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THE ROAD NOT TAKEN: SOME THOUGHTS ON
NONMAJORITY EMPLOYEE REPRESENTATION

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In 1919, Woodrow Wilson called for legislation "based upon a full recognition of the right of those who work . . . to participate in some organic way in every decision which directly affects their welfare or the part they are to play in industry."1 The call was made in the wake of decades of labor unrest, was grounded in the experience of federal labor policy during the Great War, and drew upon Progressive efforts at labor reform—for the realization of an "industrial democracy." But it came to naught. The Republic was to experience another decade and a half of labor unrest, employer resistance, judicial hostility, and reform efforts before Congress embarked upon the legislative experiment of the National Labor Relations Act (NLRA).2

The "tap-root and trunk"3 of the Act is found in section 7, which guarantees employees the right to "self-organization" and "to bargain collectively through representatives of their own choosing."4 The elemental notion embraced by the Act was that the individual employee acting alone and without assistance could have little influence upon the employer, and that only through collective representation could some rough equality be achieved. This statutory proposition, however, was neither novel nor especially controversial: It was taken verbatim from section 7(a) of the National Industrial Recovery Act (NIRA),5 which borrowed from the declaration of policy of the Norris-LaGuardia Act,6 and which, in turn, was prefigured in the principles adopted by the War Labor Conference Board of 1918. What was novel—and heavily contested at the time—were the means of realizing that policy, especially on two issues: Congress prohibited em-

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1. 58 CONG. REC. 40, 41 (1919).
ployer interference in or support of a labor organization, as defined expressly to include "any kind" of employee representation committee or plan; and it established the principle of exclusive representation by majority rule.

Over the next three decades, and despite the blunting effects of the Taft-Hartley amendments, that experiment was a modest success: The bulk of the production workers in major, nationally based manufacturing industries were organized under the Act, and the standards set in bargaining for these employees—especially the creation of internal labor markets—were widely emulated by nonunion firms. But over the course of the past two decades union density has drastically declined, to about the same percentage of the private sector non-agricultural work force as at the time the Labor Act was passed. Although this development has been explained by a variety of factors, in which the law may or may not play an especially prominent part, the result has caused a number of observers to return to President Wilson's plea; to find, as Paul Weiler put it, some alternative means for "direct indigenous representation."  

Two broad ideas for legislative reform have been proposed. The one more discussed calls for the creation of employee works councils, either by voluntary employer action or as mandated by law such as in Germany. The one less talked about calls for provision of "members only" representation. Each, in other words, would unmake one of the more contested legislative choices made in 1935: The former considerably to modify or repeal the "company union" prohibition; the latter to modify or abandon exclusive representation by majority rule.

The former draws not only from European developments but upon the American experience as well. The stimulation of works


councils for otherwise unrepresented employees was federal policy during World War I. Following that, a number of employers established employee representation plans and committees in the 20s, at the height of which efforts about ten percent of workers in large manufacturing enterprises were so represented.\textsuperscript{12} Employee representation plans were more widely adopted in the 30s as part of management’s response to section 7(a) of the NIRA—resulting in the Labor Act’s “company union” prohibition. Consequently, many of the same arguments made against that prohibition at the time are heard again today, especially the need to foster “cooperative” as opposed to “adversarial” labor relations.

But the idea of “members only” representation also draws from the historical wellspring in practice and, to a limited extent, in law as well.\textsuperscript{13} On the former, the tradition of American “trades unions” throughout the nineteenth and the early twentieth century was to bargain only for their members; but this was coupled to the demand that employers hire union members exclusively—hence the sometimes violent struggle over employer demands for the “open shop.” On the latter, under the Principles of the War Labor Conference Board, giving employees the right “to bargain collectively, through chosen representatives,” the War Labor Board recognized the right of employees “through the agency of any union to which they may belong” to select a committee “to represent the union men” in the company’s employ.\textsuperscript{14} Following that principle, the idea that the law should authorize unions to represent those—and only those—who have voluntarily chosen them was embedded in the text of the Labor Act. Section 7 gives employees the right to representatives “of their own choosing”—not of someone else’s choosing, whether that someone else is the employer or a group of co-workers. Such was a tenable reading of section 7(a) of the NIRA, until the then National Labor Relations Board (old) adopted the requirement of majority rule giving the “their” of “their own choosing” a collective rather than individual reference.\textsuperscript{15}

In consequence of the prior reading, however, the Automobile Settlement of March 25, 1934, provided for representation by any organization freely chosen by individual employees, although the Automobile

\textsuperscript{15} See Minier Sargent, \textit{Majority Rule in Collective Bargaining Under Section 7(a)}, 29 Ill. L. REV. 275 (1934).
Labor Board promptly converted that provision into a kind of super works council, by a system of proportional representation.\textsuperscript{16} But whatever potential the law might have had to effect a system of “members only” representation was eliminated by the Labor Act’s embrace of the principle of majority rule shortly thereafter. As the President of the American Federation of Labor’s Office Employees International Union explained:

Prior to the Act, unions were free to organize in whatever manner they found to be most effective. Frequently, a union would build its membership in a shop by first organizing a small group of workers who had the fortitude to stand strong for the union. Upon the organization of such group, certain job improvements would be obtained for them from management. And this working example of the gains to be achieved through organization frequently formed the most potent organizational appeal to other workers in the shop, and they too would join to improve their conditions. Now, trade unions must conform their organization activities to the appropriate bargaining unit patterns laid down by the Board. They cannot organize and bargain for those workers in a plant who are interested in collective bargaining, they must organize and bargain for all workers within “an appropriate bargaining unit.”\textsuperscript{17}

In sum, Congress took a provision, borrowing from prior law, that at the threshold granted to each individual employee the right to his or her chosen representative, and attached to it a provision requiring the employer to bargain only with a majority representative. However, the threshold grant of individual rights was not altered by the provision for majority rule. In the absence of an exclusive representative, concerted activity by work groups for better working conditions is statutorily protected, and nothing prohibits an employer from contracting with a union for terms applicable only to its members. The law simply makes no provision requiring employers to deal on that basis.\textsuperscript{18} As a result, the ability of a nonmajority group to require the employer to deal with it is entirely a function of the group’s strategic


\textsuperscript{17} Paul R. Hutchings, Effect on the Trade Union, in The Wagner Act: After Ten Years 72, 73 (Louis G. Silverberg ed., 1945) (emphasis added).

\textsuperscript{18} Clyde Summers has argued that, “The plain words of section 7, section 8(a)(1) and section 8(a)(5) would seem to require an employer, in the absence of a majority union to bargain collectively with a non-majority union for its own members.” Summers, supra note 3, at 539. It is a provocative argument; but it would require an unusually bold Labor Board (and judiciary) so to hold, against the weight of a contrary conventional wisdom. Accordingly this essay proceeds upon the assumption that legislative action would be required.
situation in the workplace. But an unstrategically situated "bargaining unit" majority would be equally unable to compel the employer to deal with it, save for the Act's imposition of a duty to bargain. What follows will examine whether the road not taken in 1935 is worth exploring in the search for an alternative to the current system: Whether it would make sense today, with the hindsight of the Labor Act's experience, to think about extending bargaining rights on a "members only" basis.

The benefits of such an extension were dealt with in a comprehensive (and prescient) study by George Schatzki in 1975 and need only be briefly rehearsed. All the regulation and delay attendant to unit determinations, election campaigns, and elections themselves would be eliminated (as well as the whole body of law surrounding successorship). Inasmuch as the employer would be required to bargain with any organization on behalf of its members, all the organization need supply to establish a bargaining relationship is a membership list. (Such, in fact, was part of the 1934 Automobile Settlement.) To be sure, the submission of such a list to the employer could facilitate anti-union retaliation. But even now, a retaliatory discharge—for example, during the course of union organizing—requires proof of the employer's knowledge of the employee's union sentiment, membership, or activity; and the potential exacerbation of the prospect of unlawful employer retaliation only emphasizes the current need to strengthen legal safeguards against it.

Moreover, in consequence of "members only" representation an employee would not be forced to be represented either in bargaining or in the handling of grievances by a representative not of his or her "own choosing," whether a union elected by a majority under the current law, or an elected works council either mandated by law or es-

19. For an assessment of how a nonexclusive representative might function under the current state of the law see Alan Hyde et al., After Smyrna: Rights and Powers of Unions that Represent Less than a Majority, 45 Rutgers L. Rev. 637 (1993).
21. The lists, however, were submitted not to the employer but to the Automobile Labor Board, and the several difficulties with their use were obviated by the electoral machinery for proportional representation adopted by the Board. Fine, supra note 16, at 260-61. One difficulty was the fact that some employees joined more than one organization; but that could be dealt with by requiring the employee to make an election of membership for representation purposes in one organization only, failing which he or she would be considered unrepresented.
22. The fact that under majority rule a union selected by the slimmest of margins was required to represent employees unsympathetic or hostile to it—and to preclude their separate representation—continued to vex critics well after the Act's passage, to the point of an argument for a partial accommodation by requiring the Board to exclude from any bargaining unit em-
tablished unilaterally by the employer. Professor Schatzki dwells at some length on the implications of a true voluntarism, but to oversimplify, the prospect is likely to be one of greater individual participation and organizational responsiveness.

The arguable disadvantages of the proposal are two, both of which harken back to the debate over majority rule: The first goes to the issue of union bargaining power; the second goes to the employer's ability to bargain on a "members only" basis. The first is concerned that nonmajority unions will be weaker in their dealing with employers relative to the power they can wield as exclusive representatives. The second is concerned that employers will be unable to deal efficiently with a multiplicity of different organizations representing otherwise fungible employees; it conjures up the spectre of three operatives working side-by-side performing identical tasks under common supervision and working conditions being represented by three different organizations. Each of these should be taken in turn.

The ability of a "members only" representative more sharply to focus shared concerns would be offset by a lessened ability to command a broader front in dealing with the employer. But a similar caution has been made with respect to bargaining unit determinations under the existing Act, and that has not deterred the Board from finding units of relatively narrow congruent interests to be appropriate—for example, just the food service workers in a single outlet of a large retail chain like F.W. Woolworth.

Moreover, it remains to be seen how effective the solidarity of coerced representation really is. The United States Supreme Court has limited a union's ability to command the financial support of the employees of a craft, class, department or plant division that had evidenced less than thirty percent support for the union. Theodore R. Iserman, Industrial Peace and the Wagner Act 78-79 (1947).

23. See Leverett S. Lyon et al., The National Recovery Administration 539 (1935):

Majority rule in collective bargaining is justified by experience, which proves that collective bargaining is nullified in practice wherever the workers are divided. Majority rule is also necessitated by the fact that labor standards cannot be properly set for all the workers of a plant, craft, or industry, if different sets of representatives bargain at the same time with the same employer.


25. F.W. Woolworth Co., 144 N.L.R.B. 307 (1963). So, too, has the Board found to be appropriate a unit of only the meat department employees of a single outlet of a grocery chain, NLRB v. Joe B. Foods, Inc., 953 F.2d 287 (7th Cir. 1992), and of only the "front desk" employees of a hotel, Dinah's Hotel Corp., 295 N.L.R.B. 1100 (1989), which may, again, be part of a chain.
bargaining unit. And in the strike situation, where solidarity is a necessary (if not sufficient) condition of economic power, the emphasis placed by the United States Supreme Court on the individual right to break with the strike and on the employer's privilege to induce breach of solidarity weakens the argument to the bargaining strength of majority representation.

Some of the reservations about the current system can be illustrated by a relatively recent and altogether unremarkable decision, Continental Web Press, Inc. v. NLRB. In 1980, a union petitioned to represent a unit of thirty-six pressmen in a lithographic printing plant. The Company argued that the unit should include seven preparatory employees. The Regional Director decided the unit petitioned for was appropriate and ordered an election. The union won the election 19 to 11, with 6 not voting, but the Company sought Board review. In 1982, the Board sustained the Regional Director, relying upon the different training (apprenticeship), supervision and work hours of the two groups and the lack of interchange between them. The employer, however, refused to bargain on the ground that the unit was inappropriate. The union filed a charge of unfair labor practice, and in 1983 the Board ordered the employer to bargain. The employer then sought review in the court of appeals. The court opined that had the case been one of first impression, a separate pressmen's unit might well have been appropriate; but the Board had held in other cases that preparatory employees and pressmen were part of a continuous lithographic process, which, by analogy, would mean that the Board in this case had placed the employees at the beginning of an assembly line in one unit and those at the end in another. And so—four years after the election—the court applied that principle of administrative law requiring the Board adequately to explain a departure from established precedent, or to announce its reasons more fully were it to be adopting a new policy, and remanded for the Board's reconsideration.

One is driven to inquire whether something is not amiss in these events: Why should the 19 of 36 pressmen who desire union representa-

28. 742 F.2d 1087 (7th Cir. 1984).
tation be denied that representation because seven nonpressmen were not included in the unit? Even if the pressmen constituted "an" appropriate unit, as the court conceded could be the case, would a union with 19 supporters of 36 in the unit (with 11 hostile and 6 arguably indifferent) be measurably stronger as a representative of the entire unit than one that represents only its members? If the union had lost the election in a pressmen's unit—15 for, 15 against, and 6 not voting—why should those fifteen be denied a representative "of their own choosing" because an equal number of their co-workers were contrary minded (and six arguably indifferent)? And even if the union in both these cases is in a weaker bargaining position representing only its members than it would be representing all the pressmen—which is by no means obvious—neither is it obvious that employees are better off in the aggregate with the current "high stakes" game, which encourages employer resistance and litigation and in which unions secure majority support less than half the time,\(^3\) than with a "lower stakes" game that assures representation automatically to all those who desire it even if their bargaining position may be of lessened strength.\(^3\)

The more difficult or, at least, perplexing problem is the prospect of a proliferation of organizations each demanding to bargain for its members over the same subjects and to which the employer would owe an equal duty to bargain in good faith. The difficulty will be discussed presently. But the perplexity derives from the Act's misleading vocabulary and from the want of any statutory guidance on the question of bargaining structure.

The Act speaks in terms of exclusive representation of "an appropriate bargaining unit"—the group of jobs the union represents. But, what the Board in reality is determining is an appropriate election unit for the designation of a bargaining agent, which may or may not coincide with the group of jobs actually represented at the bargaining table. From this perspective, the function of the "community of interests" test the Board applies to decide unit questions is only partly a concern for management's ease of bargaining and more importantly one of assuring sufficient homogeneity of employee interests for the purpose of selecting an exclusive representative and minimizing the

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32. In 1990 the NLRB ran 4,210 representation elections. Unions won 1,965 of them—or 46.7 percent. The total vote over the fiscal year was about 108,000 employees voting for unions and 121,000 against. 55 NLRB ANN. REP. 11 (1992).

number of conflicting interests the representative might be called upon to reconcile.\textsuperscript{34}

In the case of the Woolworth outlet adverted to earlier, the union sought a unit of only the food service workers, and the employer insisted that only a unit of all the store's employees would be appropriate. Accordingly, the Board attended to differences in work, supervision, and working conditions as well as to similarities in wages, benefits, and personnel policies to decide whether or not the unit petitioned for represented a true community of interests. But at no point does either the Board majority or the dissenting Board members advert to how an enormous national retail chain, with over a thousand outlets, is to bargain effectively over wages, medical insurance, pension benefits, and seniority (including transfer and "bumping" rights) with either a representative of the employees of just a single store or of only that single store's food service workers; nor does the Board contemplate the Company's situation were it required to bargain with representatives of potentially thousands of such units.

The Board's silence is not surprising for it mirrors the statute's silence on this point. The duty to bargain under the Act requires the employer to send a representative to the bargaining table with power to make an agreement; thus, the selection of a union by the single outlet's food service workers compels the employer to bargain on company-wide policies such as wages, hours, and benefits. But the Act is silent about, is unconcerned with, how the employer is to do that. Consequently, the practical difficulty for "members only" representation flows from the Act's lack of concern with bargaining structure.

Under the current state of the law, a union may attempt to rationalize the structure of bargaining for the various units it represents. If it is selected at food service counters elsewhere in the company, it may propose to bargain for them all as a single unit; but it may not insist upon that demand for such an alteration in "the bargaining unit" is only a permissive bargaining subject. If the Company agrees, however, the union may negotiate a single company-wide contract even though it was elected counter by counter, store by store. In that case, the actual "bargaining unit" will transcend the election districts from which the union derived its bargaining rights. Further, a group of unions representing different groups of the employer's employees may form a coalition and bargain jointly with the employer; but they may

\textsuperscript{34} GORMAN, supra note 24, at 67-68.
not insist that the employer bargain on that basis for that too would alter "the bargaining unit" which the Board determined to be appropriate.\textsuperscript{35} For the same reason, neither may the employer insist upon joint bargaining. In the Woolworth example, the employer could not insist upon meeting jointly with the separate representatives of the food service workers and store clerks to negotiate a common issue such as seniority in consequence of employee interchange.\textsuperscript{36} Nor may either party condition agreement in one unit upon the satisfactory conclusion of negotiations for another unit.\textsuperscript{37} Thus the prospect of a variety of organizations—some affiliated with national labor organizations, some entirely indigenous—each representing its own members, each desiring to bargain about employer policies that may affect them in common, each owed a duty to bargain in good faith by the employer has the potential of exacerbating the difficulties an employer would face under the current state of the law, where it might be required to bargain with a variety of unions, each the exclusive representative of one or more of a number of bargaining units.

One can be skeptical that the actual number of organizations demanding to bargain for their members would be outlandish. A recent study based on the empirical and theoretical literature has concluded that, "[C]ollective action tends to happen when a critical mass of interested and resourceful individuals can coordinate their efforts."

And it remains to be seen how many such critical masses there are in a given workplace, or how sustainable a number of organizations can be on a given potential membership base. (If multiplicity were considered to be a serious potential problem, the statute could require that organizational membership reach a certain practicable level as a condition of recognition, perhaps as a minimum percentage of the workforce in the establishment, division, department, class or craft.)\textsuperscript{38}

35. See generally William N. Chernish, Coalition Bargaining (1969). However, each of the unions in the coalition may sit with one another's bargaining committee as a technical representative of the then bargaining union. General Elec. Co. v. NLRB, 412 F.2d 512 (2d Cir. 1969).


39. See, e.g., Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963). It provided for recognition of an employee organization in the federal service as the exclusive representative of the employees in an appropriate bargaining unit upon designation by a majority of those employees. But it also provided for "formal recognition" short of exclusive bargaining rights of an organization "as
Nonetheless, nonmajority representation may complicate conduct of bargaining and arguably heighten the potential of whipsawing or leapfrogging by different organizations. In other words, explicit provision for “members only” representation would bring to the fore an issue currently imbedded in but ignored by the Labor Act. And although it is likely that employers and unions would work out the practical problems of bargaining structure without statutory attention, just as they do now—either by bargaining consensually on a multi-union basis or by a “pattern” bargain with a single union which is then insisted upon by the employer in bargaining with the others—the potential exacerbation of the problem argues for legislative facilitation of the bargaining process; that is, for a coalition-accommodating and, if need be, a coalition-forcing statutory provision.\textsuperscript{40}

If one were to fashion a statute that accepted the principle of majority rule but required that units be configured to relatively narrow sets of congruent interests, an analogous problem of a potential proliferation of bargaining obligations would be presented. Such a statute was drafted to deal with a rather more rarified question in public sector collective bargaining;\textsuperscript{41} but the approach it took would seem to be applicable to the possible proliferation of bargaining obligations under a system of “members only” representation. Assuming that section 9(a) were amended so to require, section 8(a)(5) could be amended as follows:

\begin{quote}
It shall be an unfair labor practice for an employer—

\begin{itemize}
  \item to refuse to bargain collectively with a representative of his employees; but it shall not be an unfair labor practice—
\end{itemize}
\end{quote}

the representative of its members” in a unit defined by the governmental agency when \textit{inter alia} it has “a substantial and stable membership” of at least ten percent of the employees in the unit.

Such a provision arguably could invite litigation much like the current determination of an “appropriate bargaining unit.” But an “establishment” is a fairly well-defined entity for federal wage and hour law purposes. 29 C.F.R. § 779.23 (1992). Unlike the multifactored test for what is an appropriate unit, what constitutes an employer’s own “department” or “division” would seem to be a much simpler determination; and only less so what constitutes a “class” or “craft.” Thus challenges on the ground of insufficient membership or level of subscription would be likely to arise only on the margin; and the incentive to such challenges would be reduced by strengthening the remedies for wrongful refusal to bargain, a much needed reform irrespective of any change in majority rule.

\textsuperscript{40} Professor Schatzki observes that unions could engage in coalition bargaining and that employers could be required to deal with them on that basis. Schatzki, supra note 20, at 919. But he does not attend to what a coalition-forcing mechanism would be, save for suggesting on the issue of seniority that the contract made with the first union be made to serve as a pattern. \textit{Id.} at 936.

\textsuperscript{41} David E. Feller & Matthew W. Finkin, \textit{Legislative Issues in Faculty Collective Bargaining, in Faculty Bargaining in Public Higher Education} 74 (Carnegie Council Series 1977).
(a) for two or more labor organizations to demand joint bargaining with an employer with respect to matters which have customarily been provided on a uniform basis among the employees represented by such organizations; or,

(b) for an employer (i) to demand joint bargaining by two or more organizations with respect to matters which have customarily been provided on a uniform basis among the employees represented by such labor organizations, or (ii) if joint bargaining is not agreed to by those organizations or no agreement is reached acceptable to all parties, to conclude an agreement as to such matter with the organization or organizations which represent the largest number of employees and to refuse to bargain further with any other organizations as to such matters unless that other organization agrees to accept the terms so negotiated.42

These provisions give the employee representatives and the employer the power directly to confront and to rationalize the bargaining structure. Subparagraph (a) makes joint bargaining a mandatory bargaining subject. Inasmuch as the statutory concern is for the employer's ability to bargain, the employer need not be required to bargain with a coalition; but where the employee representatives fear an effort to play one off against another, it permits the different organizations to require the employer directly to confront the issue. Subparagraph (b) is concerned with the reverse situation, where the employer sees the need to rationalize its bargaining structure and the representatives prove resistant. Accordingly, the proposed provision gives the employer the power to impose a coalition in the face of such recalcitrance. But both are limited to issues that have customarily been settled on a uniform basis, to preserve separate negotiations on matters of particular interest to the organization that raise no issue of common concern. Thus the operation of subparagraph (b) has been explained by its drafter:

[It] makes clear that the employer cannot, after joint bargaining, take advantage of the permissible pattern bargain by settling with the weaker organizations (at least in terms of the total number of employees represented) and imposing that settlement on the stronger. For the same reason the employer cannot impose terms on an organization to which the demand for joint bargaining had not been directed or which had not been a participant in unsuccessful joint bargaining. The provision does, however, give real meaning to the joint bargaining procedure, because a settlement with a coalition representing the largest number could be binding even on the nonconsenting representative of the single largest . . .

42. Id. at 161. This draft accordingly omits the current requirement—"subject to the provisions of section 9(a)"—in section 8(a)(5).
As a result, the bargaining agents are under considerable pressure to come together and arrive at a mutually acceptable resolution.43

The proposal has its most obvious application where the several organizations represent members in work groups who conceive of themselves as uniquely situated or as having special concerns—those who might be subsumed in a more heterogeneous bargaining unit determined to be appropriate by the Labor Board. But even if one were to speculate that employees doing otherwise the same work for the same pay and under the same supervision might choose different organizations to represent them, such would seem possible because these organizations successfully appeal to different workplace concerns. It would be possible, arguably, for employees to segregate themselves into organizations emphasizing divergent interests, for example, of health insurance and pensions for the older, of job training and retraining for the younger, of flextime and child care, especially for female employees with young children, and of safety in certain hazardous jobs. Even in such a speculative situation, a coalition-forcing provision would compel these groups to make compromises with one another in order to achieve an overall package on matters of common policy.

However, the availability of self-segregating organizations holds open the possibility for a variety of “civil rights” organizations to assert the interests of their members.44 This may well give pause, for the argument runs that the opening of a channel for these groups separately to assert their members’ “voice” would virtually insure that it would be utilized. And while added “voice” is often to be welcomed, too much voice—like too much exit—may become dysfunctional.45

Under the current state of the law, the bargaining agent is required to accommodate the unit’s various interests and desires in fashioning its bargaining demands and trade-offs, subject to external accountability under a statutory duty of fair representation, in which intra-organizational accommodation the employer has nothing to say. What is different today from when the duty of fair representation was

43. Id. at 163-64. The statutory provision and the analysis were drafted by David Feller who is not responsible for its extension into this setting.

44. Professor Schatzki acknowledges the prospect of racial self-segregation. Schatzki, supra note 20, at 933-34. That such is a distinct possibility see Black Grievance Comm. v. NLRB, 749 F.2d 1072 (3d Cir. 1984), cert. denied, 472 U.S. 1008 (1985).

45. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 31 (1970) (“But voice is like exit in that it can be overdone: the discontented . . . could become so harassing that their protests would at some point hinder rather than help . . . .”).
created in 1944, to deal with a racial distinction drawn by collective agreement, is a proliferation in the number of groups with statutory rights to assert in the workplace—on grounds of sex, ethnicity, religion, age, physical and mental handicap, citizenship and lawful immigration status in addition to race—and the emergence of other groups identifying themselves as needful of similar solicitude, most promi-
nantly on grounds of sexual orientation.

To see how this might complicate the contemporary workplace, contemplate the situation where a number of Spanish-speaking em-
ployees desire to converse with one another in that tongue even as other English-only speakers—perhaps African Americans—feel put off by the use of that language, possibly feeling themselves to be the object of comment (or ridicule) they do not understand. Their desire for an “English only” rule on company premises is strongly resisted by the Spanish-speakers. Now play out the possibility of such competing claims on racial, ethnic and sexual grounds to training and promotion opportunities, to claims for out-of-seniority accommodation to religious observance and physical handicap, and on down an expanding list of potential claims and claimants, and the “civil rights” scenario becomes a sobering one entirely apart from the additional regulation of some of these issues by civil rights law.

The argument derives its considerable force from the depiction of a multiplicity of competing interest groups clamoring to be heard. But if that is so, if all these conflicting claims are nascent in the workplace, the question presented is whether it makes sense to continue to call upon a single exclusive employee representative to reconcile them. There is much to be said for a model of minorities successfully negoti-
ating their differences with one another. But if “too much” voice may harass an employer, it is at least equally possible that too much voice internal to an employee organization may place more burdens upon its political processes than it reasonably should be asked to accommodate.

It is true that under “members only” representation, employees who believe they would be better represented separately could insist on dealing with the employer (subject, if need be, to some minimum membership requirement).46 But this may suggest in return that such groups should be heard if they desire, and that the responsibility for orchestrating their claims may rest just as well if not better with the

46. See supra note 39.
employer, subject to its invocation of the proposed coalition-forcing provision.

The shifting of this responsibility to the employer raises a related concern. Under the instant proposal, a collective representative would be free to set its own membership requirements so long as it does not violate any civil rights law. It could not, for example, refuse to admit African Americans, Mexican Americans, women, or the like. But it could restrict membership to those who perform certain tasks or who have certain training; and there is no reason why it could not also require a certain level of skill. The consequence may give separate "voice" to the more highly skilled and better trained—those whom the employer might be most anxious to retain (and reward) but whose voice would be submerged in larger noncraft bargaining units—and who may be better positioned to exact a wage premium (or "rent") at the expense of those less skilled or less in demand.47 This, in turn, may contribute to the widening of the wage inequality that the Republic has experienced over the past decade or two.48

If this consequence was thought relevant to the fashioning of a system of employee representation, we could regulate the membership policies of employee representatives to blunt these effects; to require, for example, that an organization that admits any employee of an employer admit all employees of that employer.49 But that approach would cut against the principle of free association that undergirds nonexclusive representation. It would also require a re-introduction of some externally imposed notion of statutory fair representation that the instant proposal eliminates.50

47. Professor Schatzki confronted this possibility, see supra note 20, at 933:

For example, skilled workers may be prepared to work for no less than, say, eight dollars an hour. But they may hope for nine dollars, and might be able to realize that greater salary if they are able to negotiate on their own; the employer could then compensate by offering less to the unskilled workers, who are more easily replaced if they are not satisfied with the employer's pay scale. Under the present state of affairs, with skilled employees merged in collective bargaining units with less skilled or more easily replaced employees, the union may aim only for the eight dollar figure, on the thesis that the skilled employees will be minimally satisfied and more will be left over for the unskilled workers. If one has some concern for the status and rewards of the less able, skilled, or fortunate workers, the consequence I describe should be unsettling.


49. This is the approach taken by Professor Schatzki, supra note 20, at 920.

50. This is not to suggest that unions would have no externally imposed limit on their treatment of their members. But such would derive from the general law governing the internal affairs of membership organizations and not from the Labor Act. Cf. Zechariah Chafee, Jr., The Internal Affairs of Associations Not For Profit, 43 Harv. L. Rev. 993 (1930). Nor should the Landrum-Griffin Act, requiring union democracy, be affected.
Alternatively, one could require the fundamentals of the wage bargain to be centrally set at a supra-enterprise level as is done in some European countries, of which Sweden is probably the most well known. But that would require a massive change in American law and practice of dubious workability; even Sweden has experienced "wage drift"—an increase in wages at the firm level beyond the centrally set contractual standard.

What remains to be seen is whether the incomes inequality problem ought to be addressed through the statutory structure of employee representation. If one conceives of the collectively bargained wage as a means of distributing the total wage sum among differing groups in society, then the call to statutory concern would make a lot of sense—in fact, the call should be for mandatory unionization and a centralized bargaining structure. But at the enterprise level the wage may be a tool for the effective organization of work, even a system of reward for work that bears some relationship to productivity. The giving of "voice" to the better trained and more highly skilled might well widen the wage differential within organized firms; but it might also conduce toward greater productivity—else why would employers more readily accede to these demands than those of the unskilled—and possibly encourage the unskilled to undertake more training.

Thus the "wage gap" argument is a reprise of the conventional solution to the "civil rights" problem: In that case, to place the burden of reconciling conflicting ethnic claimants on the union, so to filter them in the process; in this case, to resolve the "wage gap" problem by the same means, in the sure and certain hope that a majoritarian body will tend to compress the wage for the better skilled relative to the larger number of un- and semi-skilled. There is one difference between the two, but it only emphasizes the role the submergence of interest plays; that is, the terms of the bargain in the former case must withstand scrutiny under the civil rights laws. But no such scrutiny is afforded in the latter. In fact, the Supreme Court has explained that “[t]he workman is free, if he values his own bargaining position more than that of the group, to vote against representation . . . .” What that workman is not given is the privilege to associate

53. See supra note 47.
only with others who value their bargaining position equally with his, in contradistinction to membership in a governmentally defined bargaining unit. The result was supported in the debate on majority rule by an analogy of industrial to political democracy: Just as a Congressman represents all the voters in the Congressional district, including those who voted for her opponent or who didn’t bother to vote at all, so does the representative elected by a majority of the bargaining unit. But the analogy is flawed: Residence in an electoral district represented by a disliked politician does not preclude those voters from banding together financially and in other ways to support other members of the same deliberative body who may be sympathetic to their views. Those residents may also lobby the executive or legislative branches in opposition to “their own” representative’s position. Neither channel is available under the system of exclusive representation: No other workplace representative is allowed for dissatisfied employees to influence; nor may they effectively deal with their employer to advance a position contrary to that of the exclusive representative. Collective bargaining under the Labor Act is a form of industrial democracy; but it is a one-party State.55

If a consequence of an authentic freedom of workplace association is to contribute to a widening of wage disparities, and if that consequence is of concern to the body politic (as it well may), the better approach would be for the body politic to confront the issue of wage inequality directly—perhaps via a national incomes policy—and not to compel workers to be represented by organizations they do not want or who may not want to represent them.

Thus far this excursion has assumed for simplicity’s sake that whatever pluralism emerges in employee representation at the plant or office would occur more or less simultaneously. But the duty to bargain might arise sequentially. Return, for example, to the Continental Web Press case and assume that after negotiations have been concluded with organization A, binding only on its members, organization B is formed and insists upon different terms. Because B could not have been subject to an employer demand for joint bargaining, the Company could not refuse to bargain with it. But the Company could insist upon the terms agreed with organization A. Were it to agree to better terms with B, it would in effect be deciding which is to be the

55. Nor is this state of affairs mitigated by the intramural political structure of most unions. See Clyde W. Summers, Democracy in a One-Party State: Perspectives from Landrum-Griffin, 43 Md. L. Rev. 93 (1984).
dominant organization. To be sure, A’s “no strike” obligation would bind only its members. Consequently, in this sequential bargaining scenario B would be free to strike were the Company to insist on the pattern made with A. But in simultaneous bargaining, a nondominant organization would be equally free to strike in an effort to secure better terms than those agreed upon with the dominant organization or coalition. In other words, the “sequential bargaining” scenario does not differ greatly from the situation an employer faces under the current state of the law when it bargains with a number of organizations who differ among themselves as to which will be the pattern setter.

The prospect of sequential bargaining obligations ripening as new organizations emerge raises a question: How is the employer to carry on its day-to-day operations when the duty to bargain in good faith imposes a limit upon the employer’s ability to take unilateral action over bargainable subject matter pending the exhaustion of its bargaining obligation? This would be a serious concern if a statute were configured to require the exhaustion of a “meet and confer” obligation with any organization claiming to represent any members of a bargaining unit before any change could be made in terms and conditions of employment for the unit as a whole. But, the sequential ripening of nonmajority bargaining obligations would not seem to differ materially from the situation a company—say, Woolworth—would face as various bargaining units—say, each of its food counters—proceed to unionize over time. The bargain struck with one organization representing either only its members or a bargaining unit would be binding upon those it covers; and the terms agreed to might be extended unilaterally by the employer to nonrepresented employees. But whatever the existing employment terms are, they constitute the status quo to which the unilateral action rule would apply as new organizations secure bargaining rights, just as they do now.

To be sure, were a hundred or more tiny and so economically unsustainable organizations—of, say, two or three employees each—sequentially to demand to represent themselves, the unilateral action rule would significantly hobble the employer’s ability to act—so significantly, in fact, that it would be a virtual certainty that the exception to the rule would be held to apply, allowing the employer to act

56. So, too, might A, in cautious anticipation of any new organization emerging, negotiate a “me too” clause that would give it the benefit of any better bargain struck with another organization.
But the mere theoretical possibility of such a scenario should not lend credence to it as a likely reality: Why would three hundred production workers feel it necessary—or useful—to form a hundred organizations? In any event, if an excess of legislative caution were thought prudent, that potential could be dealt with along the line of a mandatory minimum membership.

A final aspect of the workability of “members only” representation concerns not negotiation but contract application and administration, for it contemplates a system where organizations represent not jobs, as under the current system, but people. Return to Continental Web Press and assume that in addition to organization A, which represents nineteen pressmen, organization B represents the eleven pressmen who were hostile to A (for whatever reason) as well as three preparatory workers, and that each is statutorily entitled to represent its members. How is it possible for the employer to give better terms to A than to B, or to A and B but not to extend these terms to the unrepresented without violating section 8(a)(3), which forbids discrimination in terms and conditions of employment to encourage or discourage union membership? And if the grievances of A’s and B’s members are presumably to be dealt with through the grievance arbitration provisions of their respective representative’s agreements, how are the unrepresented nonmembers to be dealt with? In other words, for these purposes must there not have to be some notion of a “bargaining unit”—a cluster of common jobs subject accordingly to common treatment?

Under the existing statutory regime, differences in terms and conditions of employment between represented employees, or between the represented and the unrepresented, that reflect the respective bargaining powers of the organizations and are not rooted in an intent to favor one union over another or to sanction the represented in favor of the unrepresented do not work a violation of section 8(a)(3). It is possible for one group of employees—Woolworth’s food service workers—to unionize while another, their fellow retail clerks, do not. As a result, the former may secure improvements and protections the latter do not then enjoy, even though they heretofore had the same pay scale, hours, and benefits, had some interchange of duties, and worked in the same location under the same store management. And

58. See generally Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1077-78 (1st Cir. 1981).
per contra an employer may pay its nonunionized workers at a higher rate than the unionized, even where it is entirely conceivable that the two groups could have comprised "an" appropriate bargaining unit, where, that is, the major distinction between the two is the fact of unionization. Neither does it violate the Act for an employer to institute welfare or pension benefits that exclude unionized workers from coverage on that basis alone, so long as the employer has not instituted the benefits to defeat the union and does not preclude the union from bargaining for them. In other words, as the Labor Act currently stands, a cluster of common jobs may nevertheless be disaggregated for unit purposes along the lines of more narrowly focused communities of interests. This in turn may result in different terms and conditions of employment for persons who had been governed by common terms heretofore, which differences derive from the fact of such separate representation.

In a sense, a great many unions already bargain on a nonmajority basis to the extent the units they represent (albeit on an exclusive basis) comprise a minority of the employer's eligible employees or a minority even within alternative configurations of appropriate bargaining units. Consequently, bargaining on a nonmajority, "members only" basis should pose little difficulty for reconciliation with section 8(a)(3).

But most important, under the proposed statutory provision the Company is given the power to assure that the similarly situated are in fact treated similarly if it desires (or where antidiscrimination law requires)—in the lithographical hypothetical, by insisting on a coalition,

59. Cf. Viacom Cablevision, 267 N.L.R.B. 1141 (1983) (no unfair labor practice for employer to call a meeting of its unionized workers to inform them of the better wages and benefits paid to their nonunion counterparts).

60. Cf. Lennox Indus., 308 N.L.R.B. 1237 (1992) (breaking up what had been a single bargaining unit not due to any change in the work but because of the employer's organizational restructuring).


63. See NLRB v. Reliable Newspaper Delivery, Inc., 187 F.2d 547 (3d Cir. 1951) (refusing to sustain a section 8(a)(3) violation where a minority union, bargaining only for its members, secured a retroactive pay raise that was not extended by the employer to nonmember employees). It should follow that a collective agreement could not forbid an employer from extending its gains to nonmembers. Nor can an employer agree to prefer union members over nonmembers as such in a layoff. Radio Officers' Union v. NLRB, 347 U.S. 17 (1954); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963). But the employer could agree with a "members only" representative (or coalition) upon the configuration of the unit within which seniority would operate and to extend that definition unilaterally to the unrepresented.
failing which it could settle with organization A and effectively impose those terms on organization B, to assure that the terms accorded to the pressmen via each of their organizations are substantially the same. (However, the Company would be required to bargain separately with organization B for any special terms or conditions pertaining only to the three preparatory workers.) And, as a practical matter the employer is free, and would be expected to extend the negotiated terms—putting the grievance procedure aside—to the technically "unrepresented" nonmember pressmen and preparatory employees respectively.

Inasmuch as the unrepresented are likely to benefit from whatever is secured by the bargaining representative (or coalition), and because there could be no compulsory dues for nonmembers, a question remains of whether such a system would not encounter an insuperable "free rider" problem. But with a sufficient "critical mass" of participants, the fact of free riding would not seem to disable an otherwise economically sustainable representative organization to a significantly greater extent than does the current system where the gains of an exclusive representative may be extended by the employer to its "free riding" nonunionized employees. In addition, the major difference between the represented and the unrepresented would be the grievance-arbitration procedure available only to the member as a swift, inexpensive, and effective means of enforcing contract rights. To be sure, the employer is free unilaterally to establish a grievance-arbitration procedure for the unrepresented, so long as it does not violate section 7 in so doing. But the one critical feature that such a procedure would lack is the institutional presence and participation of the employee's representative organization—its expertise, indepen-

64. See Marwell & Oliver, supra note 38, at 101:

[S]imultaneous coordinated action is modeled as an all-or-none contract. The organizer is conceived as asking others to participate in a risk-free agreement to make contributions if enough others also agree. . . . [G]roup members will agree to contribute if the total benefit they would experience from the "contract" exceeds their own share of the cost. . . . [T]he model would . . . apply to any small group whose members have decided to pool their resources and act in concert, as if they were one complex person.


Moreover, the right to participate in the organization’s decision-making, to influence the terms of the bargain, flows exclusively from membership. These lawful differences between members and nonmembers should tend to mitigate the free rider problem.

Last, but of no small significance, nonmajority representation holds open a degree of flexibility arguably better attuned to the contemporary workplace. As the Foreword to this Symposium points out, the Nation is now legislatively committed to a variety of workplace protections, and the common law has recognized employee dignity—reputation, privacy, and emotional well-being—as legally protected interests. But these legislative goals and societal values depend upon the happenstance of administrative intervention or individual litigation for their vindication. If society is serious about realizing them, there would seem to be no more effective means than well informed, adequately financed, and truly independent employee organizations active in the shop or office. Take, for example, the earlier discussion of the emergence of a critical mass of employees concerned only with a single workplace issue such as pensions. Under the Employee Retirement Income Security Act, which regulates both welfare and pension benefits, an employer is under no obligation to inform benefit plan participants of its intention to alter or even to abrogate a benefit, let alone any obligation to bargain with them about such change.

The United States Supreme Court has opined that “employee resistance” is a “significant check” on an employer’s ability to terminate a pension plan; but the Court did not explain how that resistance would be manifested or marshaled. An exclusive bargaining agent would serve to focus and channel that resistance—because pension benefits are a mandatory bargaining subject and because the duty to bargain under the Labor Act requires an employer to bargain to impasse before it may implement a change. What remains to be seen is why employees concerned about their benefits should be given the Hobson’s Choice of only that one model of representation: Why should a group of employees who desire to be informed of impending changes have only the Hobson’s Choice presented to them? The answer is, of course, that they should have a variety of choices.

67. See Julius G. Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916 (1979), and Martha S. West, The Case Against Reinstatement in Wrongful Discharge, 1988 U. Ill. L. Rev. 1, respectively on the significance of unions in the arbitration process, and of a union presence in the workplace to the effectiveness of the arbitral remedy of reinstatement for wrongful discharge.

68. The cases are collected in 1 Howard A. Specter & Matthew W. Finkin, Individual Employment Law and Litigation § 1.80, at 153 (1989).

changes in employer benefits and to negotiate over them, and who notify their employer to that effect, first be required to become the exclusive bargaining agent of an appropriate bargaining unit?

So, too, of information sharing more generally. The Labor Act requires an employer to disclose job-related information in its possession necessary for the employees' agent to deal with terms and conditions of employment as well as with employee grievances. But absent some other law requiring disclosure, an employer need not disclose that information to unrepresented employees. Some employers, for example, keep even their supervisory rules governing discipline and discharge a secret from the employees governed by them. So again, it remains to be seen why a group of employees who desire to know what the rules are should be required first to become certified as an exclusive bargaining representative. Under the instant proposal, all they need do is submit a membership or subscriber list—and ask to see the rules. And if they are able to contribute funds sufficient to retain a lawyer to represent them, there is no reason why their employer should not be required to deal with her.

In addition, nonmajority representation would have the potential of being more responsive than is the current system to the growing use of "contingent" (or "atypical") workers who are hired for short terms of service and who cannot expect to have a permanent or long term relationship with any single employer. On the one hand, the expectation of impermanence (and, in some cases, the lack of even a central workplace for those who are employed to work at home) makes it difficult if not impossible for these employees to secure representation. But on the other hand, these sequential short-term job holders may be most in need of representation. For example, with the acceleration in job mobility—with the growing reality for many entrants to the labor market that they cannot expect to have a career with a single employer for the duration of their working lives—the assumption that

70. This has emerged in litigation on whether the terms so secreted can be contractually binding on the employer. The prevailing view is that they are not. SPECTER & FINKIN, supra note 68, § 1.01, at 6 n.11 (1989).

71. The Labor Act speaks in terms of a "representative" designated or selected by the employees. A statutory representative need not be a labor organization. Under existing law, a majority of a bargaining unit could designate a single person, e.g. a lawyer, as their exclusive bargaining representative.


employees will be assured of post-employment income via a single company's pension plan becomes increasingly unrealistic. The grant of representational rights to occupationally based organizations that automatically represent their members, hired even as contingent workers, and so able to negotiate fully vested and fully portable pension systems would fill a growing and important need.  

This excursion has been unconcerned with the political reality that any legislative reform is highly unlikely unless it holds some tangible benefit to management and to organized labor, however defensible from the point of view of individual employee freedom of choice. Nonmajority representation offers a trade-off to both. Labor would get the benefit of automatic representational rights, but in an arguably more weakened bargaining position vis-a-vis employers. Management would not be able to resist collective representation, at least not by dilatory litigation and election campaigns, but would be given the statutory power to rationalize its bargaining structure under terms that would seem to concede it a commanding bargaining position in most cases. This is essentially the trade-off perceived in the debate over majority rule in 1935 that was acceptable to management but unacceptable to organized labor at that time. It remains to be seen whether it is politically sufficient today. But if "direct indigenous representation" in the workplace is a social good, should nonmajority representation not merit consideration?