the Court's decision in *Briggs-Stratton* has been routinely cited for the principle that employers can lawfully fire intermittent strikers—a principle it did not embrace.[121] While the Court's holding that states may enjoin intermittent strikes has since been overruled,[122] *Briggs-Stratton* is still, paradoxically, misread to permit employers to fire workers who engage in intermittent strikes.[123] On this tenuous foundation rests the unprotected status of intermittent strikes.

The *Briggs-Stratton* Court found little support for its holding in the express language of the NLRA or in its own prior decisions. In fact, the Court concluded that the Act did not forbid strikes based on their form alone. Even though the 1947 Taft-Hartley amendments had empowered the Board to order the cessation of strikes that had an illicit secondary purpose, the Court found that the Board had no "power to forbid one because its *method* is illegal."[124] The UAW argued that the broad language of § 7 of the Act granted affirmative protection to all forms of strikes.[125] The Court, however, cited *Fansteel* to support its rejection of that literal interpretation.[126] But this still left in question why the mere act of stopping work repeatedly (in contrast to the physical seizure of a plant in violation of state criminal law) should be unprotected.

The Court answered this question simply by applying the term "indefensible" to intermittent strikes. It drew the term from the Board's 1938 decision in *Harnischfeger Corp.*[127] In *Harnischfeger*, the Board decided whether a concerted refusal to work overtime was unprotected by considering whether this form of partial strike was "so indefensible" as to justify the employer's

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[121] The Court's decision removed any federal bar to state interference with intermittent strikes, but it did not sanction any direct retaliatory action by the employer against the strikers. In fact, the Court expressly distinguished the injunction at issue in *Briggs-Stratton* from the discharge of intermittent strikers, underscoring the fact that only the question of state action was raised. "Here the employer has resorted to no retaliatory measures . . . . The remedy sought against repeated disruption of production is not summary dismissal but invocation of a statutory procedure made available by the State for the adjudication and resolution of such difficulties." Id.

[122] See text accompanying notes 144-149, 155-57.

[123] See, for example, *Western Wirebound Box Co.*, 191 NLRB 748, 762 & n 33 (1971).

[124] 336 US at 253 (emphasis added).

[125] Id at 255.

[126] Id at 257.

[127] 9 NLRB 676 (1938).

discharge of the strikers.[128] The Board held that it was not, but provided no further guidance as to when other forms of strikes would be "so indefensible" as to strip them of protection.[129] After quoting the Board's language in *Harnischfeger*, the Supreme Court concluded, "in view of that statement, the facts of the present case do not bring it within the protection of the Act . . . ."[130] Like the Board, the Court failed to set forth any more general standard by which to judge whether particular strikes are indefensible. The Court neither distinguished *Harnischfeger* nor otherwise explained why the intermittent strikes were unprotected. The sole rationale offered by the Court was that intermittent strikes are unprotected because they are "indefensible."[131]

In dissent, Justices Murphy and Rutledge criticized the absence of legal foundation for the majority's holding. Specifically, they challenged the equation of the intermittent strikes in *Briggs-Stratton* with the sit-down strike in *Fansteel*.[132] The dissenters also objected that the holding was overly solicitous of the employer's economic interests, which had already been hedged by the NLRA's recognition of the right to strike. They argued that the majority "adopts the employer's plea that it cannot plan production schedules, cannot notify its customers and suppliers, cannot determine its output with any degree of certainty and that these inconveniences withdraw this activity from § 7."[133] But as these were the objectives of all strikes, the dissent reasoned, intermittent stoppages were no more indefensible than conventional forms of strikes.

In *Briggs-Stratton* the Court thus failed not only to spell out the principles underlying its holding, but also to define the scope of the holding. The Court delivered its *Briggs-Stratton* ruling in wholly particularized terms. It characterized the strikes at issue as "recurrent or intermittent," but articulated no general definition of these terms.[134] It left unanswered the questions whether two strikes within any period of time are unprotected intermittent strikes, whether more are required, or whether multiple

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[128] Id at 686.

[129] Id. This was also the holding in *Armour and Co.*, 25 NLRB 989, 1000 (1940), the other Board case cited by the Supreme Court.

[130] 336 US at 256.

[131] Id at 264-65.

[132] Id at 269 (Murphy dissenting).

[133] Id.

[134] Id at 264 (majority opinion).

strikes must occur within a specific time period for strikers to lose the protection of the NLRA.

The Supreme Court revisited the elusive problem of the intermittent strike's unprotected status in the 1960 case of *NLRB v Insurance Agents' International Union, AFL-CIO*.[135] In this case, the Court undercut the *Briggs-Stratton* decision by recognizing intermittent strikes as integral to collective bargaining, while also misreading the prior decision to permit employers to fire intermittent strikers. The Court provided no better explanation of why such strikes should be unprotected from employers than it had earlier provided of their vulnerability to state sanction. *Insurance Agents* involved a "Work Without A Contract" program adopted by the Insurance Agents' International Union during bargaining with the Prudential Insurance Company.[136] The program combined various non-traditional tactics, including intermittent strikes, slowdowns, and appeals to consumers.[137] Prudential filed a charge with the NLRB alleging that the program violated the union's duty to bargain in good faith.[138] Relying on *Briggs-Stratton*, the Board issued a cease and desist order,[139] but the Court of Appeals reversed and the Supreme Court affirmed the appellate court.[140]

The question before the Court in *Insurance Agents* was whether the NLRB had the same authority the *Briggs-Stratton* Court had accorded state agencies to order workers to cease and desist from engaging in intermittent strikes. The Board thus bore the burden of elucidating what the Court itself had not coherently explained in *Briggs-Stratton*; namely, why the legal status of a

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[135] 361 US 477 (1960).

[136] Id at 480.

[137] The Court detailed the actions:

> [R]efusal for a time to solicit new business, and refusal (after the writing of new business was resumed) to comply with the company's reporting procedures; refusal to participate in the company's "May Policyholders' Month Campaign"; reporting late at district offices the days the agents were scheduled to attend them, and refusing to perform customary duties at the offices, instead engaging there in "sit-in mornings," "doing what comes naturally" and leaving at noon as a group; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside the various offices of the company on specified days and hours as directed by the union; distributing leaflets each day to policyholders and others and soliciting policyholder signatures on petitions directed to the company; and presenting the signed policyholder petitions to the company at its home office while simultaneously engaging in mass demonstrations there.

Id at 480-81.

[138] Id at 480.

[139] 119 NLRB 768, 771 n 10, 773 (1957).

[140] 361 US at 481, 500.

strike should be contingent on its form. The Board's explanation seemed to invoke orthodoxy as the standard. Had the union called a "'total' strike," the Board argued before the Court, it would not have been subject to any sanctions: "an orthodox 'total' strike is 'traditional'" and therefore consistent with collective bargaining.[141] Conversely, the intermittent strikes were "not 'traditional' or 'normal,'" and therefore were inconsistent with the NLRA.[142] In support of its argument, the Board also cited "the public's moral condemnation of the sort of employee tactics involved here."[143]

Departing from *Briggs-Stratton*, the Supreme Court in *Insurance Agents* categorically rejected the notion that a strike's form, in itself, could put the strike beyond the pale of federal law. The Court held that all forms of strikes are consistent with good-faith bargaining, a holding based on the Court's recognition that economic pressure is indispensable to the collective bargaining process.[144] The Court dismissed the orthodoxy of the strike's form as irrelevant, whether "the practice in question is time-honored or whether its exercise is generally supported by public opinion."[145] Furthermore, echoing the dissent in *Briggs-Stratton*, the Court repudiated the proposition that "the only economic weapons consistent with good-faith bargaining are those which minimize the pressure on the other party or maximize the disadvantage to the party using them."[146] The Court emphatically denied the Board's authority to regulate the form of work stoppages, declaring such regulation an "intrusion into the substantive aspects of the bargaining process" which would vest the Board with "the choice of economic weapons that may be used as part of collective bargaining . . . ."[147]

Unlike in *Briggs-Stratton*, however, the Court in *Insurance Agents* proceeded beyond the facts at issue in the case to consider whether the intermittent strikers were protected from direct employer retaliation. Although *Briggs-Stratton* had held intermittent strikes unprotected only from state intervention, the *Insur-*

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[141] Id at 491, 495.

[142] Id at 495.

[143] Id.

[144] "The use of economic pressure . . . is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining," declared the Court. Id.

[145] Id at 496.

[146] Id.

[147] Id at 490.

ance Agents Court cited this holding to support the distinctly different proposition that the NLRA did not bar employer discipline or discharge of intermittent strikers. "[T]he employer could have discharged or taken other appropriate disciplinary action against the employees."[148] The Court thus confirmed the existence of a middle category of unprotected strikes between those deemed illegal and those fully protected under federal law. But whereas *Briggs-Stratton* had held that these permissible strikes were not protected from state action, *Insurance Agents* indicated they were not protected from employer action either. Ironically, the Court's dicta placed the intermittent strike in the legal position occupied by all strikes prior to the NLRA; intermittent strikes were protected from federal injunction, as all strikes had been by the Norris-LaGuardia Act, but not from employer interference or coercion.[149] The *Insurance Agents* Court held that the Board lacked statutory authority to outlaw certain forms of strikes, but then, in dicta at odds with its holding, suggested that the Board might have power to designate which strikes are affirmatively protected by the NLRA.[150] Even though the Court resoundingly rejected the Board's effort to enlist tradition and public opinion to push intermittent strikes from this middle category into the category of prohibited actions, it allowed that these might be "relevant arguments" in locating the other boundary of the intermediate category—the boundary between legal toleration and affirmative protection.[151]

The anomalous status of non-traditional strikes—their location in a legal no-man's land between prohibition and protection—was firmly established by the Supreme Court's most recent ruling on the issue. In the 1976 case of *Lodge 76, International Ass'n of Machinists v Wisconsin Employment Relations Commission*,[152] the Court overruled *Briggs-Stratton*'s holding that such strikes were enjoinable under state law, while endorsing the *Insurance Agents* dicta suggesting they were not protected from employer retaliation. The *Lodge 76* dispute arose when management unilaterally implemented a 40-hour week, but union mem-

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[148] Id at 493.

[149] See Norris-LaGuardia Act, Pub L No 72-65, 47 Stat 70 (1932), codified at 29 USC §§ 101-15 (1988) (limiting the federal courts' jurisdiction to issue injunctions in labor disputes).

[150] 361 US at 494-99.

[151] Id at 495.

[152] 427 US 132 (1976).

bers voted to refuse to work more than 37½ hours per week.[153] The employer sought relief before the NLRB, but its charge was dismissed pursuant to *Insurance Agents*. Then, like Briggs & Stratton, the employer resorted to a state agency, which enjoined the partial strike.[154] After affirmance by the state courts, the Supreme Court reversed.[155]

The Court held that federal labor law shielded the partial strike from state interference. Reviewing developments in labor law preemption since *Briggs-Stratton*, the Court found that federal labor policy may "dictate that certain activity 'neither protected nor prohibited' [by federal law] be deemed privileged against state regulation."[156] The Court thereby overruled the holding of *Briggs-Stratton* and completed the process of deregulating non-traditional strikes begun in *Insurance Agents*.[157]

Although the *Lodge 76* Court shielded both non-traditional and traditional strikes from governmental interference, it did not hold that all strikes were equally protected by federal law. To the contrary, the Court based its reversal of *Briggs-Stratton*'s non-preemption rule on the assumption that employers were free to discipline intermittent and partial strikers. According to the *Lodge 76* Court, the employer invoked the aid of the state "because it was unable to overcome the Union tactic with its own economic self-help means."[158] In dicta, the Court stated that "the employer could have discharged or taken other appropriate action against the employees participating" in the partial strike.[159] The *Lodge 76* decision thus perpetuated the notion that certain forms of strikes are not fully protected by the NLRA. Together, the rulings in *Insurance Agents* and *Lodge 76* render the form of a strike irrelevant to the question of whether it is prohibited under federal law or protected, in most instances, from state interference.[160] But, in both cases, the Court's dicta sug-

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[153] Id at 134.

[154] Id at 135-36.

[155] Id at 141.

[156] Id, quoting *Hanna Mining Co. v Marine Engineers*, 382 US 181, 187 (1965).

[157] "We hold today that the ruling of *Briggs-Stratton*, permitting state regulation of partial strike activities such as are involved in this case is . . . 'no longer of general application.'" 427 US at 151.

[158] Id at 148. The preempted interference with federal labor policy was precisely this effort of the employer to enlist state power when it lacked the economic power to stop the partial strike.

[159] Id at 152, quoting *Insurance Agents*, 361 US at 493.

[160] The form of a strike might implicate an exception to the sweep of federal preemption if it raised concerns deeply rooted in state law, such as the prevention of violence. See *San Diego Building Trades Council v Garmon*, 359 US 236, 247 (1957).

gest that protection from employer retaliation hinges directly on the strike's form.

The Supreme Court has never held that intermittent or partial strikes are unprotected. Nevertheless, this trio of Supreme Court decisions suggests that these forms of strike fall into an intermediate category, where they are not prohibited by federal law or subject to state interference, but are unprotected against retaliatory employer self-help. Less clear, however, are the reasons for this category and the precise forms of strike it encompasses. The Board has not exercised its authority to clarify the issue, but has repeatedly confirmed the existence of an unprotected class of strikes, declaring that it has "long recognized a limited exception to otherwise protected activity where employees engage in work stoppages which are 'partial,' 'intermittent,' or 'recurrent.'"[161] Moreover, the Board's definition of a partial strike, such as a refusal to work overtime, is relatively clear-cut, and it has at least articulated reasons for stripping this form of strike of protection. But it remains a mystery at what point strikes become "recurrent" or "intermittent" and why this matters.

B. The Elusive Rationale

The Board has formulated two principal rationales for the unprotected status of non-traditional strikes. In so doing, it has indiscriminately grouped together partial and intermittent strikes.[162] But the Board's own reasoning suggests critical, though unacknowledged, distinctions between these forms of strikes—distinctions that render the Board's rationales completely inapposite to intermittent strikes. Two alternative explanations of the *Briggs-Stratton* doctrine, one based on a conception of properly balanced bargaining power and the other on an expansive notion of employer property rights, may underlie the express rationales. Like the articulated rationales, however, the unarticulated also fail to justify the unprotected status of intermittent strikes.

The Board has reiterated that non-traditional work stoppages are unprotected by the NLRA because they subvert the binary opposition of strike and work. According to the Board, such stoppages produce "a condition that [is] neither strike nor work."[163]

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[161] *E.R. Carpenter Co.*, 252 NLRB 18, 21 (1980).

[162] See note 24 and text accompanying notes 82-90.

[163] *Valley City Furniture Co.*, 110 NLRB 1589, 1595 (1954), enf'd, 230 F2d 947 (6th

This statement, however, is more descriptive than explanatory, for the NLRA's protection is not limited to strikes. Although the Board and the federal courts have often strained to distinguish partial and intermittent work stoppages from strikes,[164] they have lost sight of a crucial statutory issue, namely that the NLRA protects "concerted activities," of which strikes are only one form.[165] Therefore, even if non-traditional work stoppages are "neither strike nor work," they may still be protected as a form of collective activity.

Arguably, the problem with labor protests that blur the line between striking and working lies in the unfairness of employees continuing to earn wages while they are intentionally thwarting the interests of their employer.[166] But, as in the case of a traditional strike, the Act does not require employers to pay employees for work they do not perform. It would be lawful for employers simply to reduce partial strikers' pay to reflect their reduced effort.[167] In the case of slowdowns, it might be difficult to distin-

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Cir 1956). The Seventh Circuit formulated this rationale somewhat differently. Finding that workers involved in a dispute with their employer had two options—to continue working or to strike—the court stated, "they did neither, or perhaps it would be more accurate to say they attempted to do both at the same time." *C.G. Conn, Ltd. v NLRB*, 108 F2d 390, 397 (7th Cir 1939).

[164] See, for example, *Briggs-Stratton*, 336 US at 264 n 17 ("To call these stoppages a strike we would have to ignore petitioners' own conception of this activity. As we have shown, they adopted this technique precisely because it was believed to be 'better than a strike.'"); *C.G. Conn*, 108 F2d at 397 ("[W]e are of the opinion that the facts in the instant situation [a refusal to work overtime] do not bring the discharged employees within th[e American and English Encyclopedia of Law's] or any other definition of the word 'strike' of which we are aware.").

[165] 29 USC § 157. Moreover, since 1947, the Act has defined "strike" to include "any concerted slowdown or other concerted interruption of operations by employees." 29 USC § 142(2). This definition was noted in *Briggs-Stratton* but taken to apply only to illegal secondary strikes. 336 US at 258, 263-64. In *Insurance Agents*, the Court speculated about whether this aspect of the *Briggs-Stratton* holding had "become open also," but found it unnecessary to rule on the point. 361 US at 494 n 23. Finally, in *Lodge 76*, the Court again side-stepped the definitional issue, but noted "that in determining the sense of the entire structure of the federal law respecting the use of economic pressure and the economic weapons assumed by Congress to be available to the parties," the Act's definition of the term strike "is not insignificant." 427 US at 151 n 12. The Court then quoted Justice Frankfurter's separate opinion in *Insurance Agents*: "It is hardly conceivable that such a word as 'strike' could have been defined in these statutes without congressional realization of the obvious scope of its application." Id, quoting *Insurance Agents*, 361 US at 511 n 6 (Frankfurter in separate opinion).

[166] See *NLRB v Electrical Workers (Jefferson Standard)*, 346 US 464, 476 (1953) (holding product disparagement unprotected partly on grounds that "[i]t was a continuing attack initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop").

[167] See, for example, *Solo Cup Co.*, 114 NLRB 121, 134 (1955), enf'd, 237 F2d 521 (8th Cir 1956) (employer free to remove employees from payroll during one-hour strike);

guish striking from working,[168] and hence docking pay from disciplining employees, but in other cases (such as refusals to work overtime) employers could easily calculate what wages to withhold for the work that employees refuse to do. The rationale of "neither strike nor work" does not even accurately describe a refusal to work overtime, which is the most common partial strike.

Although the rationale loosely applies to some forms of partial strikes, it is in no way germane to intermittent strikes. Except when intermittent strikes are so brief and so constantly repeated as actually to constitute a slowdown, they do not create a condition that is "neither strike nor work." Employees go out on strike, return to work, and then strike again; the boundary is distinct, though repeatedly crossed.[169] If work stoppages are unprotected when they disrupt the binary opposition of strike and work, then intermittent strikes should be protected.

The Board's second rationale, while somewhat more aptly explaining the unprotected status of partial strikes, also fails to apply to intermittent strikes. The Board has posited that partial strikes are inconsistent with the process of collective bargaining. Instead of applying economic pressure to further the bargaining process, partial strikes purportedly subvert it by providing workers a way "to do what we would not allow any employer to do, that is, unilaterally determine conditions of employment."[170]

There are two problems with this rationale. First, it does not always fit the facts. The ultimate object of a partial strike may not be to rid workers permanently of the tasks they refuse to perform; employees may, for example, refuse to work overtime in order to secure a wage increase, rather than a permanent reduction in hours.[171] Partial strikes may therefore operate to advance the bargaining process as well as directly to obtain changes

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Kennametal, Inc., 80 NLRB 1481, 1491 (1948), enf'd, 182 F2d 817 (3d Cir 1950) (employer "privileged to deduct the wages for the time lost by those who participated" in short strike).

[168] Slowdowns may be distinguishable from other partial strikes because they involve "an element of cheating." *Honolulu Rapid Transit*, 110 NLRB 1806, 1828 (1954).

[169] Here, it becomes evident that some forms of what I have called partial strikes, such as refusals to work overtime or on weekends, closely resemble intermittent strikes.

[170] *Valley City*, 110 NLRB at 1594-95. See also *Honolulu Rapid Transit*, 110 NLRB at 1810 n 3 ("We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him.").

[171] See, for example, *John S. Swift Co.*, 124 NLRB 394, 396-97 (1959), enf'd in part, 277 F2d 641 (7th Cir 1960) (holding unprotected a refusal to work overtime intended to pressure employer to come to terms on fringe benefits and job security).

in working conditions. This is precisely what the Supreme Court held in *Insurance Agents*, finding partial as well as total strikes "part and parcel" of the bargaining process.[172]

Second, this rationale, at most, justifies modifying the *Insurance Agents* rule that partial strikes do not conflict with good-faith bargaining;[173] it does not support stripping them of all protection. Under the NLRA, employers are barred from unilaterally changing the terms of employment only prior to bargaining to impasse.[174] The imposition of a parallel restriction on unions, based on the Board's reasoning that partial strikes constitute unilateral changes in working conditions, would only bar such strikes prior to an impasse. This rationale does not justify allowing employers to fire workers who engage in partial strikes at any juncture in the bargaining process.

This rationale cannot be reformulated in terms that avoid these defects without detaching it from all statutory mooring. It might be said that the wrong entailed in the partial strike is not that workers exercise unilateral authority forbidden to management, but rather that they invade powers reserved exclusively to management. In a case involving a refusal to work overtime, for example, the Seventh Circuit explained that the employees were unprotected because they "intended to continue work upon their own notion of the terms which should prevail."[175] This statement assumes it is outside the proper province of employees to set their own terms of work. Such actions, as the Board stated in another case, represent "an arrogation" of the rights of management, which alone possesses the "responsibility" and "prerogative" to establish work schedules.[176] In what can only be understood as a flight of fancy, the Seventh Circuit paraded the horribles that might result from such invasions of management's prerogative to fix the hours of work: "[I]t would follow that a

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[172] 361 US at 495.

[173] Id at 496. The Court expressly reserved the question of whether a partial strike, by setting working conditions unilaterally, violates the duty to bargain collectively. It decided to wait for a case in which the evidence revealed that "the practices that the union was engaged in were designed to be permanent conditions of work" rather than "means to another end." Id at 497 n 28.

[174] *NLRB v Katz*, 369 US 736, 743 (1962). And this is true only if a union has been certified by the Board or voluntarily recognized by the employer. Id at 739.

[175] *C.G. Conn*, 108 F2d at 397. Kenneth Lopatka accepts this justification of the unprotected status of partial strikes. He observes that in such strikes, "employees presume to work on their own terms—intermittently, partially or slowly—when their employers have offered remuneration and continued employment only for full service." Lopatka, 29 Stan L Rev at 1189 (cited in note 60).

[176] *Honolulu Rapid Transit*, 110 NLRB at 1809.

similar right existed by which [employees] could prescribe all conditions and regulations affecting their employment."[177] But this, obviously, could not follow. The power physically to determine the hours and pace of labor inheres in workers themselves; but they cannot similarly control wages, benefits, or most other "conditions and regulations."[178] Moreover, although labor's adjustment of its own pace or hours of work may conflict with assumptions about the appropriate roles of management and labor, these assumptions are not ratified in the NLRA, which, in fact, grants workers a role in setting these and other terms of employment.[179]

The rationale that non-traditional strikes subvert the bargaining process is questionable but not wholly unfounded with respect to partial strikes. But this rationale is utterly untenable with respect to intermittent strikes, for intermittent strikers do not unilaterally alter terms of employment. Rather, by repeatedly stopping work, they pressure employers to agree to mutually acceptable terms. In some sense, of course, intermittent strikers invade their employer's prerogative to decide when employees shall work,[180] but no more so than traditional strikers whose actions are clearly protected. Once, therefore, the differences between the "partial" and "intermittent" forms of the non-traditional strike are recognized, it becomes readily apparent that neither of the explanations articulated by the Board and courts provides a convincing rationale for the unprotected status of intermittent strikes.

Two alternative explanations of this doctrine might be advanced. The first is that intermittent strikes are too effective. The dissenters in *Briggs-Stratton* concluded that this was the only possible explanation of their brethren's holding, stating that "[t]he majority call the weapon objectionable, then, only because

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[177] *C.G. Conn*, 108 F2d at 397.

[178] The trial examiner in *First National Bank of Omaha*, 171 NLRB 1145 (1968), enf'd, 413 F2d 921 (8th Cir 1969), drew precisely this contrast. "Hours of work is perhaps the only condition of employment which employees can manipulate at their own instance. Physical conditions in the plant, such as heat and cold, wages, plant rules, the quality of supervision, and other terms and conditions by the very nature of the employment relationship, cannot be unilaterally changed by employees who are protesting such conditions. Employees who demand a raise in wages cannot take matters into their own hands and pay themselves the increase they want . . . ." Id at 1150-51.

[179] This point is forcefully made in Atleson, *Values and Assumptions* at 56-66 (cited in note 60), specifically about slowdowns, and also more generally about administrative and judicial construction of the NLRA.

[180] Lopatka argues that employees do in fact "presume to work on their own terms—intermittently." Lopatka, 29 Stan L Rev at 1189 (cited in note 60).

it is effective."[181] Although the *Briggs-Stratton* majority did not actually articulate such a rationale, it was made explicit in later decisions. Dicta in a 1974 Ninth Circuit opinion, for example, explained that partial and intermittent strikes are unprotected because they "unreasonably interfere with the employer without placing any commensurate economic burden on the employees."[182] Such strikes "impede the employer from using replacements" while employees "continue to draw their wages."[183] The Ninth Circuit thus made explicit what the Supreme Court had left implicit, namely that partial strikes are unprotected "because they make it impractical for the employer to operate his business properly."[184]

But that, of course, is precisely the purpose of all strikes. The mere fact that partial and intermittent strikes more effectively interrupt business operations cannot strip them of protection. According to the Supreme Court, the Board does not have "general authority to assess the relative economic power of the adversaries"[185] or a mandate to act as the "arbiter of the sort of economic weapons the parties can use."[186] In the absence of a statutory warrant, the Board cannot strip concerted activity of protection on the grounds that it yields labor too much leverage.

Moreover, the efficacy of partial and intermittent strikes should not be overstated. It is untrue that these strikes are costless to employees because they continue to earn wages, for employers remain free to withhold wages for hours not worked or tasks not performed. In fact, the cost of these strikes to employees is proportional to their toll on employers: the more frequent the strike and the more tasks not performed, the greater the harm to the employer, but the more income lost to workers. Indeed, if employers wish to impose higher costs on partial or intermittent strikers and are willing to suffer greater loss of produc-

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[181] 336 US at 269 (Murphy dissenting). This critique parallels the critique of the law of strikes prior to the enactment of the NLRA. Writing in 1928, Alpheus Mason observed, "After an examination of judicial opinions and decisions, one is apt to arrive at the conclusion that the activities of labor are lawful so long as they are confined to means which are ineffective for achieving perfectly legitimate purposes." Alpheus T. Mason, *The Right to Strike*, 77 U Pa L Rev 52, 59 (1928).

[182] *Shelly & Anderson Furniture Mfg. Co. v NLRB*, 497 F2d 1200, 1203 (9th Cir 1974).

[183] Id. See also *First National Bank of Omaha*, 171 NLRB 1145, 1151 (1968) (partial strikes unprotected because workers refuse "to assume the status of strikers, with its consequent loss of pay and risk of being replaced").

[184] *Shelly*, 497 F2d at 1203.

[185] *American Ship Building Co. v NLRB*, 380 US 300, 317 (1965).

[186] *Insurance Agents*, 361 US at 497.

tion, they may lawfully lock out the strikers. Even before the Supreme Court ratified offensive lockouts generally,[187] the Board had sanctioned lockouts designed to preempt a series of short strikes.[188] Through a lockout, employers can withhold all wages from partial or intermittent strikers until they agree on terms, including a pledge not to strike. Not only can employers withhold wages from such strikers for work not performed, they can withhold all wages by refusing to allow them to perform any work. Partial and intermittent strikes therefore are hardly costless for employees.

It is equally untrue that partial and intermittent strikes are rendered too effective because they wholly preclude the hiring of permanent replacements. Certainly, as this Article demonstrates, one of the principal advantages of these forms of strike is that they thwart the ready hiring of replacements; and even though workers engaged in these strikes may be locked out, it is unlawful to replace locked-out workers permanently.[189] Nevertheless, only slowdowns and other partial strikes not involving a full cessation of work actually preclude permanent replacement. Intermittent strikers are at risk of replacement, and the longer and more often they strike, the greater the risk. However, simply because intermittent strikers are harder for employers to replace than workers involved in traditional strikes is no reason to deny them protection. It would be unfair to hold that workers must exercise the right to strike so as to facilitate their own permanent replacement,[190] while employers have no corresponding obligation to make striking practicable. Intermittent strikes may afford workers an important tactical hedge against both withheld

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[187] See *American Ship*, 380 US at 318; *NLRB v Brown*, 380 US 278, 285, 288 (1965).

[188] *International Shoe*, 93 NLRB 907, 909 (1951).

[189] See *Harter Equipment, Inc.*, 293 NLRB 647, 648 (1989); *Johns Manville Products Corp.*, 223 NLRB 1317, 1317-18 (1976), enf denied, 557 F2d 1126, 1133 (5th Cir 1977). The Court of Appeals denied enforcement in *Johns Manville* based on a finding that employees had engaged in sabotage "tantamount to a strike." 557 F2d at 1133. It expressly declined to rule on the question of whether employers may permanently replace locked-out employees in all cases. Id at 1134. The relevance of this ruling to the forms of strikes under discussion is unclear. Moreover, neither the Board nor the Supreme Court has adopted the appellate court's position.

[190] I have intentionally refrained from using the term "right" in connection with employer authority to lawfully replace strikers permanently. The Act does not expressly confer any such right. While the Supreme Court has ruled that the Act does not bar such replacement, Congress has recognized this ruling, and state efforts to hedge employer authority have been held preempted, employer ability to replace strikers lawully does not occupy the same central place in the statutory scheme occupied by the express right to strike.

wages and permanent replacement, but they do not leave employers defenseless. And even if that were the case, it would be for Congress and not the Board or the courts to declare them unprotected on that basis.

The other possible explanation that might be advanced for the unprotected status of partial and intermittent strikes is that they infringe on employer property rights through the act of trespass. This explanation recognizes no distinction between different kinds of non-traditional strikes, for it posits that both partial and intermittent stoppages interfere with the employer's productive use of its property not only by the withholding of labor, but by the strikers' continuing physical presence in the workplace. Slowdowns provide the clearest support for this position, because as strikers in a slowdown perform less and less work, the slowdown seemingly verges on the sit-down strike. In an intermittent strike, by contrast, strikers exit and return to work repeatedly. In some measure, the effectiveness of all these forms of non-traditional strike derives from the coupling of a work stoppage with the occupation of the workplace. But only the sit-down strike by definition entails the refusal to leave the workplace. If partial or intermittent strikers disobey an employer's order to vacate the premises, the law considers them sit-down strikers and denies them protection of the Act. But until that point they have not trespassed and therefore have not violated the employer's property rights. Conceivably, employers might object that the right to lock out strikers, while affording them formal dominion over their property, does not entitle them fully to exploit its productive potential because they are barred from permanently replacing locked-out workers. But this objection collapses into that addressed above. Once, therefore, the distinctive forms of non-traditional strike are distinguished, it is evident that the unprotected status of intermittent strikes has no tenable rationale.[191]

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[191] The unprotected status of partial and intermittent strikes is also in tension with the protected status of refusals to cross stranger picket lines (those of other workers picketing their own employer). A refusal to cross a stranger picket line results in either a partial or intermittent strike. Yet the Board has held such refusals protected, with the exception, during some periods, of allowing employers to discharge employees who refuse to cross lines if the employer could show a substantial business justification. See *Business Services by Manpower, Inc. v NLRB*, 784 F2d 442, 446-53 (2d Cir 1986) (reviewing the development of doctrine governing stranger picket lines).

C. The Undefined Category

The Board has not only failed to enunciate a justification for stripping intermittent strikes of protection, it has yet to provide even a clear definition of such strikes. The meaning of the term "intermittent strike" is not self-evident, for it is plain that the right to strike cannot forever be exhausted after it is exercised once. Mere repetition, separated by the term of a collective agreement or some other extended period, cannot strip strikes of the NLRA's protection. What, then, is an unprotected intermittent strike? Although the Board has repeatedly stated that intermittent strikes are unprotected,[192] it has decided only three cases actually holding recurrent strikes to be unprotected,[193] none of which clearly defines an intermittent strike.

The first case, *Pacific Telephone and Telegraph Co.*, concerned a "multiplicity of little 'hit and run' work stoppages," arising from a contract dispute between the Communications Workers of America (CWA) and Pacific Telephone.[194] Employees in "a great many of the division's more than 200 offices walked off their jobs on different days instead of all at the same time; at many offices they returned to work after a short time and then walked out again after a day or two; and in some offices they again returned to work briefly and later quit anew a third time."[195] The Board unequivocally held that the repeated strikes were unprotected, calling them "a form of economic warfare entirely beyond the pale of proper strike activities" and declaring that it would have been lawful for the employer to fire the strikers.[196]

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[192] See, for example, *Advance Cleaning Service*, 274 NLRB 942, 944 (1985); *E.R. Carpenter*, 252 NLRB at 21; *Crenlo Div. of G.F. Business Equipment, Inc.*, 215 NLRB 872, 879 (1974), enf'd in part, 529 F2d 201 (8th Cir 1975).

[193] See also *Kohler Co.*, 108 NLRB 207 (1954), enf'd, 220 F2d 3, 10-11 (7th Cir 1955) (finding unprotected a single refusal to complete shift without medical justification, when combined with threat to leave shift each time employees "feel sick, dizzy or otherwise feel as if they cannot take it any longer").

[194] 107 NLRB 1547, 1548 (1954).

[195] Id. Like the union at Briggs & Stratton, the CWA hoped to gain tactical advantages from the intermittent strikes. The union explained to its members, "*By striking quickly and unexpectedly, the Company has a problem getting its defenses set up. They can't spare supervisors from other non-struck areas, because they have to carry on normal work. The ones they do gather together reach the picketed place, only to have the picket line gone . . . .* Another advantage for the union in this tactic is that most of the workers are on the job, maintaining their financial take home . . . ." Id at 1548 n 3.

[196] Id at 1547-48, 1550. The actual issue in the case was the employer's failure to immediately return tollmen represented by another union to work after they honored the CWA's picket lines. Id at 1549. The Board found that the tollmen knew of and cooperated in the CWA strategy and therefore "removed themselves from the protection of the Act."

The Board was far more ambiguous, however, in stating the scope of its holding. It failed to delineate the boundaries of the category of unprotected strikes into which it placed the CWA's activity. Although finding that employees had stopped work three times in nine days,[197] the Board did not rule that strikes occurring this often, or more so, were always unprotected. Nor did it otherwise elaborate the broader implications of its holding. The only theory advanced by the Board was that the union's goal was "to bring about a condition that would be neither strike nor work."[198] That theory, which was neither descriptive nor explanatory, highlights the gaps in the decision: its silence regarding both the precise parameters of an intermittent strike and the wrong involved in this form of work stoppage.[199]

The gaps in the Board's reasoning were not filled by its second decision holding intermittent strikes unprotected. The case, *Western Wirebound Box Co.*, concerned a "surprise work stoppage" lasting 15 minutes, which was called during negotiations over a new collective bargaining agreement.[200] When employees refused to comply with an order to return to work, management dismissed them for the day, and the same sequence of events occurred four weeks later.[201] According to the Board Trial Examiner, the suspensions did not constitute a discriminatory lockout of the employees. Rather, the second stoppage was deemed unprotected because it was "tantamount to a partial or 'quickie strike.'"[202] In this case, as in many others, the ruling blurred the two categories—partial and intermittent strikes—while defining neither. The Board affirmed without opinion.[203]

The Board's most recent holding is just as curt and imprecise. In *Embossing Printers, Inc.*, a 1984 case involving a bargain-

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Id at 1550.

[197] Id.

[198] Id at 1549.

[199] The ambiguities of the decision were underscored in a dissenting opinion that questioned the specific wrong at stake in an intermittent strike that was "not as objectionable as a wildcat or a sit-down strike, or a work stoppage in which employees refuse to perform part or all of their duties while remaining on the Company's payroll or on its premises." Id at 1557 (Murdock dissenting).

[200] 191 NLRB 748, 749 n 5, 761-62 (1971). The employees called the stoppage a "surprise birthday party" for the Company President, though it was not his birthday. Id at 762 & n 32.

[201] Id at 762.

[202] Id. An alternative rationale was also available in the case—that the union waived the employees' right to stop work by agreeing that they would not strike without first resorting to the grievance procedure. Id.

[203] Id at 748.

ing impasse which closely paralleled *Briggs-Stratton*, the Board again failed to explicate the contours of the category of intermittent strikes.[204] Over the course of eight days, the union called three meetings during working hours to discuss negotiations.[205] The Board held that the strikes were unprotected, without providing a systematic definition of intermittent strikes or stating the legal foundation for their unprotected status. It ruled that employees "did not have a right under the Act to come and go as they pleased. They were entitled to strike. But they were not entitled to walk out and return and to engage in this activity repeatedly."[206] The Board explained that the three strikes were unprotected because they did not really constitute strikes: "the method was not protected, because intermittent work stoppages transgress the bounds of a genuine strike."[207] Neither the summary ruling nor the essentialist explanation clarify why the two strikes were unprotected, distinguish them from "genuine strikes," or define the category of unprotected intermittent strikes.

III. "WE HAD ALL GOT TOGETHER AND THOUGHT IT WOULD BE A GOOD IDEA TO GO HOME"

The doctrine articulated in *Briggs-Stratton* and its progeny runs contrary to another line of cases that holds brief protest strikes to be protected. The germinal decision was the 1962 *Washington Aluminum* case, in which the Supreme Court found that a single brief strike was protected.[208] Later decisions by the Board extended this rule to two strikes.[209] The logic of this body of law, which cannot be confined to a single strike or even a pair of strikes, directly controverts the illogic of the cases declaring intermittent strikes to be unprotected.

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[204] 268 NLRB 710, 722-23, enf'd, 118 LRRM 2967 (6th Cir 1984).

[205] Id at 711.

[206] Id at 723.

[207] Id.

[208] 370 US 9 (1962).

[209] See, for example, *City Dodge Center, Inc.*, 289 NLRB 194 (1988), enf'd, 882 F2d 1355 (8th Cir 1989) (two spontaneous strikes protected); *Robertson Industries*, 216 NLRB 361, 361 (1975), enf'd, 560 F2d 396 (9th Cir 1976) (two related strikes protected because they did not evidence a "pattern of recurring or intermittent partial work stoppage"); *Chelsea Homes, Inc.*, 298 NLRB 813, 831 (1990), enf'd, 962 F2d 2 (2d Cir 1992) (two related stoppages not a pattern).

A. *Washington Aluminum*

The facts of *Washington Aluminum* vividly illustrate the role of strikes in resolving labor's grievances outside the collective bargaining process. January 5, 1959, was an extraordinarily cold day in Baltimore, Maryland, where the Washington Aluminum Company operated a machine shop. The temperature dropped to eleven degrees, and there were high winds. The machine shop was not insulated, and a number of doors leading outside were opened frequently. When the machinists arrived at work that day, they found that the shop's main heat source, an oil furnace located in an adjoining building, had broken down. One of the machinists entered the foreman's office, hoping to keep warm, but the office was just as cold as the shop. On seeing other workers huddled together outside the office, the foreman commented, "[I]f those fellows had any guts at all, they would go home."[210] The machinist left the foreman's office, told the other workers what the foreman had said, and announced, "I am going home, it is too damned cold to work."[211] After a brief discussion the others agreed to join him. Although the foreman dissuaded one machinist from leaving, the other seven left the shop just as their shift was beginning. When the company's president arrived, he fired all the machinists who had walked out.[212] The employees filed unfair labor practice charges with the NLRB, which found that the walkout was protected and ordered the employer to reinstate the employees with backpay.[213] The Court of Appeals denied enforcement of the Board's order, but the Supreme Court reversed the appellate court.[214]

In *Washington Aluminum* the Supreme Court expressly rejected the employer's argument that the work stoppage was "indefensible" and therefore unprotected.[215] It held that employees are entitled to engage in concerted work stoppages, unconnected to any ongoing negotiations, in order to remedy specific grievances. The employees in this case did not belong to a union, the Court noted, and therefore lacked both a bargaining representative and a procedure for voicing their collective opinion in negotiations.[216] The Court recognized the legitimacy of the

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[210] 370 US at 10-11.
[211] Id.
[212] Id at 12.
[213] Id at 12-13.
[214] Id at 13-14.
[215] Id at 17.
[216] Interestingly, there appears to have been a union present in the workplace at the

walkout, stating that "the men took the most direct course to let the company know that they wanted a warmer place in which to work."[217] The Court ruled that the strike was protected because it fell outside the "normal categories of unprotected concerted activities," and thus could not be "classified as 'indefensible' by any recognized standard of conduct."[218]

B. Grievance Strikes

Since *Washington Aluminum*, the Board and the courts have repeatedly protected brief strikes designed to remedy specific grievances or to protest substandard working conditions. Indeed, it would be very strange if a statute designed to secure industrial peace required workers to strike for some specified period before gaining its protection. A protest strike does "not lose its protected status because it was limited in duration," according to the Board.[219] The Third Circuit has reasoned that since employees are indisputably protected if they wage a traditional, open-ended strike over a grievance, they must be protected if they engage in a short stoppage to voice their protest.[220] In a case where "employees suddenly dropped their tools and insisted upon presenting their grievances during working hours," the court ruled that Congress did not intend that employees should be protected only when they "exert the maximum economic pressure" in a full-scale, traditional strike.[221] A strike's short duration, therefore, does not render it unprotected.

Even a short strike involving a refusal to perform certain specific tasks is not an unprotected partial strike. In *Polytech, Inc.*, the Board decided whether a one-time refusal to work overtime was analogous to the walkout in *Washington Aluminum* or to a partial strike.[222] The Board read *Washington Aluminum* as

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time of the walkout, because just two months later a representation election was held. See *NLRB v Washington Aluminum*, 291 F2d 869, 878 n 11 (4th Cir 1961).

[217] 370 US at 15.

[218] Id at 17.

[219] *Polytech Inc.*, 195 NLRB 695, 696 (1972).

[220] *NLRB v Kennametal, Inc.*, 182 F2d 817, 819 (3d Cir 1950).

[221] Id.

[222] 195 NLRB at 696. In this case, the employees of a plastic sheeting manufacturer had been required to do an increasing amount of overtime work. One day, at their normal quitting time, the employees simply shut off their machines and began to leave. When they refused to obey their employer's direction to continue working, they were suspended for two days without pay. Id at 695. The Trial Examiner found that the evidence suggested it was the workers' intention to "engage in recurrent partial work stoppages" whenever they felt they were working too much overtime. Id at 696.

establishing a presumption that a single refusal to work overtime is protected unless the evidence shows that the strike "is part of a plan or pattern of intermittent action."[223] Finding no plan to engage in intermittent stoppages, the Board held the short strike protected.[224] Thus single, short, protest strikes are presumptively protected.

C. How Many Is Too Many?

The *Polytech* decision exposed the tension between the protected status of short strikes under *Washington Aluminum* and their unprotected status under *Briggs-Stratton*. The opposing principles of the two cases raise the question, unanswered in *Polytech*, of what constitutes a "plan or pattern" of intermittent strikes. How many strikes is too many? If employees who engage in a brief work stoppage over a discrete grievance are protected, do they lose that protection the second time they engage in such a stoppage?

The answer is no if the multiple work stoppages are spontaneous. In *City Dodge Center, Inc.*, for example, six mechanics left work one morning when the company president refused to meet with them.[225] Upon arriving at work two work days later, the mechanics learned that the employer had fired a sympathetic supervisor; they then left work to discuss the situation. When they returned to work about two hours later, another supervisor told them they were fired.[226] The Board ordered them reinstated on the grounds that the two stoppages did not indicate that "the employees had any plan [at the time of the first stoppage] to engage in a series of intermittent strikes."[227]

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[223] Id.

[224] Id at 696-97. The Board has followed this ruling in many other cases. See, for example, *Advance Cleaning*, 274 NLRB at 943-44 (overtime); *E.B. Malone Corp.*, 273 NLRB 78, 81 (1984) (overtime); *Gulf-Wandes Corp.*, 233 NLRB 772, 776 (1977), enf'd in part, 595 F2d 1074, 1078 (5th Cir 1979) (overtime); *Associated Cleaning Consultants*, 226 NLRB 1066, 1079-80 (1976) (refusal to work on regular day off); *Florida Steel Corp.*, 221 NLRB 554, 559 (1975), clarified, 226 NLRB 123 (1976), enf'd, 562 F2d 46 (4th Cir 1977) (refusal to work on Sunday).

[225] 289 NLRB 194, 194-95 (1988), enf'd, 882 F2d 1355 (8th Cir 1989).

[226] Id.

[227] Id at 197. See also 882 F2d at 1359-60. Similarly, in *GF Business Equipment*, 215 NLRB 872 (1974), pressmen dissatisfied with a recent wage increase met with their foreman over their lunch break to express their grievance. The foreman indicated he would confer with management and get back to them, but when he did not do so by 2 p.m., the employees gathered again to demand a meeting. The foreman ordered them to return to work and they did so within an hour. Having failed to obtain a meeting with management, the employees again decided to stop work the next day at the end of their

Stoppages that must occur spontaneously, however, are unlikely to be of much use to organized labor. Notably, the line of cases from *Washington Aluminum* to *City Dodge* involves unorganized workplaces. This fact raises the question whether deliberate grievance strikes by organized workers fall outside the bounds of protection.

In *Robertson Industries*, the Board delivered a partial answer to this key question. It held that two brief strikes, the second involving a union, were protected.[228] In this case, the employees stopped work to protest excessive overtime, but returned the next work day because the employer threatened to fire them. The employees then decided to join a union. About three months after the first strike, they attended a union meeting during working hours to discuss adverse working conditions; as a result, they were fired. An Administrative Law Judge (ALJ) upheld the discharges based on a finding that the strikes were "part of a pattern of recurring or intermittent partial work stoppage."[229] The Board reversed, finding that though the two strikes were linked, they did not form a pattern and therefore were protected: "While there is no magic number as to how many work stoppages must be reached before we can say that they are of a recurring nature," the Board held, "certainly the two work stoppages in the case at bar, which involved a total of 2 days' absence from work, do not . . . evidence the type of pattern . . . which would deprive the employees of their Section 7 rights."[230] Thus, the Board in *Robertson* extended *Polytech*'s presumption of protection from one strike to two.[231]

In *Robertson*, the Board also addressed the question of when planning would overcome the presumption of protection regardless of the strike's pattern. Here, the Board did not consider it a

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morning break. When employees refused to obey a direction to return to work, the employer fired the employees it believed were the ringleaders. Id at 878. The Board ordered the employees reinstated, finding no "plan to engage in a series of quickie work stoppages to force the [employer] to meet with the employees." Id at 879.

[228] 216 NLRB 361 (1975), enf'd, 560 F2d 396 (9th Cir 1976).

[229] Id at 361.

[230] Id at 362. See also 560 F2d at 399.

[231] In later cases, the Board read *Robertson* to hold that "two stoppages, even of like nature, are insufficient to constitute evidence of a pattern of recurring, and therefore unprotected, stoppages." *Chelsea Homes, Inc.*, 298 NLRB 813, 831 (1990), enf'd, 962 F2d 2 (2d Cir 1992). In *Eagle International, Inc.*, 221 NLRB 1291 (1975), the administrative law judge extended *Robertson*'s logic to three strikes; his decision was affirmed by the Board, but the Board suggested that the strikes were more spontaneous than the judge allowed. Id at 1291, 1297. But see *Western Wirebound*, 191 NLRB 748, discussed in text accompanying notes 200-03.

material fact that the union was involved in the second strike.[232] This is unsurprising, for it would be inconsistent with the NLRA's protection of union organization[233] to deny organized workers the right to engage in short grievance strikes.[234] Moreover, in important respects, unorganized and organized workplaces do not differ. Prior to the execution of a collective bargaining agreement, workers in an organized workplace, as in an unorganized one, have no binding method of resolving grievances. The rights recognized in *Washington Aluminum*, therefore, have not and should not be confined to the nonunion sector.

Although in *Robertson* the second strike was planned, the Board dissociated it from the first strike on the grounds that it involved different, though overlapping, issues.[235] The Board concluded that to deny protection to the second strike would permit employees to exercise their rights under *Washington Aluminum* only once. Such a rule, the Board declared, would "disallow employees to engage in more than one instance of concerted protected activity during an indefinite period of time regardless of the variety and number of conditions or occurrences protested."[236] *Robertson* builds on *City Dodge* and like cases by establishing that the *Washington Aluminum* right to engage in a short, protest strike is not spent by one strike and can be exercised after deliberation. *Robertson*, however, did not involve a plan for more than one strike.

Thus, there exists a gray area between the prohibition of intermittent strikes and the protection of one, two, and perhaps more grievance strikes. The critical question defined by the intersection of the *Washington Aluminum* and *Briggs-Stratton* doctrines is whether a union could plan a series of short strikes over discrete grievances without exposing employees to discharge as intermittent strikers.

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[232] *Robertson Industries*, 216 NLRB at 362.

[233] See 29 USC § 157.

[234] It might be suggested that *Emporium Capwell Co. v Western Addition Community Org.*, 420 US 50 (1975), is to the contrary. In that case, the Court held concerted activity to protest alleged race discrimination unprotected when it undermined a union's status as the exclusive representative of the employees. Id at 70. But in the context under discussion here, a union would sponsor the activity in order to bolster its authority as exclusive representative.

[235] 216 NLRB at 361.

[236] Id at 362. See also *Chelsea Homes, Inc.*, 298 NLRB at 830-31 (holding that two strikes seven days apart were protected when the first protested excessive overtime and the second protested other issues, including the inability to start work at the regular time).

IV. "SEPARATE AND DISTINCT PROTESTS"

Under existing Board construction of *Washington Aluminum*, workers are entitled to strike at least twice, if the strikes are spontaneous or planned in response to separate grievances. This construction entails the protection of a planned series of strikes as well. If workers may plan one protest strike, the fact that they plan to engage in such strikes whenever the employer gives them cause should not strip the strikes of protection. A planned series of strikes should be protected so long as each strike is motivated by a discrete grievance. This conclusion follows from existing case law as well as the policies underlying the NLRA. It is also supported by recognition of the unequal pressures on management and labor to reach agreement during periods of contractual hiatus. In other words, multiple grievance strikes should be distinguished from unprotected intermittent strikes.

A. Unequal Ability to Hold Out

Imagine a scenario where a union local represents workers of one employer during slack economic times. The collective bargaining agreement has just expired. After evaluating the limited legal protection they would have if they struck, the union members vote not to call a traditional strike.

The decision not to strike leaves the employees with little defense against the disabilities attendant upon working without a contract. In this situation, labor and management confront unequal pressures to make concessions in order to reach a new agreement. After negotiating to impasse, the employer is free to implement its final offer to the union unilaterally.[237] Employees may face wage cuts, loss of vacation days, and other adverse changes in the terms of employment. Management is technically obliged to honor those substantive terms of the prior agreement over which the parties have not yet reached impasse,[238] but employees have no effective means of enforcing these provisions in the absence of a contract, for the parties' agreement to arbitrate grievances does not survive the contract's expiration.[239] While

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[237] *NLRB v Katz*, 369 US 736, 747 (1962). No statistics exist on the percentage of negotiations that reach impasse. However, as nearly 40% of newly certified unions never obtain an agreement, impasse is clearly a common phenomenon, at least in first contract negotiations. See Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv L Rev 351, 354 (1984). See also Statement of Kirkland (cited in note 11).

[238] *Katz*, 369 US at 747.

[239] *Indiana & Michigan Electric Co.*, 284 NLRB 53, 58 (1987). See also *Hilton-Davis*

employees may still be entitled to file a grievance and pursue it through the steps set forth in the expired contract, the final step would no longer be submission to a neutral third party, but rather the employer's unappealable decision. A grievance procedure may survive expiration, but without arbitration, according to one Board member, it is a "headless horseman."[240]

The expiration of a contract also deprives the union as an institution of key legal rights and protections, placing it under strong pressure to accept management's terms. The employer is not only entitled to, but must, cease to enforce any form of union security provision contained in the prior agreement,[241] which means, for example, that the union can no longer require employees to pay their fair share of the cost of representation after the contract expires. Still more important, even before bargaining has reached an impasse, the employer is entitled to discontinue payroll deduction of union dues unilaterally, forcing the union to collect individually from each member each month.[242] A contractual hiatus can rapidly put a local union in financial straits. In the absence of both arbitration and secure funding, the union's ability to meet its legal obligation to represent employees fairly is severely limited. And its representative status is subject to challenge at any time during this period of vulnerability, when there is no contract bar to the filing of a decertification petition by a rival union or dissatisfied employees.[243] The very existence of a local union is threatened by an extended period without a contract.[244]

Chemical Co., 185 NLRB 241, 242 (1970). The only exception to this exists when the grievance concerns rights that accrued prior to expiration of the contract. See *Nolde Brothers, Inc. v Bakery Workers*, 430 US 243, 254-55 (1977). Ninety-six percent of agreements contain provisions for binding arbitration of grievances. See Archibald Cox, et al, *Cases and Materials on Labor Law* 745 (Foundation, 11th ed 1991). In the absence of such a provision, the third party would be a court. Obviously, judicial enforcement is also not available after expiration of a contract.

[240] *Indiana & Michigan Electric*, 284 NLRB at 63 (Dotson dissenting in part).

[241] 29 USC § 158(a)(3) (permitting the requirement of union membership only pursuant to agreement). See *Litton Financial Printing v NLRB*, 501 US 190 (1991).

[242] *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), enf denied on other grounds, 320 F2d 615, 619 (3d Cir 1963). See Tom Balanoff, *The Cement Workers' Experience*, 7 Labor Research Rev 5, 9 (Fall 1985) (working without a contract "involves not having the luxury of union security clauses and dues check-off provisions").

[243] Under Board case law, a valid contract bars the filing of a representation petition for the term of the contract or three years, whichever is shorter. See *General Cable Corp.*, 139 NLRB 1123, 1125 (1962).

[244] The fact that most local unions are small, and administer only one contract, increases their vulnerability. See Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 Wis L Rev 1, 56-59.

Meanwhile, the employer has the legal authority to achieve its economic objectives by fixing the terms of work without the union's agreement. In the absence of a contract, there are only two key objectives that the employer cannot obtain unilaterally: a no-strike pledge from the union and a binding, peaceful means of resolving labor's grievances.[245]

Return now to the scenario sketched above. Caught between the risks of a full-scale strike and the perils of working without a contract, how can the union induce the employer to sign a new contract, and meanwhile protect individual workers and resolve grievances? In voting not to strike, have the employees consigned themselves to accepting the terms imposed unilaterally by management? An alternative is suggested by the employer's one point of vulnerability—its incapacity, by fiat, to bind employees to a method of resolving grievances that proscribes strikes. In such a scenario, a planned series of grievance strikes would provide the union both a method of redressing grievances during a hiatus and the leverage to convince the employer to come to terms on a new contract.

Workers unwilling to wage a traditional strike might join in repeated grievance strikes because such strikes are less likely to result in the permanent replacement of strikers. A principal advantage of this innovative form of work stoppage is that it enables the union to calibrate the strikes so as to reduce the risk of permanent replacement. By weighing the cost imposed on the employer by a short strike against the inconvenience and expense of recruiting, hiring, and training replacements, the union can maximize the strike's impact while minimizing the exposure of the strikers. Because the Board does not deem strikers replaced until the employer has actually offered their positions on a permanent basis to others who have accepted,[246] the union could protect grievance strikers by having them resume work before the employer completes this process.

This strategy would not entail a "plan" to call a series of strikes precisely akin to the union's plan in *Briggs-Stratton*. In that case, the union planned to strike repeatedly regardless of provocation. As conceived here, the plan would be to strike re-

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[245] Advocates of work-to-rule tactics contend that employers also cannot achieve a committed, innovative work force unilaterally. See, for example, Uchitelle, *Labor Draws the Line* at C1 (cited in note 23). But employers cannot obtain a truly binding agreement requiring commitment and innovation.

[246] *Home Insulation Service*, 255 NLRB 311, 312 n 9 (1981), enf'd, 665 F2d 352 (11th Cir 1981).

peatedly only if necessary to resolve grievances. But the grievance strikes would inevitably have an effect beyond simply expressing workers' dissatisfaction with a particular condition, such as the frigid shop in *Washington Aluminum*. To some degree, they would also pressure the employer to make concessions in bargaining; this corollary effect of grievance strikes would render the parties' ability to hold out more nearly equal.

B. Policy

Protecting repeated grievance strikes is fully in accord with the intent of the NLRA. The stated purposes of the Act are to facilitate the collective bargaining process and thereby to secure industrial peace.[247] Each of these purposes is advanced by the protection of repeated grievance strikes.

Protecting these strikes is necessary to insure that management fulfills its legal duty to bargain in good faith. When no comprehensive agreement is in effect, employers are obliged to join in good-faith bargaining both to reach such an agreement and to resolve disputes arising with individual employees over the terms of employment. According to the Board, "employers and unions must continue to meet and confer and seek agreement in good faith as to grievances . . . as well as to terms of the new contract."[248] Given the paltry legal remedies for failing to bargain in good faith,[249] repeated grievance strikes are necessary to assure that employers fulfill both of the obligations spelled out by the Board. Without the protection of these strikes, the employer's continuing duty to bargain with the union over grievances would be sharply truncated, if not reduced to a mere formality—for if the right to strike evaporated after a single grievance strike, the employer would have little incentive to resolve subsequent grievances through good-faith bargaining. The

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[247] 28 USC § 151. See also text accompanying notes 33-47.

[248] *Indiana & Michigan Electric*, 284 NLRB at 56. See also *Hilton-Davis*, 185 NLRB at 242.

[249] In fact, there are virtually no remedies other than an order to bargain in good faith. See *H.K. Porter Co. v NLRB*, 397 US 99, 109 (1970) (holding the Board cannot require that a party agree to a specific term); *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), rev'd as *Auto Workers v NLRB*, 449 F2d 1046 (DC Cir 1971) (refusing to award damages for failure to bargain in good faith). Despite criticism from the D.C. Circuit, the Board has continued to adhere to its position in *Ex-Cell-O*. See Patrick Hardin, 2 *The Developing Labor Law* 1856 (3d ed 1992). Of course, merely requiring that employers bargain to impasse before making unilateral changes gives unions some influence when management desires to act swiftly.

employer's continuing duty to bargain over grievances mandates the guarantee of labor's right to wage repeated grievance strikes.

That right is equally essential to good-faith bargaining over a new agreement. Due to the lack of effective legal compulsion, employers will often fail to make a genuine effort to reach agreement unless they believe that it protects their own economic interests. Precisely because employers can unilaterally change the terms of employment after bargaining to impasse, even an offer of concessions does not always induce employers to sign new contracts.[250] But because employers cannot unilaterally bind either unions or individual workers to any procedure for resolving disputes, the threat of grievance strikes provides a compelling reason for them to reach agreement.[251]

If grievance strikes were unprotected, employers could enforce uninterrupted production without entering into a collective bargain and incurring the reciprocal duty almost always imposed by such bargains—the duty to arbitrate grievances.[252] The employer's agreement to arbitrate is the traditional "quid pro quo" for a union's no-strike pledge.[253] In the words of Justice Douglas, "arbitration is the substitute for industrial strife."[254]

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[250] See *NLRB v Katz*, 369 US 736, 747 (1962).

[251] Tom Balanoff, who conducted an "in-plant" contract campaign for the International Brotherhood of Boilermakers, Ship Builders, Blacksmiths, Forgers, and Helpers, writes, "Employers like to have definite rules for handling grievances because such rules minimize disruption of the production process. This is one of the benefits that employers receive by having a contract with their employees." Balanoff, *The Cement Workers* at 10 (cited in note 242). "The lesson employers are taught" by grievance strikes, according to Balanoff, "is that they have an interest in having a contract." Id at 11-12. See also Jack Metzgar, *"Running the Plant Backwards" in UAW Region 5*, 7 Labor Research Rev 35, 36 (Fall 1985) ("Orderly procedures for processing grievances benefit management.").

[252] Ninety-six percent of agreements contain provisions for binding arbitration of grievances. See Cox, et al, *Cases and Materials on Labor Law* at 745 (cited in note 239). In grievance arbitration, the parties submit disputes about the application and meaning of their contract to a third party for binding resolution. One of the few points of agreement in President Truman's unsuccessful Labor-Management Conference of November 1945 was that contracts should provide a binding means of resolving grievances. *The President's National Labor-Management Conference November 5-30, 1945: Summary and Committee Reports*, 77 US Dept of Labor, Div of Labor Standards Bulletin 45 (1946). For a brief history of the rise of grievance arbitration and the ideology that located it at the center of labor relations, see Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 Yale L J 1509, 1523-25 (1981).

[253] *Textile Workers v Lincoln Mills*, 353 US 448, 455 (1957). As Katherine Stone has pointed out, there is no necessary connection between arbitration and a pledge not to strike. 90 Yale L J at 1530. A binding contract accompanied by some other means of enforcing it, such as litigation or arbitration, is what really displaces strikes. Staughton Lynd has exposed the nonconsensual origins of labor's exchange of its right to strike for binding arbitration as well as the inequities of this quid pro quo. Staughton Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 Case Western Res L Rev 396 (1979).

[254] *United Steelworkers v Warrior & Gulf Co.*, 363 US 574, 578 (1960). United Auto

Indeed, the connection between arbitration and a pledge not to strike is so strong that the Board and courts will imply a no-strike pledge in any agreement providing for binding arbitration of grievances.[255] According to the Supreme Court, arbitration is the "fulcrum" for finding a duty not to strike.[256] When an agreement to arbitrate grievances exists, strikes over grievances not only represent a breach of contract, they may be enjoined in aid of the arbitration process, and the strikers may be fired.[257]

To strip grievance strikes of protection would destroy the close connection drawn by the law between a pledge not to strike and a duty to arbitrate grievances. In the absence of a collective bargaining agreement, therefore, employers should not be entitled to impose any form of sanction against grievance strikers. It is beyond dispute that when the agreement to arbitrate expires, as it does automatically upon a contract's expiration,[258] a grievance strike does not breach the contract and is not enjoinable.[259] Once the employer's part of the bargain lapses, the union's does also.[260] Deprived of a breach of contract action and an equitable remedy, employers should equally be denied the right to fire workers who strike more than once when no other method of resolving grievances exists. Conversely, in order to secure uninterrupted production, employers should be required to tender the traditional quid pro quo—an agreement to arbitrate disputes arising under a mutually satisfactory collective bargaining agreement.

My argument takes into account the common scholarly criticism that arbitration is a means of defusing worker discontent. Arbitration, it is said, divests workers of the power to take direct action in resolving their grievances and transfers their power to lawyers and union bureaucrats.[261] But this is exactly the trade-

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Workers President Walter Reuther called arbitration an effort "to substitute civil procedure for war." Nelson Lichtenstein, *Great Expectations: The Promise of Industrial Jurisprudence and Its Demise, 1930-1960*, in Nelson Lichtenstein and Howell John Harris, eds, *Industrial Democracy in America: The Ambiguous Promise* 113, 130 (Cambridge, 1993).

[255] *Gateway Coal Co. v United Mine Workers*, 414 US 368, 380-83 (1974); *Teamsters Local v Lucas Flour Co.*, 369 US 95, 104-06 (1962).

[256] *Buffalo Forge Co. v Steelworkers*, 428 US 397, 408 n 10 (1976).

[257] *Boys Markets, Inc. v Retail Clerks*, 398 US 235, 247-49 (1970) (strike enjoinable); *NLRB v Sands Mfg. Co.*, 306 US 332, 344 (1939) (employer may terminate strikers).

[258] See note 239.

[259] See, for example, *A.S. Abell Co. v Typographical Union*, 85 LRRM 2368, 2370 (D Md 1974). Even if a contract containing a no-strike clause is still in effect, no injunction can issue if the strike concerns a dispute not encompassed by the arbitration clause. *Buffalo Forge*, 428 US at 408-09 & n 10.

[260] *Litton Financial Printing v NLRB*, 501 US 190 (1991).

[261] Stanley Aronowitz argues that under arbitration procedures "control over the

off at the heart of the collective bargaining process. Obviously, it is advantageous to employers for labor to channel its grievances into a binding process of adjudication. The problem, more fundamental than that identified by arbitration's critics, lies in the denial of labor's right to wage grievance strikes without exacting any consideration from employers. The law should be read to entitle unions to harness worker discontent in periodic grievance strikes in order to confront employers with the worth of collective bargaining agreements.[262]

Grievance strikes may not only convince employers to sign labor agreements, they may also illustrate the benefits of collective action to employees, thereby enabling unions to build loyalty and hone the techniques necessary if a full-scale strike is waged for a contract. Unions often find it especially difficult to mount a full-scale strike for a first contract.[263] This is partly because Board certification alone does not afford a union power to protect workers or provide benefits, and therefore, if contract negotiations prove protracted, workers may become disillusioned with the union. Moreover, in newly certified units, most workers have never been covered by a collective bargaining agreement and may not think attaining one is worth the risk of a full-scale strike. Through grievance strikes, unions can secure workers' demands prior to a collective bargaining agreement, while workers gain experience that may be decisive in gaining a contract. Thus these

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grievance is systematically removed from the shop floor and from workers' control." Stanley Aronowitz, *False Promises: The Shaping of American Working Class Consciousness* 217 (McGraw-Hill, 1973). Katherine Stone is the most forceful legal critic of arbitration. See Stone, 90 Yale L J at 1565 (cited in note 252) ("The entire history of the labor movement is a history of workers creating 'disorder'—strikes, disruptions of production, picketing—in order to achieve unionization and to better their working conditions . . . . Thus by intervening to preserve order, arbitrators are not only nonneutral, they are acting consistently on the side of management."). See also id at 1569-73, 1576-77.

[262] Nelson Lichtenstein argues that massive numbers of grievance strikes—235 in 1937 alone—convinced General Motors to accede to the UAW's demand for a meaningful system of arbitration. Lichtenstein, *Great Expectations* at 124-31 (cited in note 254). He cites the comment of "one of the most reactionary" of GM's directors, endorsing the grievance-arbitration system as a means of disposing of grievances that might otherwise be the "cause of continuing friction and annoyance." Id at 131. Thus it could be argued that one form of nontraditional strike—the sit-down—forced GM to recognize the union, while another—grievance strikes—forced it to enter into a meaningful collective bargaining agreement.

[263] Nearly 40% of newly certified unions never reach an agreement with the employer. See Weiler, 98 Harv L Rev at 354 (cited in note 237). The percentage is even lower if the union was certified pursuant to a bargaining order when an employer's unfair labor practices precluded the holding of a fair election. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv L Rev 1769, 1795 n 94 (1983); *NLRB v Gissel Packing Co.*, 395 US 575, 591-92, 620 (1969).

strikes may bridge the distance between union certification and a first contract.

In addition, grievance strikes may also shape the terms of agreements to correspond more closely with the genuine desires of employees. That is because grievance strikes may be a more finely tuned gauge of labor discontent than traditional strikes. A traditional strike is animated both by an accumulation of past grievances and by forecasts of those that lie ahead: in a single strike, workers must aim to redress past injury and to secure favorable terms of future employment. But in a grievance strike, even when planned, workers act more spontaneously, striking in response to an immediate and specific injury. These strikes therefore may more accurately represent employee dissatisfaction. In guaranteeing the right to strike, the NLRA was intended to provide labor with an instrument for registering discontent that would bring employers to terms satisfactory to employees. Grievance strikes arguably accomplish this purpose better than traditional strikes.[264]

Moreover, grievance strikes may prove less disruptive of production than traditional strikes. If grievance strikes are unprotected, many unions will opt for traditional, open-ended strikes, rather than accept unfavorable terms or leave their members unprotected in the absence of a contract. Dissenting from a decision holding a partial strike unprotected, one Board member made this point forcefully. He predicted that the ruling would "serve notice on [ ] unions that they must strike continuously, without regard to the paralyzing consequences of their strike, to receive the protection of the Act."[265] Alternatively, the protection of grievance strikes might often lead employees to continue working during protracted contract negotiations, striking only as necessary to resolve grievances and only for brief intervals.[266]

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[264] This conclusion should be tempered with the realization that traditional strikes involve great risk and that unions have no means of compelling workers to strike. Under these circumstances, few unions will call a strike and few workers will heed the call if their union's demands do not speak to deeply felt grievances.

[265] *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1815 (1954) (Murdock dissenting). Atleson makes this point with a rhetorical question: "Why force employees to opt for a total strike which hurts them, as well as their employer, more than a partial strike?" Atleson, *Values and Assumptions* at 57 (cited in note 60).

[266] While there may thus be more strikes, there might still be less lost production. This would be consistent with a pattern displayed in various countries where the growth of unions drew an increasing percentage of the labor force into strikes but strikes grew shorter, resulting in an overall decline in lost work time. Arthur M. Ross and Donald Irwin, *Strike Experience in Five Countries, 1927-1947: An Interpretation*, 4 Ind & Labor Relations Rev 323, 335 (1951).

The right of employers to lock out repeated strikers strongly suggests that protecting grievance strikes will cut lost production time. At any juncture, employers can lawfully use a lockout to cut off a series of grievance strikes. As the Board has emphasized, "Nothing in the Act . . . requires that an employer continue to operate his plant despite the prospect of recurrent work stoppage which would make further operations uneconomical."[267] If employers think they are suffering greater losses from grievance strikes than they would from a traditional strike, they can create the equivalent of a traditional strike.[268] Accordingly, it is likely that employers will suffer a series of grievance strikes only if they are less economically harmful than a full-scale strike. By creating a viable alternative to traditional strikes, therefore, the protection of repeated grievance strikes may simultaneously yield labor a more effective method of accomplishing its goals and reduce the overall disruption of production caused by strikes.

Undoubtedly, workers will always have grievances, which if not expressed by strikes will find other outlets. Some employees may quit; others may covertly stint on the job; still others may engage in theft, even in industrial sabotage or violence.[269] The intention of the NLRA was not to eliminate labor grievances, but rather to channel them into strikes, a form in which they can be addressed without either severing the employment relationship

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[267] *International Shoe Co.*, 93 NLRB 907, 909 (1951). See also *Duluth Bottling Association*, 48 NLRB 1335, 1336 (1943); Louis Uchitelle, *800 Workers Locked Out By Staley*, NY Times C5 (June 29, 1993) (reporting on a lock-out of workers who had engaged in 'in-plant' tactics, including working-to-rule and grievance strikes).

[268] A lockout may impose some costs on employers not associated with a strike because under the law in some states workers who are locked out can collect unemployment compensation while strikers cannot. See United States Department of Labor, *Comparison of State Unemployment Insurance Laws* 4-12 and Table 405 (1991) (23 states so provide); Marc Schoenfeld, *Public Benefits: The Labor Dispute Disqualification from State Unemployment Compensation and Federal Food Stamp Eligibility*, 1988 Annual Survey of American Law 863, 864-97 (1988) (detailing state laws on subject). Moreover, a few employers' ability to continue operations may be hindered during a lockout because of restrictions on their ability to hire permanent replacements as opposed to operating with temporary replacements or management stand-ins or contracting out struck functions. See note 189.

[269] Julius Getman and Ray Marshall report the ambivalence of permanently replaced paper workers to their union's policy of nonviolence. Julius G. Getman and F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 Yale L J 1803, 1829-30 (1993). One replaced striker told them, "We did it by the law and we got our ass ripped . . . . Had we not gone by the law and wrecked everything up there . . . the federal government would have moved in and made everybody sit down and settle it . . . ." Id at 1830.

or incurring even greater economic and social disruption. Protection of repeated grievance strikes would advance this purpose.

C. Case Law

Scarcely any case law addresses the legal status of repeated grievance strikes. Although the Board has reiterated that intermittent strikes are unprotected, in language so broad and unqualified that it appears to encompass the category of repeated grievance strikes, two Board decisions qualify these dicta, supporting the conclusion that repeated grievance strikes are protected. Yet neither of these decisions fully confronts the conflicting principles at stake, and one was denied enforcement by the Eighth Circuit. Two advice memoranda from the Board's Associate General Counsel also lend support to the protection of repeated grievance strikes, but they are binding only on the Board's regional offices.[270]

The facts of these four cases aptly illustrate the problematic location of repeated grievance strikes at the point where *Briggs-Stratton* and *Washington Aluminum* collide. Like the workers in *Washington Aluminum*, those in each of these cases struck in response to grievances, but like the workers in *Briggs-Stratton*, they also aimed, at least in part, to pressure the employer to begin bargaining or to make concessions concerning a contract. In each case, the Board concluded that the strikes were protected, and that its construction of the NLRA is not only due greater weight but is sounder than that of the court of appeals.[271] Although the Board's rulings qualify the broad dictum that all intermittent strikes are unprotected, the Board has not carved out a new category of repeated grievance strikes, nor has it drawn a clear line between such strikes and unprotected intermittent strikes.

Blades Manufacturing Corp., the first Board case to address the issue, involved a series of strikes over the employer's refusal to meet with a newly certified union to discuss grievances.[272]

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[270] The advice process is described in *NLRB v Sears, Roebuck & Co.*, 421 US 132, 141-42 (1975). Although they only bind the regions, the memoranda are important because the regions decide whether to issue a complaint based on unfair labor practice charges, and their decisions are not subject to judicial review. Id at 138-41.

[271] The Supreme Court defers to the Board's construction of the Act, see, for example, *Ford Motor Co. v NLRB*, 441 US 488, 497 (1979), but not to that of a court of appeals. The Board will also not necessarily acquiesce to a court of appeals' construction outside the circuit at issue. See *Arvin Industries*, 285 NLRB 753, 757 (1987).

[272] 144 NLRB 561 (1963), enf denied, 344 F2d 998 (8th Cir 1965).

When one employee received a written reprimand, his coworkers decided to walk out "for approximately one day at a time" if the employer refused to discuss the matter with union representatives.[273] In less than two weeks, the employees waged three one-day strikes to protest three different disciplinary actions. The employer fired all the strikers who participated in the final stoppage.[274]

The Board distinguished these repeated grievance strikes from the intermittent strikes enjoined in *Briggs-Stratton*, holding the mere fact of repetition did not render the strikes "'intermittent' in the sense in which the Board and courts have used that term."[275] The strikes were obviously planned in advance, and the evidence at least suggested that the workers not only planned to strike, but planned to strike repeatedly if the employer repeatedly refused to meet with the union. Nevertheless, the Board found that each walkout had a discrete cause: each was "precipitated by, and was in protest against, a separate unlawful act" by the employer.[276] The employees struck repeatedly, the Board reasoned, because the employer "repeatedly denied them their statutory rights," and "[e]ach strike was therefore a separate, protected concerted activity."[277]

The Eighth Circuit disagreed, rejecting what it characterized as the Board's finding that each strike "was a separate, spontaneous protected activity."[278] In fact, the Board had made no such finding; it did not conclude there was no plan to strike repeatedly or that each strike was "spontaneous." The underlying disagreement between the Board and court was over the nature of the plan and the objective of the repeated strikes. The court found that the strikes' goal was to "force the Company into recognizing the Union" and to begin bargaining,[279] whereas the Board found that the goal was to adjust discrete grievances.[280] Undoubtedly

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[273] 144 NLRB at 565.

[274] Id at 565-66. After the second strike, the employer warned that the stoppages made it impossible for the employer "to know whether employees would do their assigned work so as to allow it to operate its business" and therefore it would fire employees who participated in any further "temporary work stoppages." Id at 565.

[275] Id at 566. The trial examiner had upheld the discharges, citing *Briggs-Stratton*. Id.

[276] Id. In this case the employee grievances were the employer's unfair labor practices. While this motive yields heightened protection to a single strike, it does not protect strikers if they are deemed to have engaged in intermittent strikes. See *Western Wirebound Box Co.*, 191 NLRB at 762 & n 33.

[277] 144 NLRB at 566.

[278] 344 F2d at 1005.

[279] Id.

[280] 144 NLRB at 566.

the plan encompassed both objectives, giving rise to the conflicting rulings. The Board, however, did not acknowledge the dual motives of the plan, and thus failed to adopt a test for weighing them. This opened the way for the court simply to cite the evidence of a bargaining-related motive as grounds for holding the strikes unprotected.

The Board was equally inattentive to the equivocal evidence presented in *Union Electric Co.*, where it accorded protection to a series of walkouts over disciplinary suspensions.[281] The strikes arose from a seniority dispute occurring after the expiration of a collective bargaining agreement. When one electrician was informed by his supervisor that he would be temporarily upgraded from his position as a lineman to replace a repairman, he refused the assignment because it had not first been offered to a more senior employee. The lineman was sent back to headquarters, where he was again ordered to take the upgrade. After contacting the union, he again refused and was sent home. In protest, other employees walked off the job, telling their superintendent they would remain out "as long as we had a man suspended."[282] A supervisor warned them that the company would not tolerate any more of the "quick, sporadic, intermittent work stoppages," but the pattern was repeated a week later and several employees were suspended.[283]

Again, the evidence at least suggested not only that the strikes were planned and would recur each time the employer disciplined a worker for refusing an upgrade, but also that the union intended the strikes to pressure the employer to comply with seniority procedures. The ALJ who heard the case for the Board so found, citing one striker's statement that the second strike was caused by "the same dispute" as the first.[284] The ALJ summarily rejected the bona fides of the workers' contemporaneous statements that the strikes were due to the suspensions. He held that the stoppages were unprotected intermittent strikes because the suspensions were merely "an incidental condition of, but not the reason for the stoppages" whose "true purpose" was to induce the employer to come to terms on the underlying seniority dispute.[285]

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[281] 219 NLRB 1081 (1975).
[282] Id at 1081-82.
[283] Id.
[284] Id at 1089.
[285] Id at 1090.

Just as summarily, the Board rejected the ALJ's conclusion, identifying the suspensions as the sole motive behind the strikes. Although citing the contrary evidence, the Board held that the strikes "coincided with, and were not shown to be otherwise than in protest against, the separate actions taken" by the employer, and were therefore protected.[286] Because it did not sort through and evaluate the strikers' mixed motives, however, the Board's decision, like that of the ALJ, amounts simply to an unexplained assertion that one was the "true" motive.[287]

The evidence of multiple motives was even stronger in the two cases reviewed by the Board's Advice Division. But the Board's Associate General Counsel (AGC) was only slightly more explicit than the Board in confronting the problem. The first memorandum, in *Douglas Aircraft Co.*, advised that two strikes protesting separate unilateral changes implemented by the employer were protected.[288] In this case, negotiations had reached an impasse on some issues, and the employer unilaterally implemented its final offer. In protest, the union called a half-day strike. The next day the union president was quoted in a local newspaper saying, "in order to get a good contract, this may have to happen again."[289] Two months later, the parties reached impasse on the remaining issues and the employer again implemented its final offer, followed by another short protest strike. The employer disciplined the employees who had participated in the second strike.[290] Finding that the strikers' unfair labor practice charge raised an open question of law, the Board's Regional Director requested advice.

Like the Board, the AGC distinguished repeated protest strikes from intermittent strikes. Even though the statement by the union official and the likeness of the two strikes suggested the union planned to strike each time the employer made unilateral changes in working conditions, the AGC found no "pattern or plan to use intermittent strikes to harass the Employer."[291] He reached this conclusion, however, by focusing exclusively on the

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[286] Id at 1082.

[287] The Board's decision could also be read as establishing a presumption that multiple strikes are motivated by discrete grievances and holding that the evidence was insufficient to rebut that presumption. Id.

[288] Harold J. Datz, NLRB Associate General Counsel, *Memorandum: Douglas Aircraft Co.*, Case No 31-CA-16512 (July 31, 1987) (on file with U Chi L Rev).

[289] Id at 1.

[290] Id.

[291] Id at 2.

protest motive, finding that the strikes "were separate and distinct protests of separate and distinct implementations by the Employer of different terms and conditions of employment."[292] The AGC dismissed the clear evidence of a bargaining objective on the grounds that it did not establish a plan of repeated strikes, but only indicated that the union might strike again to obtain a better contract, "depending on future events."[293] This reasoning tacitly suggests a test for deciphering the objectives underlying the strikes. The issue to be determined, according to the AGC, is whether the strikes would have occurred in the absence of discrete grievances, indicating whether or not the application of pressure in bargaining was their sole motive. But as cursorily adumbrated in *Douglas Aircraft*, this test would have failed to place any strikes into the unprotected category, for even the paradigmatic intermittent strikes in *Briggs-Stratton* were contingent on "future events"—that is, the employer's failure to make concessions in bargaining.

The Advice Division of the Board used parallel logic in the second of its two memoranda on the question of grievance strikes. In *Norfolk Shipbuilding and Drydock Corp.*, a local union carried out ten short strikes over a three-week period—the most extensive use of grievance strikes revealed by the case law.[294] The announced causes of the stoppages included management's unilateral change of a grievance procedure, its schedule for disbursing pay checks, and its discipline of employees for engaging in stoppages.[295] Yet the union president informed the Board that the strategy was also directed toward contract negotiations and that employees had "established an 'in plant solidarity program' which included rallies, safety complaints and concerted activities over unilateral changes."[296] Despite the clear evidence that the union planned to stop work repeatedly when the employer provided provocation and that the plan aimed to pressure the employer in negotiations, the AGC again advised that the strikes were protected, because the plan did not amount to a "pattern of

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[292] Id.

[293] Id.

[294] Harold J. Datz, NLRB Associate General Counsel, *Memorandum: Norfolk Shipbuilding and Drydock Corporation*, Case Nos 5-CA-21113, 5-CA-21227, 5-CA-21138, 5-CB-6542, 5-CB-6544 (Nov 7, 1990) (on file with U Chi L Rev).

[295] Id at 2.

[296] Id at 18. In addition, during the period of the strikes, the union's newsletter publicized another union's "in-plant" contract campaign consisting of "aggressive, coordinated solidarity action" that is "better than a strike." Id at 11-12.

intermittent action" to be pursued "irrespective of Employer conduct."[297] Rather, each strike involved the exercise of rights established by *Washington Aluminum* and "was precipitated by a work related complaint or grievance and/or by separate unlawful acts of the Employer."[298] The Advice Division again discounted the evidence of a bargaining objective, reasoning that the facts evinced merely a contingent plan to strike repeatedly. Still unclear, however, are the range of contingencies that would remove a plan of repeated grievance strikes from the category of unprotected intermittent strikes.

The Board's decisions in *Blades* and *Union Electric*, together with its advice memoranda, unambivalently enunciate the principle that planning repeated grievance strikes does not necessarily strip them of protection.[299] The legal status of such strikes thus depends on the plan's objective. But existing case law has articulated no coherent standard for distinguishing among workers' predictably mixed motives.

V. DRAWING THE LINE BETWEEN *BRIGGS-STRATTON* AND *WASHINGTON ALUMINUM*

This Article has argued that repeated grievance strikes are protected under existing law. It has traced the twisted path of the cases emerging from *Briggs-Stratton*, and shown that no rationale for denying protection to intermittent strikes has been formulated by either the courts or the Board. Nor, dicta aside, has the Supreme Court ever ruled that intermittent strikes are unprotected.[300] This might suggest that the Board should override precedent and hold all intermittent strikes protected. Despite the undeniable logic of such a conclusion, this Article has taken a different, more pragmatic tack: It has argued that repeated grievance strikes can be protected without disturbing *Briggs-Stratton* or other precedent. The remaining problem, then,

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[297] Id at 18.

[298] Id.

[299] Employees are still limited to one strike per grievance, however. Compare *Kohler Co.*, 108 NLRB 207, 218 (1954), enf'd, 220 F2d 3, 11 (7th Cir 1955) (holding a single stoppage coupled with a threat to engage in repeated stoppages over a *single* grievance to be unprotected).

[300] Nor has Congress endorsed Board law in this area. Compare House Conf Rep No 510, 80th Cong, 1st Sess 38-39 (1947), reprinted in NLRB, 1 *Legislative History of the Labor Management Relations Act, 1947* 542-43 (1948) (explaining that House conferees agreed to withdraw an amendment of § 7 of the NLRA that would have stripped unlawful concerted activity of protection because court and Board decisions rendered the amendment unnecessary).

is systematically to distinguish repeated grievance strikes from unprotected intermittent strikes.

Whether repeated strikes are unprotected under *Briggs-Stratton* or protected under *Washington Aluminum* turns on the question of motive. Implicit in the Board's ruling in *Blades* and the few cases that followed it is the principle that employees are protected, even though they plan to strike every time they are aggrieved, so long as their motive is to resolve the grievances or to protest their employer's actions. Conversely, they are unprotected if they plan to strike repeatedly simply to pressure their employer to come to terms on a collective bargaining agreement. Thus, the dispositive question is whether particular employer conduct is an actual cause of the grievance strikes or a mere pretext for intermittent strikes.

In a few instances, the answer will be plain. For example, in *General Portland Inc.*, employees allegedly struck over a safety grievance, but the evidence indicated their true motive was solely to pressure management to reach a new agreement.[301] The strike occurred the day that management unilaterally implemented its final offer, and discussion among employees the night before focused on pressing management to resume bargaining. The safety problem at issue had existed for several months, but the union had not even pursued it through existing grievance procedures.[302] When workers walked off the job and confronted their employer, the first question they raised was whether the final offer had been implemented. Based on these facts, the ALJ found the union's safety complaint to be "merely a cloak devised to conceal its true motive," and the Board agreed that it was "a pretext to engage in a series of work stoppages" to force the employer back to the bargaining table.[303] Therefore the Board denied protection to the strikers.

In most instances, however, the motive question will be difficult to answer because employees will have mixed motives. As in all of the cases involving repeated grievance strikes that have been decided to date, the employees will aim to resolve grievances, but also to pressure their employer to enter into a new agreement. However, neither the Board nor its Advice Division has yet devised a rule specifying how workers' mixed motives should be weighed.

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[301] 283 NLRB 826, 837 (1987).

[302] Id at 830.

[303] Id at 837, 826 n 1.

Nevertheless, there is an existing rule readily adaptable to separating the motives of repeat strikers. Indeed, it has been applied by both the Board and the courts in a closely analogous context—that of determining whether strikers are motivated by an employer's unfair labor practices or by economic factors. The Board must perform this parallel task in order to determine whether it is lawful for employers permanently to replace strikers. This authority obtains with respect to economic strikers—strikers who are motivated by a desire to obtain a new contract, for example.[304] But an employer is not entitled permanently to replace strikers who are motivated by a desire to protest employer unfair labor practices.[305] These motives are often closely intertwined, as when workers strike during bargaining to protest their employer's failure to bargain in good faith.[306] In this context, the Board has held that a strike is an unfair labor practice strike if it is motivated in any part by an employer's unfair labor practices.[307] A parallel test should be adopted to differentiate intermittent strikes from repeated grievance strikes: the latter should be protected if motivated in any part by discrete grievances.

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[304] *NLRB v Mackay Radio & Telephone Co.*, 304 US 333, 345 (1938). Actually, economic strikers are those motivated by anything other than a desire to protest employer unfair labor practices. See, for example, *Philanz Oldsmobile, Inc.*, 137 NLRB 867, 869-70 (1962) (strike intended to persuade employer to agree to consent election deemed economic strike).

[305] See, for example, *Head Division, AMF, Inc.*, 228 NLRB 1406, 1417, enf'd, 593 F2d 972, 979 (10th Cir 1979).

[306] Obviously, employees who want their employer to bargain in good faith also want their employer to come to terms on a contract.

[307] *Head*, 228 NLRB at 1417, quoting *Colonial Haven Nursing Home, Inc.*, 218 NLRB 1007, 1009 (1975) (strike was unfair labor practice "even though the strike activity may have been motivated by concerns that went beyond their employer's commission of unfair labor practices, so long as it can be determined . . . that the unfair labor practices contributed in part to the employees' decision to strike"). The D.C. Circuit has held that "if an unfair labor practice *had anything to do with* causing the strike, it was an unfair labor practice strike." *General Drivers & Helpers Union v NLRB*, 302 F2d 908, 911 (DC Cir 1962) (emphasis added). It is "unnecessary to determine which concerns predominated in the employees' minds in determining to go out on strike." *Head*, 228 NLRB at 1417, quoting *Colonial Haven*, 218 NLRB at 1009. See also *NLRB v Moore Business Forms, Inc.*, 574 F2d 835, 840 (5th Cir 1978). Even if the employer can prove that the employees would have struck regardless of the unfair labor practices, the strike is an unfair labor practice strike if the unfair practices were a "contributing cause." *Northern Wire Corp. v NLRB*, 887 F2d 1313, 1321 (7th Cir 1989). Thus the Board's *Wright Line* test, which is used to sort out employer motives in discrimination cases, does not apply in this context. Id. Compare *Wright Line*, 251 NLRB 1083, 1088-89 (1980), enf'd, 662 F2d 899, 902-04 (1st Cir 1981).

Determining whether a strike is an economic or unfair labor practice strike is analogous to the problem of categorizing multiple strikes for three reasons. First, in each case the task of drawing lines often entails sorting out the mixed motives behind the strikes. Second, in neither case are the strikes unlawful, no matter their motive—economic and intermittent strikes are not unfair labor practices, and they are not enjoinable or subject to any other legal sanction.[308] Finally, in both cases the answer to the question of motive dictates the measures employers may use to counteract the strikes. The risks to the employer of misjudging striker motives and taking improper countermeasures are the same in each case. For permanently replacing strikers protesting unfair labor practices, or for firing repeated grievance strikers, employers are subject to an order reinstating the strikers with backpay. Therefore, just as the law forbids permanently replacing strikers involved in a single strike motivated in part by an employer's unfair labor practice, it should as clearly forbid firing or disciplining strikers involved in repeated strikes motivated in part by discrete grievances.[309]

Although not clearly articulating such a test, existing case law does point to the factors the Board should examine to determine whether discrete grievances in part motivated each of the repeated strikes. The first factor is the timing of the strikes. A delay between the employer's commission of an unfair labor practice and the outbreak of a strike may show that the strike was not motivated by the unfair labor practice. The Board should also look to the temporal relationship between the conduct giving rise to the grievances and the consequent strikes.[310] In *Embossing Printers*, for example, the Board found a series of strikes unprotected when the strikers' purpose was not to resolve "some *immediate*, adverse, and undesirable working condition."[311] In con-

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[308] It is for this reason that the test used to distinguish unlawful secondary picketing from lawful primary picketing is not appropriate here. In that context, courts have held that "if any object of the picketing is to subject the secondary employer to forbidden pressure[,] the picketing is illegal." *Superior Derrick Corp. v NLRB*, 273 F2d 891, 896 (5th Cir 1960) (emphasis omitted).

[309] One significant difference between unfair labor practice strikes and grievance strikes is that unfair labor practices are defined in the law, while employees can be aggrieved by an unlimited variety of employer actions. But this simply explains the heightened protection of unfair labor practice strikes.

[310] See, for example, *NLRB v Colonial Haven Nursing Home, Inc.*, 542 F2d 691, 705 (7th Cir 1976); *Precision Castings Co.*, 233 NLRB 183, 193-94 (1977).

[311] 268 NLRB 710, 723 (1984) (emphasis added), enf'd 118 LRRM 2967 (6th Cir 1984). See also *General Portland, Inc.*, 283 NLRB 826, 830 (1987).

trast, the Board noted in *Union Electric* that the protected strikes "*coincided with* . . . the separate actions taken by the [employer]."[312] Timing is thus relevant to, although not solely determinative of, the motive behind repeated strikes.

Second, the Board should consider whether the union informed the employer of the objectives of the strikes in an effort to resolve the grievances. In cases holding intermittent strikes unprotected, both the Supreme Court and the Board have found that the strikes were unannounced and had no stated ends. In *Briggs-Stratton*, the Court characterized the unprotected conduct as the "intermittent *unannounced* stoppage of work to win *unstated ends*."[313] The Court stressed that the employer "was not informed during [the period of the strikes] of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them."[314] Similarly, the unions failed to inform the employers how they could avert the strikes in the three Board cases holding intermittent strikes unprotected.[315] In *Blades*, however, the Board expressly contrasted the unannounced objectives of the strikes in *Briggs-Stratton* with the situation in *Blades* where "the Union told the [employer] why the men were walking out and what the [employer] could do to meet the demands of the employees."[316] Similarly in *Union Electric*, the strikers told their employer they would "remain away from work indefinitely and so long as their fellow employees . . . were 'off the clock.'"[317] Such notice militates in favor of a finding of protection.[318]

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[312] 219 NLRB 1081, 1082 (1975) (emphasis added). Similarly in *Blades Manufacturing Corp.*, 144 NLRB 561, 565 (1963), and *Douglas Aircraft*, Case No 31-CA-16512 (July 31, 1987), the strikes immediately followed the employers' actions. However, the Board should recognize that some grievances are of a continuing nature. For example, overwork is not a grievance that arises on a single day, but rather one that accumulates. The Board has in a number of cases held that single work stoppages were intended to protest excessive work during an extended period of time. See, for example, *Polytech, Inc.*, 195 NLRB 695, 696 (1972).

[313] 336 US 245, 264 (1949) (emphasis added).

[314] Id at 249.

[315] *Embossing Printers*, 268 NLRB at 723; *Western Wirebound*, 191 NLRB at 762; *Pacific Telephone*, 107 NLRB at 1551. In *Kohler Co.*, 108 NLRB 207 (1954), the union informed the employer that its grievance concerned the stopping of barrel fans used to dispel dust, but the Board held that because the union merely told the employer that employees would leave their shifts when they felt sick or could not "take it any longer," the case could not be distinguished from *Briggs-Stratton*. Id at 213, 220. All the communication did, according to the Board, was inform the employer to expect a curtailment of production in "unknown and variable amounts at unspecified times." Id at 220.

[316] 144 NLRB at 566.

[317] 219 NLRB at 1082.

[318] However, a union's mere failure to make demands on an employer before striking

Third, the Board should consider whether the union pursued other available means of resolving the grievances. For example, if the employer has a grievance procedure, the Board should consider whether the union filed a grievance.[319] Yet even though the Board should consider whether a union has invoked an available grievance procedure, it should not require a union to exhaust other remedies before striking.[320] This is justified because, after the expiration of a contract, formal grievance procedures are actually reduced to a structured form of bargaining, since they no longer end in binding arbitration.[321] The Supreme Court unequivocally held in *Insurance Agents* that there is nothing improper about striking prior to impasse.[322] This is true whether bargaining is directed toward a new contract or toward resolving an individual grievance. The alternative would be to imply a temporary agreement not to strike based on a grievance procedure that does not terminate in binding arbitration. This would be inconsistent with the law governing implied no-strike clauses and in tension with the right to strike announced in *Washington Alumi-*

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does not necessarily render multiple strikes unprotected. As the Supreme Court ruled in *Washington Aluminum*, "The language of section 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." 370 US at 14. See also *Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982); *Tamara Foods, Inc.*, 258 NLRB 1307, 1308 (1981), enf'd, 692 F2d 1171, 1179-80 (8th Cir 1982).

[319] See *General Portland*, 283 NLRB at 830.

[320] In deciding whether employees who refused to leave a plant at the end of their shift were protected, the Seventh Circuit considered their failure to invoke an existing grievance procedure, but made clear, "[w]e do not mean to indicate that an employer can prevent employees from expressing their grievances in any proper manner they see fit by unilaterally establishing a grievance procedure." *Advance Industries Div.-Overhead Door v NLRB*, 540 F2d 878, 885 (7th Cir 1976). See also *Serendippity*, 263 NLRB at 775 (strike over grievance protected "notwithstanding alternative methods of solving the problems"); *Tamara Foods*, 258 NLRB at 1308-09 (workers who struck over grievance protected regardless of "whether their objection could have been pressed in a more efficacious or reasonable manner"). After all, workers who strike over unfair labor practices receive heightened protection despite the fact that the NLRA itself provides them a remedy.

[321] An employer cannot prevent grievance strikes by offering to continue to arbitrate grievances. Even if an employer has not repudiated the arbitration provisions of an expired contract or has unilaterally implemented a final offer which includes binding arbitration, a union is not bound to resolve grievances through arbitration unless it so agrees. See Rosemary M. Collyer, NLRB General Counsel, *Memorandum: Cases Involving the Obligation to Arbitrate Under a Lawfully Implemented Offer*, GC 87-3 (May 8, 1987) (on file with U Chi L Rev). This makes sense because a union cannot accept the offer to arbitrate without also accepting the substantive terms of the employer's proposal, otherwise an arbitrator would have no basis for making a decision.

[322] 361 US at 490-96.

num.[323] A union may strike precisely to convince an employer to resolve a grievance justly through its grievance procedure.

Finally, the Board should consider the scope and duration of the strikes in relation to the workers' grievances. If the number of strikers and the length of their work stoppages are reasonably related to the discrete grievances ostensibly motivating the strikes, the Board should weigh this fact in favor of holding the strikes protected.[324] But the Board should not judge the merits of the grievances. Here, the question before the Board differs from that involved in deciding whether a strike is an unfair labor practice strike. In that context, the Board must find that the employer did in fact commit an unfair labor practice as well as that the employer's unlawful action contributed to the strike.[325] However, a grievance, unlike an unfair labor practice, is not defined by law.[326] The Board cannot and should not judge the validity of workers' sense of being aggrieved. This point was made clear in *Washington Aluminum* when the Supreme Court held that protection did not turn on "the reasonableness of workers' decisions to engage in concerted activity."[327]

The Board should qualify its oft-repeated injunction against intermittent strikes to make it clear that not all repeated strikes are unprotected. Because the logic behind the lesser status of these strikes is so elusive, the Board should clearly and narrowly define the category of unprotected activity. By adopting the same test used to distinguish economic from unfair labor practice strikes and by identifying the factors it will consider in deciding whether repeated strikes are in any part motivated by discrete

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[323] The Board rejected limits on the methods employees can use to press a grievance based on a grievance procedure that does not terminate in binding arbitration in *American Hospital Ass'n*, 230 NLRB 54, 55 (1977). The Board found that there was "no showing that employees gave up their right to press grievances in other ways as a *quid pro quo* for this procedure." Id at 55.

[324] This is not to suggest that an entire bargaining unit could not engage in a protected strike over a grievance affecting only a few workers or even a single worker. After all, under collective bargaining agreements, unions marshal the resources of the entire unit to pursue grievances to arbitration that affect only one grievant.

[325] See, for example, *Reichhold Chemicals, Inc.*, 277 NLRB 639, 640 (1985), vacated on other grounds, 288 NLRB 69 (1988).

[326] The grievance must, however, concern a mandatory subject of bargaining for the strike to be protected.

[327] 370 US at 16. The Court also cited its statement in *Mackay Radio* that "[t]he wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute." 370 US at 16 n 12, quoting *Mackay Radio*, 304 US at 344. See also *Serendippity*, 263 NLRB at 775; *Tamara Foods*, 258 NLRB at 1308.

grievances, the Board can draw a distinct line between the decisions in *Briggs-Stratton* and *Washington Aluminum*.

CONCLUSION

The language of case law rarely conveys what a strike means to those who walk off their jobs. It operates on an entirely different order of representation; the law has variously categorized strikes as criminal activity, as an invasion of property rights, and as a fundamental component of labor's right to engage in collective bargaining. Yet a quarter of a century before the NLRA's passage, in a case arising out of a series of infamous mining strikes, Clarence Darrow delivered an impassioned closing statement that aimed to convey to the jury why "a strike is a serious thing to the workingman."[328]

> They had to strike or to give up every hope they had for the betterment of themselves . . . . I don't know whether you, gentlemen, understand just what it means to strike. Did any of you ever do it? I did not . . . . If the lawyers got up and struck for an eight-hour day and wages of three dollars and a half a day, I don't believe I would be brave enough to go out . . . . To ask a man to lay down the tools of his trade, to lose his job . . . is a serious responsibility, and workingmen hate to take it, and they only take it with the direst necessity.[329]

In seeking to bridge the distance between the courtroom and the picket line, Darrow's sententious defense of strikes underlined both their ultimate necessity and immense risks.

In theory, the NLRA recognized the need for strikes and therefore protected strikers. Critics of the Act argue that it aimed to co-opt labor by transforming the strike from a radical challenge to the existing economic order into an instrument through

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[328] Arthur Weinberg, ed, *Attorney for the Damned* 479 (Simon and Schuster, 1957). The closing statement was made in 1907 on behalf of William (Big Bill) Haywood, Secretary-Treasurer of the Western Federation of Miners, who was on trial for the murder of Idaho Governor Frank Steunenberg. Id at 410-11, 442-43. Steunenberg was murdered in the wake of his declaration of martial law during a miners' strike in the Coeur d'Alene district. Id at 411.

[329] Id at 478-79, quoting Darrow's address to the jury (July 24, 1907).

which workers consent to their own subordination by participating in state-supervised collective bargaining.[330] No matter how telling, however, this criticism does not speak to labor's concrete problems today. This Article, by contrast, stays within the paradigms of existing law. It exposes the contradiction between the central place of strikes in the system of collective bargaining and the paltry protection actually afforded strikes by the law, and it seeks to salvage and extend the existing right to strike. Proceeding beyond the critique of strikes' illusory protection under contemporary labor jurisprudence, it focuses on their form and argues for the protection of repeated grievance strikes. This Article advances a new legal construction of strikes, which more fully accords workers the right to strike promised by the law and thereby furthers the NLRA's stated end of more equal collective bargaining.

Only by guaranteeing the possibility of conflict can the law create the conditions for true cooperation. The profound, if paradoxical, relationship between conflict and cooperation, strikes and collective bargaining, was central to the vision of industrial relations that animated the passage of the NLRA. By protecting new forms of collective work stoppages, the law can breathe new life into that vision.

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[330] See, for example, Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America 1880-1960* 327 (Cambridge, 1985).