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Toward a Theory of Rights for the Employment Relation

Robert Brousseau
TOWARD A THEORY OF RIGHTS FOR THE EMPLOYMENT RELATION

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I. INTRODUCTION

Recent cases¹ from the several corners of labor law leave the impression that there exists in this important branch of the law some confusion as to the nature of the rights and obligations which it treats. There is a clear tendency to deal with the myriad cases ad hoc, in accordance with principles and prejudices drawn from the general jurisprudence rather than under the influence of some overarching conception of the regulation of the employment relation. It is no innovation to remark that we are all the products of our long history. Tradition is our great teacher and our guide: without it we should be lost. As Borges has said in the literary context, there is no attractiveness in originality in a literal sense, for it means simply rootlessness. But tradition can fetter us, indeed mislead us. In fact, the traditions of the law are many and to speak of them as one is an evil this article seeks to avoid, indeed to rectify.

It is my argument that much thinking in the area of labor law has been grafted upon an individualistic stock where it ought not grow; in fact, the considerations embodied in that diverse corpus we call labor law draw heavily upon a tradition of collective jurisprudence, and it is in collective terms that we ought to seek the solution of concrete cases. I shall attempt first to demonstrate the disarray in the treatment of labor rights, to show the origins of the conflict between collective and individualistic traditions, and then to propose a mode of analysis for the reconciliation of competing employment values. Finally, I shall show how the system thus developed fits into the mainstream of labor adjudication, drawing illustrations from the National Labor Relations Board and the courts.

II. THE DILEMMA EXPOSED

I have selected a series of cases which demonstrate the web of inconsistencies which has developed due to the absence of any clearly understood theory of labor rights. The cases fall under four main headings: first,

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¹. See Parts II and IV infra.
those in which the employer confronts the individual employee; second, disputes over communicational rights; third, employer countermeasures to employee activity; and fourth, disputes as to such subjects of social legislation as assurance of a minimum wage, safety or freedom from illicit discrimination. Together they are meant to illustrate, not exhaust, the difficulties in analysis and adjudication under the current, largely unarticulated, conception of labor rights. I shall address them briefly here, and return after a full development of a theory useful to their resolution to discuss them in detail.

A. Employer-Employee Confrontation

The story of Blue Flash Express, Inc. is one long taught in the law schools, but one that happily is waning in impact. The National Labor Relations Act (NLRA) makes it unlawful for an employer to refuse to bargain collectively with the representatives of his employees, and that representative, under section 9 of the Act is the one "designated or selected . . . by the majority of the employees . . . ." Moreover, it is illegal for the employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]. . . ." How does the employer determine if a union indeed represents a majority, for absent such majority status the employer has no obligation to treat with it? Indeed, it would be a violation of the same Act for him to recognize a minority union as the exclusive representative of his workers. The most obvious way is simply to ask individual employees whether they had joined the union. The National Labor Relations Board initially took the position that this practice constituted per se coercive employer conduct illegally interfering with protected section 7 rights, thus recognizing the justifiability of employees' fear when questioned about union affiliation.

"The employee who is interrogated concerning matters which are his sole concern is reasonably led to believe that his employer not only wants

3. See Linden Lumber Div. v. NLRB, 419 U.S. 301 (1974) and text accompanying notes 139-43 infra.
Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities.

Of course, "members only" recognition of a minority union is permitted under the Act. There, the
information on the nature and extent of his union interests and activities but also contemplates some form of reprisal once the information is obtained. The finger which espionage might merely direct to him is actually pointed at him by the inquiry from his employer. He fears that a refusal to answer or a truthful answer may cost him his job."

This sensible position, nonetheless, was overruled by the Board in Blue Flash. The company, having received a letter from the union requesting recognition as the majority representative, systematically interrogated all its employees as to their union affiliation. Its general manager, Golden, summoned the employees singly into his office. In effect he told them that he was indifferent as to their union membership but that he wished to know their status so that he might know how to respond to the union’s recognition letter. Each employee denied to Golden that he had signed any union card, although in fact, every one of them had done so. The Board majority responded to these facts as follows:

"[T]here is no credible evidence that the Respondent at any time made any threats . . . , resorted to any reprisals, or exhibited any antiunion animus. Although the employees who had signed union authorization cards gave false answers to Golden’s inquiries, the Respondent did nothing to afford them a reasonable basis for believing that the Respondent might resort to reprisals because of their union membership or activity."

The Board’s narrow focus upon the employer’s conduct, however, leaves unanswered a question which the facts present and which demands a response: why did they all lie? Had the company somehow hired uniformly mendacious employees? That is an unlikely answer, and so there must be a more satisfactory explanation for the apparent malocclusion between the rationale pronounced and the behavior observed. Regrettably, the Board did not provide one. If behavior is the datum of a social science, then a theory must be found to explain it. It does no good to propound legal principles which on their face are irreconcilable with observed fact.

Another sort of employer-employee confrontation is exemplified by NLRB v. J. Weingarten, Inc. It is unfortunately not easy to introduce the unfamiliar reader to the complexities of Weingarten, for it is but the employer deals with the union not as the exclusive representative of all unit employees, but merely as the spokesman for its members. Retail Clerks Local 128 v. Lion Dry Goods, Inc., 369 U.S. 17 (1962).

8. Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358, 1361, 24 L.R.R.M. 1575, 1576 (1949) (footnote omitted). This opinion drolly quotes, at id., Morgan, Employer’s Freedom of Speech and the Wagner Act, 20 Tul. L. Rev. 469, 499 (1946): “. . . because of the widespread feeling that all employers hate unions, the employee does not expect his admission of union activity or membership to be used as a basis for promoting him or voluntarily giving him a raise.”


last act in a drama which has been running for years, with the Board, the
courts of appeals, and many unions and employers in the cast. Leura Col-
lins was reported by a fellow employee to have purchased a $2.95 box of
chicken but to have placed only $1.00 in the register. Store detective
Hardy summoned Collins and questioned her concerning the chicken. At
several points during the questioning, Collins in vain asked the store man-
ger, who was also present, to call the union shop steward or some union
representative to the interview. Hardy soon discovered Collins was in fact
telling the truth and had taken but $1.00 worth of chicken, and he apolo-
gized. The beleaguered Collins then burst into tears and cried that the
only thing she had ever gotten from the store without paying for it was her
free lunch. This intrigued Hardy and the store manager a great deal, as
they assumed free lunches were against company policy. They thereupon
closely interrogated Collins about her alleged violations of the assumed
company rule, with Collins repeating her request that a shop steward be
called to the interview. Again, her request was denied. Further investiga-
tion showed that Collins was in the right, that store custom was to provide
free lunches to employees and that headquarters had never communicated
any prohibition against it. Leura Collins reported the details of the inter-
view fully to her shop steward and a charge of an unfair labor practice
was filed against Weingarten, the employer, for denying her requests for
union representation.\textsuperscript{11}

The Board agreed with Collins and her union and the Supreme Court
sustained the Board’s position. But observe how the Court arrived at this
not unreasonable result:

The Board’s construction that § 7 creates a statutory right in an employee
to refuse to submit without union representation to an interview which he
reasonably fears may result in his discipline was announced in . . . Qual-

\textit{First}, the right inheres in § 7’s guarantee of the right of employees to act
in concert for mutual aid and protection.

\textit{Second}, the right arises only in situations where the employee requests
representation. In other words, \textit{the employee may forego his guaranteed
right} and, if he prefers, participate in an interview unaccompanied by his
union representative.

\textit{Third}, the employee’s right to request representation as a condition of
participation in an interview is limited to situations where the employee \textit{rea-
sonably believes} the investigation will result in disciplinary action.\textsuperscript{12}

This is odd language indeed. The Court suggests that the right to repre-

\textsuperscript{11}. The summary of the facts is taken from the majority opinion. \textit{See id.} at 254–55.
\textsuperscript{12}. \textit{Id.} at 256–57 (emphasis added except for words "\textit{First}," "\textit{Second}," and "\textit{Third}") (foot-
note omitted).
sentation depends on the reasonableness of the employee's fear of punishment. Paradoxically, the Court in the same opinion gives us language which is formalistically reconcilable but in fact completely inconsistent with this notion of reasonable fear: "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." Evidently there is a fastidiously precise threshold of fear, which, becoming "reasonable," renders one "too fearful or inarticulate to relate accurately the incident being investigated," thus triggering a section 7 right in the employee. And yet we are told that this ignorant, fearful and inarticulate employee may intelligently and effectively waive this right. This is not merely paradoxical, it is absurd. Again we confront legal precepts which seem at odds with industrial reality, and reality, whether good or ill, is not easily pronounced wrong. Because the right in Weingarten is created ad hoc without a theoretical matrix to understand it, it can scarcely satisfy.

B. Communicational Rights

Employees, it is said, have certain communicational rights in the workplace, guaranteed by section 7 of the National Labor Relations Act, rights which came before the Supreme Court in NLRB v. Magnavox Co. The facts are tidy and the opinion terse, but there is much there to mull over. In 1954, the International Union of Electrical, Radio and Machine Workers became the collective bargaining representative of Magnavox's employees and executed a labor agreement with the company including in it clauses which, as implemented, prohibited employees from distributing literature even in nonworking areas during nonworking time. The Court, in an opinion by Mr. Justice Douglas, observed obiter that the prohibition violated the important section 7 right of employees to "form, join, or assist labor organizations" or "to refrain" from such activities. While the importance of communicational rights at the workplace—the right of workers to discuss other rights in the area of common meeting and collective concern—was emphasized by the Court, whether the contractual prohibition which the union now sought to change was in violation of section 7's communicatory rights was not before the justices.

13. Id. at 262–63.
14. See note 6 supra.
16. Id. at 323.
17. Id. at 324.
18. Id. at 323–25 (citing with approval the Board's Gale Products, 142 N.L.R.B. 1246, 53 L.R.R.M. 1242 (1963) (a waiver case); Peyton Packing Co., 49 N.L.R.B. 828, 12 L.R.R.M. 183 (1943); and its own Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945)).
"The sole issue concerns the power of the collective-bargaining representative to waive those rights." In short, the Court said the union had no power to waive these section 7 rights, although the power of a union to waive so fundamental a right as the right to strike is easily accepted. How is this paradox to be resolved? Where lies the distinction between the nonwaivability of the modest right to handbill on one's working premises and the waivability of the elemental labor right to strike? Absent some articulation of a theory of rights, the readers of this case are at a loss to derive any usefully broader principle from it than its narrow holding. If law is to be at all predictive, we are entitled to more.

C. Employer Responses to Concerted Activity

There is a decision of the Board the difficulty of which is not displayed by the simplicity of its teaching: that a union, in negotiating in good faith a strike settlement agreement, may substantially curtail an employee's preferential recall rights, or Laidlaw rights, assured under theretofore unquestioned interpretations of section 8(a)(3) of the NLRA. After all, reasoned the Board in United Aircraft Corp., if management may unilaterally preclude reemployment of economic strikers for legitimate and substantial business reasons, then certainly reinstatement claims may be adjusted by mutual accord of management and the union. The paradox of this particular decision is this: If section 8(a)(3) is designed to insulate the individual employee from employer discrimination against him for having asserted his rights (here, to strike) under the NLRA, which is the common understanding, it seems irrelevant that the union concurs in the discrimination. Certainly no parallel precept exists in the law of race dis-
Moreover, there is a strong textual argument against the *United Aircraft* result, since section 8(b)(2) of the same Act makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of [section 8] (a)(3). . . ." 26 Hence it is lawful to do together that which is unlawful if done by either. Here the dilemma seems to be not so much a misalignment of theory with behavior, but the use of a legal duty to enforce a social desideratum to which it is unrelated, or more properly noncorrelative. Because the courts have no theory of rights for labor law, the correlative uses of the concept of duty fail as well.

D. Labor Standards and Equal Employment Opportunity

Four cases in the area of social legislation also demonstrate the need for a theory of labor rights. Two involve racial discrimination and two involve minimum wage or overtime claims.

Harrell Alexander, a black man and a drill operator in the employ of Gardner-Denver Co., was fired, ostensibly for producing too many defective or unusable parts. 27 The collective agreement between his union and his employer provided that "[n]o employee will be discharged, suspended or given a written warning notice except for just cause," and that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." 28 Alexander filed a grievance pursuant to a clause covering "differences . . . as to the meaning and application of the provisions of [the] Agreement" and "any trouble arising in the plant." 29 His grievance was simply that "I feel I have been unjustly discharged and ask that I be reinstated with full seniority and pay," 30 although it was later modified to assert a claim of improper racial motivation. At the arbitration hearing, Alexander testified that his discharge was the result of racial discrimination, but the arbitrator sustained the company's action. Alexander subsequently filed a private action under Title VII of the Civil Rights Act of 1964, 31 alleging that his discharge was a racially discriminatory employment practice. The com-

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25. See, e.g., Papermakers, Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969).
28. Id. at 39.
29. Id. at 40.
30. Id. at 39.
pany pleaded the arbitral award as a bar to Alexander’s private action, and the trial court entered a dismissal subsequently affirmed by the court of appeals. The Supreme Court in *Alexander v. Gardner-Denver Co.*, reversed. Title VII, the Court said, “concerns not majoritarian processes, but an individual’s right to equal employment opportunities. Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. . . . The actual submission of petitioner’s grievance to arbitration . . . does not alter the situation.”

Decided the following term, however, *Emporium Capwell Co. v. Western Addition Community Organization*, took a less sweeping view of the right to be free of racial discrimination. In that case, the company and union were parties to a contract prohibiting racial discrimination; in fact, the union was actively pursuing complaints of racial discrimination and had appointed a special investigating committee, prepared reports, and convened special meetings with the employer, the employer’s collective bargaining association, the California Fair Employment Practices Committee and an antipoverty agency. When the grievances came to arbitration, two employees, Hollins and Hawkins, refused to participate, demanding to deal directly with the company president. Soon thereafter they held a news conference denouncing the employer and engaged in a consumer picket urging customers not to patronize their employer. They were fired. The Court, upholding a Board finding of no employer violation of section 8(a)(1) of the NLRA, stated that the employees’ argument that their conduct was protected concerted activity under section 7 “confuse[d] the employees’ substantive right to be free of racial discrimination with the procedures available under the NLRA for securing these rights. . . . [T]hey cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA.” Contrary to its language in *Gardner-Denver*, the Court observed that “the elimination of discrimination . . . is an appropriate subject of bargaining. . . .” Thus the “absolute right” to be free from racial discrimination announced in the first case apparently evaporated in the second.

An employee’s right to a minimum wage and overtime pay under the

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32. 466 F.2d 1209 (10th Cir. 1972).
34. *Id.* at 51–52.
37. 420 U.S. at 69.
38. *Id.* (emphasis added).
The complaining employees, however, chose to bring suit individually under the Fair Labor Standards Act for pay due them for hours worked under that statute. The unsettled question in the case, the court of appeals noted, was "whether an individual employee seeking to assert his statutory rights under FLSA must exhaust grievance procedure [sic] before seeking judicial resolution." It held that he need not.

Conceding the broad presumption in favor of arbitrability created by the Steelworkers Trilogy and that the presumption even extended to labor standards disputes, the court of appeals nonetheless found that the employee could not be denied his statutory remedy. The court cited Alexander, and found its "underlying rationale" controlling.

Contrast the opinion of another court of appeals in Satterwhite v. United Parcel Service, in which the collective agreement contained a

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40. The so-called "walkaround" provision of the Occupational Safety and Health Act of 1970, § 8, 29 U.S.C. § 657(e) (1976) provides: "Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . ."
41. This clause read: "Disputes as to the interpretation of or an alleged violation of the application of the terms of the Agreement, or as to working conditions . . . shall be considered a grievance . . . ." 523 F.2d at 1156 n.3.
42. The court of appeals expressly declined to resolve the issue, as its decision on the requirement of exhaustion rendered it unnecessary. 523 F.2d at 1159.
44. 523 F.2d at 1155.
46. 523 F.2d at 1156 (citing Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974)).
47. The court relied on U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971), where the Supreme Court held that exhaustion of grievance procedures was not required before a seaman might sue under 46 U.S.C. § 596 (1976), regulating the payment of maritime wages.
grievance and arbitration procedure similar to the one in *Leone*. The employer eliminated two fifteen minute coffee breaks and the union grieved. The arbitrator held that the company could not unilaterally eliminate the coffee breaks and that the affected employees were entitled to a half hour of pay for each day worked during the disputed period. The parties jointly requested a clarification: should the employees be paid the additional half hour at straight time or at time and a half, for overtime pay? The arbitrator, in what the court of appeals termed a *compromise*, ruled that straight-time wages be paid.\(^4\) Subsequently, the employees brought suit under the Fair Labor Standards Act for the overtime pay provided for by that act for hours worked in excess of forty. The employer pleaded the arbitral award as a defense, the trial court dismissed, and the court of appeals affirmed. Observe the effect of this: the employees ended up being paid one-third less, arguably, than the black letter of the act requires. Have we, in Professor Cleary's words, turned "pumpkins into coaches and one man's property into another's"?\(^5\)

III. THE THEORY DEVELOPED

The foregoing procession of cases exposes the problem: if a "right" is sometimes good and sometimes not, if this "right" may be waived but another not, then the meaning of rights within the employment relation becomes obscure and the duties correlative to them equally so. We run, moreover, the risk of cheapening whatever social and economic values those rights assume, the values they should assure and preserve. I propose to develop here at least a prolegomenon to a theory of rights for the employment relation.

A. *The Context of Employment Rights*

When we speak of the employment relation, we are speaking of a relation of power.\(^5\)\(^1\) With few exceptions, this power relation was historically one-sided. All rights were in the hands of the employer and whatever rights the employee found himself possessed of, he had by the grace of his master. The only right which the employee had by virtue of his own birth and legal position was the coldly analytical right not to work, of which the correlative was the duty of others to let him starve if, bizarrely, he should choose to assert the right. Such a cruel right is not a right at all, or one only in the Pickwickian sense. This simple master-servant relation-

\(^4\) 496 F.2d at 449.


ship, sketched quaintly but with heartless effect by Lord Abinger in *Priestly v. Fowler*, had already begun to pass from the scene before which our Anglo-American law was unfolding. The chambermaid and the chilly bed were even then minor characters. The focus of life had shifted to the railway, the mill, the plant and the colliery, to the worker who would never know a human employer. Nevertheless, the law of contributory negligence, assumption of risk and fellow servant were late-born and sired by men who thought of cloggers when they should have thought of capital. Capital had grouped and regrouped, and massed itself into power agglomerates, assisted by the law's grant of juristic capacity, in the form of the corporate personality. "Law has set up moral ideals for business and dressed huge organizations in the clothes of small individuals."

If the employment relation had always been an uneven power struggle, it had at least been one between men, and there is a sense of equality, if only physical or moral, which flows therefrom. Now, however, it was men, with the simple need to sustain self and family through their finite days, faced with the corporate employer possessed of relatively infinite resources and, godlike, of eternal life. If this picture is painted in garish tones, it is done so because lawyers and judges have in large measure been exempt from the more obvious forms of subjugation to massed capital. It is true that Felix Frankfurter and Nathan Greene in 1930 called attention to it in stark images; Thurman Arnold did so too, if less directly. As a class, however, lawyers little realize the slowness with which legal institutions permitted massed labor to compete with massed capital, and the systemic bias operating against such recognition. It took an act of Congress in 1947—even then a bill designed to curb labor union

52. 150 Eng. Rep. 1030 (Ex. 1837). The famous quotation of Lord Abinger, portraying the horrors should the servant prevail at suit, follows:

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. . . . The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

The inconvenience, not to say the absurdity of these consequences, affords a sufficient argument against the application of this principle to the present case.

_Id._ at 1032.


54. Both of these common law defenses are commonly traced to Abinger's judgment in *Priestly v. Fowler*. See W. Dodd, _Administration of Workmen's Compensation_ 2–6 (1936); W. Malone, M. Plant & J. Little, _The Employment Relation_ 2–3 (1974).


56. F. Frankfurter & N. Greene, _The Labor Injunction_ (1930).

57. _T. Arnold, supra_ note 55.
excesses—to assure labor organizations juristic capacity in the courts of the United States.58

Lawyers and judges will err if they forget two qualities inherent in the employment relation. First, the law of labor relations is designedly and necessarily anti-individualistic. The collective interest is made paramount and seldom should an individual interest be able to outweigh a countervailing one of the labor collective. Second, justifiable employee fear is the obligato which plays beneath even the most harmonious of labor relations. Unlike the Japanese and to some extent the Chinese, we have built our economic system on a foundation largely inimical to job security. Whether one likes it or not, American labor law is a codification of economic insecurity, of fear.59 Through the harsh lessons of experience, laborers as individuals have come justifiably to fear management as a collective.60 The lion can indeed be made to lie down with the lamb, but only when the law has acknowledged the justifiability of individual employees' fears and given them the right, even encouraged them, to pool their efforts as the entrepreneurs do their dollars, to square off as a labor collective coequal with the capital collective with which it works in the productive enterprise.61

The American system of labor relations is often spoken of as a legally sanctioned system of industrial government with its own constitutional,

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58. Taft-Hartley Act, tit. III, 29 U.S.C. § 185(b) (1976), provides:
Any labor organization which represents employees in an industry affecting commerce . . . . shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States.

59. See the opinion by Taft, C.J. in American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921), for an early recognition of this fact. See also F. FRANKFURTHER & N. GREENE, supra note 56, at 172–73.

60. Fortunately, in contradistinction to many European and colonial nations, individual relations are as likely as not to be cordial, for, with exceptions made for our racial past, we lack the bitter class divisions which so evidently undergird labor relations elsewhere.

61. On balance this seems desirable, or at least as desirable as the traditional historical alternative. Thurman Arnold, however, has aptly noted how we have allowed our institutions to define our options:

The labor legislation of the New Deal showed the same confused difference [sic: deference?] to ancient ideals. A man from Mars might be of the opinion that an orderly government should not permit pitched battles over wages, to the loss and suffering of entire communities, any more than it would permit public disorder over the payment of debts, or the settlement of any other civil litigation. However the notion of compulsory arbitration was as uncongenial to labor as it was to capital. The great labor organizations grew up as fighting and bargaining organizations. Compulsory arbitration would destroy their purpose by taking away their power to call strikes. Collective bargaining fits in with the accustomed habit of a series of labor wars and armed truces, which is the way we think of a dispute over wages as opposed to a dispute over a debt. Therefore, collective bargaining is the pattern which labor legislation has been compelled to take.

T. ARNOLD, supra note 55, at 115–16 (emphasis added).

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Theory of Employment Rights

statutory, customary and adjudicatory law.\textsuperscript{62} For all the surface appeal of treating industrial government as equivalent to political government, the analogy is an imperfect garment and suffers extended wear unsatisfactorily. There are, to be sure, useful analogies to be made; moreover, it would meet with universal agreement to state that political government and industrial government often intersect, that there are dependencies and interdependencies at play. Industrial government arose in a legal context in which regulation of the employment relation was assigned by government, consciously or not, to droit privé, to private law, that individualistic reciprocal scheme of enforceable rights and duties of private individuals among themselves. It is our duty to examine to what extent the increasingly public law orientation of employment regulation has affected the jurisprudential environment of labor law adjudication.

The heated debate which surrounded the ill-fated Labor Reform Bill of 1977\textsuperscript{63} is instructive. It was asserted there, as often it is, that government is or should be neutral in matters of labor relations, that government favors neither the individual nor labor collective but rather stands apart; and even that, drawing upon our ancestral heritage, it prizes individualism on all accounts. Despite the force of this rhetoric, government does neither; it has on the contrary acted vigorously to disestablish the individualistic regime of labor rights, and to substitute a collective principle in its stead.

B. The Chimera of Governmental Neutrality

Government, for our purposes, is that organ or congeries of organs which customarily establishes rules and exacts sanctions within a territorially defined community of persons recognized by individuals both within and without the territory as entitled so to act.\textsuperscript{64} This is the state, government and sovereignty lumped into one, for the distinctions which have bedeviled commentators with respect to the nature and origins of state and sovereignty touch only slightly if at all upon the possibility or desirability of its neutrality. In the area of labor regulation, it is the posi-


\textsuperscript{64} So far, I have not strayed far from Kelsen. See H. Kelsen, General Theory of Law and State 110–22, 207–10 (1945).
tive law of the government, its voice heard through its legislation, its executive and administrative acts of regulations, and its judicial dispositions, which are of interest. By positive law, too, I mean law in a sense wider than that sometimes acknowledged: I do not here debate the necessity of sanction in a legal order, but rather credit with legal significance what others deem only of "moral" stature, that is, the statement of government made in accordance with the procedure normally invoked for passage of sanction-bearing enactments. There are statements without ostensible sanction which yet play an active part in the legal system. These are the "pious utterances" sometimes referred to; to those more favorably inclined toward them, they are the proclamations and preambles said to put the "moral authority" of the government behind some proposition, although it is not altogether clear what this means. Kelsen himself more than once addressed the possibility of "sanctionless" norms, and while his ultimate position is unclear, to the extent he placed sanctions on a continuum between "legal" and "transcendental" (essentially reli-

65. By "positive law" I mean governmentally pronounced law in its broadest sense, which will be defined momentarily. I use the term simply to distinguish its referent from natural law, moral law, physical law and the like.

66. That is, I take it in the broadest sense it can bear, limited only by the stricture that it issue directly from a recognized organ of rulemaking or adjudication acting pursuant to procedures recognized by it and by the governed as usually, if not always and in every detail, entitled to respect and obedience.

67. See Oberdiek, The Rule of Sanctions and Coercion in Understanding Law and Legal Systems, 21 AM. J. JURIS. 71 (1960). In any event the role of sanction can well be overstressed. There is much in T. H. Green's observation that the basis of the state is will, not force, a theory I take to be currently démodé. Perhaps the two schools are not so far apart as they appear; in fact, Green remarks:

On the other hand, when the power by which rights are guaranteed is sovereign (as it is desirable that it should be) in the special sense of being maintained by a person or persons, and wielding coercive force not liable to control by any other human force, it is not this coercive force that is the important thing about it, or that determines the habitual obedience essential to the real maintenance of rights. That which determines the habitual obedience is a power residing in the common will and reason of men, i.e. in the will and reason of men as determined by social relations, as interested in each other, as acting together for common ends. It is a power which this universal rational will exercises over the inclinations of the individual, and which only needs exceptionally to be backed by coercive force.

T. Green, Lectures on the Principles of Political Obligation 103 (1895). See id. at 121-41. Green's requirement of "habitual obedience" is reconcilable with Kelsen's position although Kelsen rejects the notion that either a concept of will or one of coercion can be the basis of a state. See H. Kelsen, Theory of Law and State 61-62, 117, 184-85 (1945); H. Kelsen, Pure Theory of Law 10, 212-13 (1967). See also Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 603 (1958) ("Law is surely not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion.").

68. The social order can, however, even without promise of an advantage in case of obedience, and without threat of a disadvantage in case of disobedience, i.e. without decreeing sanctions, require conduct that appeals directly to the individuals as advantageous, so that the mere idea of a norm decreeing this behavior suffices as a motive for conduct conforming to the norm. This type of direct motivation in its full purity is seldom to be met with in social reality.

In the first place, there are hardly any norms whose purport appeals directly to individuals
sanctions, I should simply place my dividing line slightly beyond his, maintaining his characterization of "legal" over a greater range of norms. Some "sanctionless" norms carry the indirect sanction of placing the person whose conduct is sought to be regulated in a less favorable legal posture.

For example, the Occupational Safety and Health Act of 1970 adjures that "[e]ach employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct." Failure of an employee to comply with these voluminous standards leads him to no pain or penalty, civil or criminal. To be sure, the penalty for violation may be discharge by the private employer and the provision accordingly carries a "sanction" in Kelsen's "direct," economic or moral sense of the word. But to taint the norm as nonlegal because the sanction is nonlegal is to subvert the ordinary understanding of law. If we say that this prohibition is not a law, would we say that employee conduct in contravention of it is legal? I suggest not: it is the intent of the provision that the conduct be deprived of any aura of legality it might otherwise have, that it be specifically illegal so that an agent who is caught in the act will be in flagrante delicto.

The law is a complex interrelationship and the characterization of an act in abstracto as legal, as governmentally favored, may trigger reactions in other relationships different from those which might occur if the

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69. "The sanctions provided by the social order itself may have a transcendental, that is, a religious, or a social-immanent character." H. Kelsen, General Theory of Law and State 15-16 (1945); see H. Kelsen, Pure Theory of Law 27-30 (1967).

70. 29 U.S.C. § 654(b) (1976).

71. This conclusion must be reached by induction, from reading the penalty provisions in § 17 of the Act, 29 U.S.C. § 666 (1976), which apply to employer violations of these standards and of his general duty under 29 U.S.C. § 654(a)(1) (1976).
opposite characterization had been attached. Kelsen, speaking of the United Nations Charter, observed that a “statement has normative character even if it may be used only for the purpose of interpreting other statements having the character of true norms.”

 Appropriately-proclaimed statements of governmental position may be of independent legal significance and must be taken into account when discussing the legal relationships upon which they bear. Governments take positions and those positions necessarily influence the nature and operation of the legal order. Congress has spoken extensively upon labor relations; any single normative or sanction-bearing provision of these enactments, stripped of jurisprudential context, may appear nakedly individualistic and devoid of any new teaching as to the one and the many. If one looks, however, at the whole of its pronouncements, the government has in this sphere altered the traditional orientation of our legal system away from the individual and toward the group.

 It cannot be gainsaid that the notion of neutral or nonpartisan government has always been an appealing one in history and literature. One cannot but praise the ideal of a government aloof from the petty caprices which sway men’s minds, which stands for principled legislation for the common weal, for adjudication as unerringly impartial as blindfolded Justice. However, neutrality as a unitary concept is, like many immediately appealing phenomena, an oversimplification. The hollowness of any principle of neutrality of government is shown by demonstrating that the component elements of the concept, neutrality and government, are irreconcilable. There are, perhaps, certain philosophies which stress the minimal or even nonexistent role of government in man’s attempt to determine and attain the ends of human existence. Among the ancients are the Cynic and the Cyrenaic conceptions; yet only the Cynic need detain us, for the Cyrenaic needed the government to supply the wants necessary to his good. It is the Cynic of Diogenes, indifferent to the laws and governance of men, and the anarchist among the moderns, hostile rather than indifferent, who make it uneasy to declare the unanimity of political philosophy that governments are purposive. Unanimity, however, is a small virtue. Plato, it may quickly be said, would have viewed neutrality

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72. Certain legal circumlocutions may attempt this straddling of categorical legality. One “decriminalizes” the possession of marijuana rather than legalizes it. Not dissimilarly, one “deregulates” the price of natural gas or the pricing of airfares.


of government as folly.\textsuperscript{75} Aristotle, too, saw the state as the instrument of the attainment of the ethical weal of the community.\textsuperscript{76}

"Nonpartisan" government is worse than a paralogism, for even if it were logically feasible, it would not be the goal of normal men: it is a political verbalism which can only confuse. In fact, "governmental non-partisanship" is itself not a negation of partisanship but rather an affirmation of it by groups traditionally having influence in government, Kahn-Freund's "bearers of power."\textsuperscript{77} In short, I want government to stay out of my affairs, but not necessarily out of yours. Often, I affirmatively desire governmental intervention in your affairs, whatever my motives, pure or grasping.\textsuperscript{78} Our word "govern" comes to us from the Latin \textit{gubernare}, to steer. Etymologically it suggests that all government aims at directing the \textit{corpus politicum} and the concerted activities of those within it. It is not by accident that we speak of the ship of state.\textsuperscript{79}

How then has the vision of the neutrality of government come down to us? If one looks at those familiar images of impartiality, of the three Fates and their anonymous threads, of blind Justice and her anonymous balance, of Solomon and his wise adjudication, the theme is clear. It is not the purpose which must be impartially arrived at, but rather the means of execution which we would have impartially applied. Thus while liberals do their best to prevent the passage of laws deemed beneficial not to their own interests but to those they identify with conservatives, they do not think it, without more, wrong that conservatives seek legislatively to impose their own view of things. Members of all factions would, however, decry any attempt by the government in any of its branches of authority, once having proclaimed its goals, to seek a broader—or more to the point of this article, a narrower—application of them by partisan administration or interpretation of the laws. It is this concept of the impartial application of "legitimated partisanship" which is the stuff of the citizen's

\textsuperscript{75} \textit{Id.} at 126-27. Plato’s blueprint for his highly directive state is found in his \textit{The Republic}.

\textsuperscript{76} W. Windeband, \textit{supra} note 74, at 152.

\textsuperscript{77} See text accompanying note 89 \textit{infra}.

\textsuperscript{78} Benjamin Constant did observe:

In the matter of opinion, of beliefs, of insights, \textit{there will be complete neutrality on the part of government}, because the government, composed of men of the same nature as those they govern, no longer has anything but incontestable opinions, undoubted beliefs and infallible insights. . . .

Such is, I think, the social state toward which the human species is beginning to move. To attain that social state is the need of, and accordingly will be, the destiny of the epoch. To want to remain short of it would be unwise; to go beyond it would be premature.

B. Constant, \textit{Le Libéralisme}, in \textit{Adolphe et Œuvres Choisies} 243 (1914) (author’s translation) (emphasis added). The remark is utopian by its own terms and a reading of the corpus of Constant’s work will show him no exception to my rule.

\textsuperscript{79} Indeed \textit{gubernare} was a nautical term; \textit{gubernaculum} meant the rudder of a boat.
desire that his government be neutral: it is at the heart of the notion of justice, a necessary if not a sufficient condition of the just. Fuller's attempt to give an internal morality to law is an extrapolation from this basic premise. In denying any role to neutrality of purpose, one need not, however, deny a large role to principled purpose: any government can become too partisan. This concession of the desirability of benevolence of purpose, nonetheless, does not suggest that a government ever can be relieved of its essential task of goal-directed regulation of human relations. Thus, there are fundamental decisions a government must make: to take this course of action and improve the lot of the working man, or to pursue that path and aid the stability of business or capital formation. The one need not exclude the other: often multiple goals, even apparently conflicting ones, may be served by the same governmental act.

It is the determination of and striving after goals identified at least transitarily as the common weal which is the first principle of government, its prime duty. Without this purpose, governments should cease to be necessary. But governments are for all practical purposes unwieldy committees rather than doctrinaire autocrats; they act not out of ignorance of that which they wish to achieve, but rather out of compromise, resolution or expediency. Difficulty in the articulation of goals should not be confused with an absence of them. And in this articulation there is a danger: that the new will not be seen as new, but simply be construed as a trifling refinement of the old and the familiar. The systematization of positive law is necessarily a product of hindsight and there is no Delphi for the interpreter of laws.

A conscious realignment of the American legal system's treatment of the labor combination began early in this century, even drawing on earlier statutory and industrial experience with the capital combination. These basic enactments, some simple declarations, others clear commands, affirmatively endorse the labor combination, create the collective principle and give birth to certain labor rights which we shall later classify as collective, participatory or individual. All of these acts in some way directly affect employee-employer relations. The Landrum-Griffin Act of 1959 is of a different nature, for it regulates the relation of the individual to his collective, that is, of the member to his union. It is, in fact, the

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Theory of Employment Rights

product of a collective system already established by the earlier legisla-

tion.

C. The Principle of Collective Liberty

A review of the labor enactments of this century reveals a degree of
redundancy uncommon even in legislation. The mere right of labor, how-
ever, to collectivize or to "combine" for mutual aid and protection, in
spite of the clear language of the 1914 Clayton Act, was resisted even as
against a willing Congress, by tradition-bound courts. The history of
the right's ultimate legal vindication is well-written elsewhere and there is
no need to repeat it here. The right to combine is now recognized, but to
state that is to state the obvious. What is more important is the affirmative
shift in the legal context, from an individualistic private law orientation,
to a public law system of conflict adjustment among competing units of
social and economic aggregation. It is now the policy of the United States
to encourage labor collectivization. This is not neutrality in any quoti-

84. The labor of a human being is not a commodity or article of commerce. Nothing con-
tained in the antitrust laws shall be construed to forbid the existence and operation of la-
bor organizations, instituted for the purposes of mutual help, and not having capital
stock or conducted for profit, or to forbid or restrain individual members of such organiza-
tions from lawfully carrying out the legitimate objects thereof; nor shall such organizations,
or the members thereof, be held or construed to be illegal combinations or conspiracies in
restraint of trade, under the antitrust laws.

added).

85. The case which eviscerated the language of the Clayton Act intended to immunize labor
combinations from antitrust attack was, of course, Duplex Printing Press Co. v. Deering, 254 U.S.
443 (1921), from which Justice Brandeis dissented in an opinion joined by Justices Clarke and
Holmes. Small wonder as to Holmes, a vox clamantis since his dissenting opinion in Vegelahn v.
going on so fast, means an ever increasing might and scope of combination. It seems to me futile to
set our faces against this tendency." See also F. Frankfurter & N. Greene, supra note 56, at
167–76 (1930).

86. See, e.g., R. Gorman, Basic Text on Labor Law, Unionization and Collective Bar-
gaining 1–6, 240, 621–24 (1976); C. Gregory, Labor and the Law 95–104 (1961); 18 T. Kheel,

87. This policy was expressed in the Wagner Act of 1935, § 1, 29 U.S.C. § 151 (1976):
The inequality of bargaining power between employees who do not possess full freedom of
association or actual liberty of contract, and employers who are organized in the corporate or
other forms of ownership association substantially burdens and affects the flow of com-
merce.

Experience has proved that protection by law of the right of employees to organize and bar-
gain collectively safeguards commerce from injury by restoring equality of bargaining
power between employers and employees.

It is declared to be the policy of the United States to eliminate the causes of certain substantial
obstructions to the free flow of commerce by encouraging the practice and procedure of
dian sense. It is the shift of the focus in which we define liberties, from the individual to the group. We there see the emergence of collective notions of liberty.

Kahn-Freund illustrated the inevitability of the emergence for the common worker of the principle of collective liberty in the industrial age. The individual employee, he said, normally has no social power because normally he has no economic bargaining power. Typically the worker as individual must take what conditions the employer proffers. Hence, Kahn-Freund asserted that on the labor side, power, if it is to exist, is necessarily collectivized power:

The individual employer represents an accumulation of material and human resources, socially speaking the enterprise is itself in this sense a "collective power." If a collection of workers . . . negotiate with an employer, this is thus a negotiation between collective entities, both of which are, or may at least be, bearers of power. But the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination . . . . The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent . . . in the employment relationship.

collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.


The public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

ld. (emphasis added).

88. O. KAHN-FREUND, supra note 51, at 7–11.

89. Id. at 8 (emphasis added). Although I do not believe it diminishes the applicability of the quoted passage, it should be noted by the American reader that the British have a relation between collectives which is in more than one reading of the word, foreign to our own. Kahn-Freund elsewhere, in his 1967 Martin Lectures, observed:

A collective agreement can, of course, operate as a legal contract between the parties who made it, that is, between the union or unions on one side and whoever is the party on the employer's side, whether individual firm or association. A collective agreement can also operate as an enforceable code for the industry to which it applies so that in one form or another it is law between individual employers and employees and regulates their individual contracts.
With these observations Kahn-Freund reminded us that our strongly individualistic feelings are more troublesome in application than the mere statement of them might indicate, that individuals are not simply individuals and nothing more, but are parts of social wholes; and that human, and thus legal, relations, rather than being linear and dualistic are multidimensional and molecular. Charles Frankel explored the subtleties of our inherited traditions of rights and perceived a tension in another context which Kahn-Freund observed in the employment relation. Frankel detected a strain in our contemporary legal attitude toward liberty between rights and liberties of the individual on one hand, and those of social groups “to maintain the communal life they desire,” on the other. Drawing upon Benjamin Constant’s perceptive distinction, he identified a conflict between “the liberty of the ancients,” that is, political liberty, the right to participate in the public power and enforce the collective will, and “the liberty of the moderns,” the peaceful enjoyment of private independence. While prizing our legal system’s concern with the rights of the individual as against the group, he nonetheless asked whether there are not notions of collective liberty, of “men in their capacities as members of groups to make laws for themselves without outside interference—to which our contemporary jurisprudence should give more attention.” No solution entirely on one side or the other, Frankel wrote, will be satisfactory. “But it is desirable to be aware of the face that the tension between the One and the Many . . . is not a tension between liberty

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Regarding the first, the contractual, effect [the British] situation is interesting. It is almost universally agreed that in Great Britain collective agreements are not legal contracts, and the reason which I suggested many years ago and which has been widely accepted is that one of the essentials of contract making is absent: this is the intention to create legal relations. That intention to create legal relations does not exist although there is nothing to prevent the parties from making their agreement into a legal contract, and it has happened, for example in the boot and shoe industry. But this is the exception: the rule is that this is an agreement creating norms of positive morality, in the language of John Austin, moral obligations but not legal obligations. This is another part of the heritage of the Industrial Revolution.

O. Kahn-Freund, Labour Law: Old Traditions and New Developments 24–25 (1968) (footnotes omitted). His explanation of this striking difference between American and British labor law was explored illuminatingly in the first lecture of this volume, where Professor Kahn-Freund demonstrated that while English and American labor relations both involve competing collectives, the former are more political-economic while the latter are more legal-economic. Id. at 3–28.


92. See B. Constant, De la liberté des anciens comparée à celle des modernes, in Adolphe Et Oeuvres Choises (1914).


94. Frankel, supra note 91, at 612.
pure, simple, and beautiful one one side and something else which is not liberty. It is a tension between different liberties. . . .”

Since true individual liberty in the employment relation results only when the individual employee is part of a power collective, a “‘bearer of power’” in Kahn-Freund’s words, one may usefully analyze legal relations in the labor sphere in terms of Constant’s ancient, or collective liberty, but with certain modifications to assure that its own peculiar dangers (which Constant himself foresaw) will, effectively as possible, be avoided. Constant described ancient liberty as exercising collectively, but directly, many of the elements of sovereignty: “to deliberate in public places, both as to war and to peace, to conclude treaties of alliance with foreign peoples, to vote the laws, to pronounce judgments, to examine the accounts, the acts, the conduct of affairs of public officials, to make them appear before all the populace, to accuse them, to condemn them or absolve them.” And yet alongside this conception of collective liberty, the ancients would acknowledge “the complete subjugation of the individual to the authority of the whole.” “Hence among the ancients, the individual, sovereign almost habitually in public affairs, was a slave in all his private relations. As citizen, he decides war and peace; as individual, he is circumscribed, observed, repressed in all his movements . . . . Among the moderns, on the other hand, the individual, independent in his private life, is even in the most free of states, sovereign only in appear-

95. Id. at 612–13.
96. The piece to which Professor Frankel refers is B. CONSTANT, De la liberté des anciens comparée à celle des modernes, in ADOLPHE ET OEUVRES CHOISIES (1914). The address by Constant was delivered in 1819.
97. Id. at 159 (author’s translation).
98. Id. Constant says “l’assujetissement complet” (author’s translation). See also the enlightening treatment by Professor Kahn-Freund which corresponds to his earlier analysis, quoted in text accompanying note 89 supra:

Countervailing labour power is not synonymous with trade union power, but even if it were, the problem would be exceedingly complex. Who has the rule-making power and the decision-making power inside the trade union movement and inside a given union? The problem is strictly analogous to the corresponding problem on the management side. Here, on the union side, we also have a relation of subordination, of command and obedience, and necessarily so. How far then, is the subordination of the individual union member to union’s rule and decision-making power mitigated by his share in the making of these rules and of these decisions? How much reality is there in the democratic right of members to participate in these processes? . . . A trade union shares with a company or a government department or a county council the quality of being a collective unit, and whether the law treats it as a corporate person in the technical sense is irrelevant in this context. By saying that a collective entity exercises social power you have said very little until you have also said who (that is which individuals) have that power inside the collective unit. . . . An analysis of the impact the law has on labour relations is only a fragment unless it takes into account the internal structures of the trade unions and of the trade union movement as a whole, . . . . between unions and their officers and branches, above all between unions and their members.

O. KAHN-FREUND, supra note 51, at 11–12 (emphasis added).
ance. His sovereignty is confined, almost suspended. . . ."99 Lest Constant sound harsh, one must read on, for it was the purpose of his essay to show that a unitary conception of the notion of liberty can lead to the total suppression of valuable rights; that liberty as a multifarious concept is susceptible to multifarious threats.

Because individualistic liberty differs from collective liberty, it followed for Constant that it is threatened by a different sort of danger. The peril of individualistic, or modern, liberty is that in becoming absorbed in the enjoyment of private independence and in the pursuit of our individual interests, we shall renounce too easily our right to share in political power.100 And conversely, it is the danger of collective liberty that, ever watchful to assure the sharing of social power, we may sell "too cheaply individual rights and enjoyments."101

D. Collective Liberty in the Employment Relation

These words contain a lesson for the employment relation. They are a statement of the collective principle, the ancient conception of liberty regenerated by economic and industrial necessity in the present age, which constitutes a change of the focus of liberty from the individual to the whole, with the added element which Constant saw, the subordination of the individual to the authority of the whole. Although attacked from time to time,102 the notion of exclusive majority representation is a necessary element of a system of collectivity of right, for assertion of individual right for momentary individual gain will inevitably lead to the weakening and ultimate destruction of the collective and thus to a recurrence of the naked weakness of the individual employee. It is a primary feature of the American scheme of labor relations, embodied in section 9(a) of the NLRA: "Representatives designated . . . for the purpose of collective bargaining by the majority of the employees . . . shall be the exclusive representatives of all the employees. . . ."103

99. B. Constant, supra note 92, at 159–60 (author's translation).
100. Id. at 162.
101. Id. (author's translation).
103. 29 U.S.C. § 159(a) (1976). The section reads:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collec
there is but one voice; as to labor, management has but one ear to lend.\textsuperscript{104}

The individual, whether supporter or opponent of the labor collective, as to any relations with his employer, is subsumed to the collective authority once it is brought into being by majority vote.

Thus, in order to reestablish a degree of equality of position, Congress has in open and purposive aid of the individual worker established the collective principle. It has, when he and his peers desire it, absorbed him into a larger authority and bestowed upon it the prestige of statutory support, just as it had long before permitted the aggregation and corollary subjugation of individual capital. By its statutes, labor relations have been cut loose from the individualistic traditions which have anchored thinking in the area. It is benignly misguided, but irrevocably wrong, to decide labor relations cases wholly in individualistic terms. It is as foolish, and comes to as sad results, to apply individualistic notions to collective situations as to use trial by ordeal in the conduct of criminal justice.

The collective principle, Constant was wise enough to see, is not anti-individual; it does not care to see the individual crushed beneath huge powers.\textsuperscript{105} Constant saw rather that it is anti-individualistic, which is an altogether different thing, the indiscriminate sanctification of individual autonomy in all its manifestations and in every aberrance of occurrence. One is not faced, as Frankel correctly said, with a question of choosing between liberty or none, but between kinds of liberties and the means to

\textsuperscript{104} The situation is slightly more nuanced than that. Professor Summers maintains that the first proviso to § 9(a) indicates congressional intent to deny to unions the exclusive power to settle grievances arising under collective agreements, Summers, \textit{The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation}, 126 U. PA. L. REV. 251, 255-56 (1977), a view he candidly acknowledges is neither the Supreme Court's, \textit{see Vacca v. Sipes}, 386 U.S. 171 (1967), nor Professor Cox's, \textit{see Cox, Rights Under a Labor Agreement}, 69 HARV. L. REV. 601, 621-24 (1956). \textit{See also} R. Gorman, supra note 86, at 391-94 (citing Emporium-Capwell Co. v. Western Addition Comm. Org'n, 420 U.S. 50 (1975)). Both Gorman and Emporium-Capwell are in accord with Cox's view.

\textsuperscript{105} Collective power on either side of the employment equation necessitates an opposing collective power for the protection of the individual. A "mixed system," where a collective deals with an individual, is inherently biased in favor of the collective. This may not be the case where the individual is himself an equal bearer of power, but that is rarely the case in the employment relation. \textit{Cf.} Watson, \textit{Comparative Law and Legal Change}, 37 CAMBRIDGE L. J. 313, 324-26 (1978) (discussion of pressure forces and opposition forces on the scale of a legal system).
their attainment.\textsuperscript{106} Constant saw the key in representation, participation in the creation, governance and dissolution of the collectivity. There is, to be sure, a suppressed quid pro quo at work: the individual is subjected to his collective vis-a-vis strangers to the collective; but within the scheme of communal liberty, the individual is protected against abuses of his own community by giving him participatory rights, those rights which Constant listed as so precious to the ancients, and another sort of right, as yet unnamed.

\section*{E. Toward a Classification of Rights}

A \textit{summa divisio} of rights into "collective" and "individual" has a surface appeal to recommend it, but it would simply put the question and would not facilitate solving actual cases. All three of the writers whom I have presented as admitting certain virtues in collective or communal liberties have recognized the two dangers which Constant made explicit in his essay. We cannot follow the individualistic course, the liberty of the moderns, for private liberty is a valueless token without political or economic power to match it. That is, in the individual worker's case, seldom the fact. Nor can we swallow without more the bitter medicine of the "liberty of the ancients" for we thereby sell too cheaply the worth of the individual. We must attempt a system of reconciliation and compromise between these competing liberties, and perhaps forego the architechnic satisfaction of system-building. In Isaiah Berlin's striking phrase we must be watchful of the slaughter of individuals on the altars of ideals.\textsuperscript{107} Tentatively, however, we may usefully view rights as collective, participatory or individual. These terms, if as yet without fixed content, have identifiable contours which will allow us to use them in solving concrete cases. One cannot enumerate in alphabetical fashion the rights which fall within each of these three categories, but by way of example and illustration we may hint at their nature and the reader may by analogy himself discover others.\textsuperscript{108}

\subsection*{1. Collective versus participatory rights}

The term "collective rights" is not talismanic. Neither is there an \textit{a priori} category of rights by essence collective. Rather, collective rights are those rights, the assertion of which by the individual employee would be ineffective in the long run to assure meaningful employee influence in

\textsuperscript{106} Frankel, supra note 91, at 612.
\textsuperscript{108} There is no need to apologize for leaving the growth of the law to analogy. It is Edward Levi's thesis that legal reasoning is essentially analogical rather than inductive or deductive. See E. Levi, \textit{An Introduction to Legal Reasoning} (1948). Holmes once remarked: "And is not a princi-
the conduct of the enterprise and the division of its benefits. They are the
rights which it is necessary to bundle together and vest in a collective
representative, in order that the employment relation may be a relation-
ship between two bearers of power. Because, at least in the working
place, power on the employer's side is primarily economic and deriva-
tively political, and because inequality in the equation is due to a lack of
economic power on the employee's side, collective rights are those neces-
sary to restore economic equilibrium. "Representatives designed or se-
lected for the purposes of collective bargaining . . . shall be the exclu-
sive representatives of all the employees . . . for the purpose of
collective bargaining in respect of pay, wages, hours of employment or
other conditions of employment . . . ." 109

Thus, as to the affairs of the working place—for that is what the final
clause comes down to—the collective holds all rights primarily, and any
benefits (the claim of Doe to be called or not be called for overtime, or his
claim to X dollars an hour in the future), are obtained by the individual
only derivatively, and not independently or primarily.110 These collective
rights are exercisable within the constraints of the NLRA by the labor
collectivity, and waivable by it as well. Collective bargaining, remember,
as a form of negotiation inevitably involves waiver, the giving up of this
right to gain that one, perceived to be superior.

Participatory rights, on the other hand, are the liberties of the ancients,
the democratic rights of participation in the formation, administration and
dissolution of the collective. Section 7 of the NLRA, the "rights" provi-
sion, guarantees that "[e]mployees shall have the right to form, join, or
assist labor organizations. . . ." 111 These participatory rights are one of
the counterbalances to a system of majority rule; the other will be the
right fairly to be represented (which it is not analytically proper, how-
ever, to call a participatory right). Participatory rights, by definition, in-
here in the individual, create a duty in both the employer collective and
the employee collective, and are waivable solely by the individual in his
individual capacity.112 Ideally perhaps, participatory rights should oper-

110. See Part IV-D-2 infra for a more complete discussion of these claims.
111. 29 U.S.C. § 157 (1976). This section reads:
Employees shall have the right to self-organization, to form, join, or assist labor organizations,
to bargain collectively through representatives of their own choosing, and to engage in other
concerted activities for the purpose of collective bargaining or other mutual aid or protection,
and shall also have the right to refrain from any or all of such activities except to the extent that
such right may be affected by a lawful agreement requiring membership in a labor organization
as a condition of employment . . . .
112. To say that the right is not waivable by the collective is not to say that it may not be asserted
ate only against the employee collective. This assumes, however, the preexistence of an effectively functioning collective. The employee’s right to participate in a collective may be threatened either from within, by the union hierarchy, or from without, by management.

The balance of section 7 assures employees the right “to bargain collectively through representatives of their own choosing” and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” Where do these rights fall under the present system? The first of them creates the right to bargain collectively, which section 9, as we have seen, vests in the collective. Properly understood, it is only declaratory of the self-evident right of employees (and that noun may be used collectively) to assert their collective right to negotiate. Similarly, the second clause just quoted, guaranteeing the right to engage in other concerted activities for mutual aid or protection, likewise declares collective rights, for a collective acts only through its members.

There is one section 7 right, added in 1947, the right to refrain from all activity guaranteed under the section, which at first blush appears wholly individualistic and out of place in the scheme as drawn. In essence, however, it belongs in the category of participatory rights because (at least in theory) it is merely individual nonparticipation in collective activity which is protected: the worker is bound by communal decisions in any event.

Other participatory rights are assured by the Labor-Management Reporting and Disclosure or Landrum-Griffin Act of 1959113 and its union member’s “Bill of Rights,” and by the democratic representative and adjudicatory provisions of most, if not all, union constitutions. Of greater practical significance, perhaps, than these participatory rights just mentioned is the firmly established duty of the union fairly to represent all within its unit,114 the legally enforceable duty of fair representation, which harkens back to Constant’s warning, lest the union “sell too cheaply individual rights and enjoyments.”115

2. Participatory versus individual rights

In a sense, participatory rights are individual rights, as we have just

by the collective on the individual’s behalf. Moreover, my theory does not admit lightly of waiver by individuals. The pressures brought to bear upon the individual to waive his rights are precisely the unequal pressures which the collective system seeks to redress. See Part IV-C infra.

115. B. Constant, supra note 92, at 162 (author’s translation).
seen: they inhere in the individual and are one of the counterbalances to his being subsumed to the collective. Is there, however, another class of rights which we have yet to address? This is one of the most troubling questions in all of labor law, and I cannot presume once and for all to determine it, when Professors Cox, Feller and Summers have yet to reach common accord.\footnote{116. See Cox, \textit{supra} note 104; Feller, \textit{A General Theory of the Collective Bargaining Agreement}, 61 CAL. L. REV. 663 (1973); Summers, \textit{supra} note 104.}

One could, in pursuit of that architectonic purity earlier foresworn, answer no: that the categories already set out exhaust the universe. Ideally, perhaps this would be so; but again, we have been warned against the altar of ideals. In reality, the collective-participatory mechanism as outlined is felt insufficient to protect individual interests. To remedy this felt need we may rely upon an endogenous mechanism, an internal adjustment to or fine tuning of the system already devised. Such would be the right fairly to be represented, or correlatively stated, the duty of fair representation on the part of the collective. Or one may employ an exogenous mechanism by creating a genus of individually vested rights which exists independently of the collective agreement, or perhaps even arises out of it. For want of better terms I shall call the two species of this latter mechanism statutorily vested rights and contractually vested rights.

First, there are statutorily imposed \textit{ex ante} standards fixed upon the employment relation and generally vested by the statute in the individual:\footnote{117. There is at least one federally imposed non-negotiable employment standard which may be viewed as vesting in a collective. See the Service Contract Act of 1965, § 4, 41 U.S.C. § 353(c) (1976), which guarantees unionized successor employees certain fruits of a predecessor union’s contract negotiation efforts.} thou shalt have the minimum wage,\footnote{118. Fair Labor Standards Act of 1938, § 6, 29 U.S.C. § 206 (1976).} thou shalt have a safe and healthful workplace,\footnote{119. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (1976).} thou shalt be free of certain forms of discrimination.\footnote{120. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e (1976).} As to these matters, the collective is normally forbidden to interfere, which is consonant with the notion of a purely individual right; and in the interest of the employee sought to be protected, these statutorily vested rights are in most instances not waivable.\footnote{121. In a sense, of course, virtually any right is “waivable” by nonuse or nonassertion. This is not what I intend.}

The question, of course, is why this excrescence? Protection of the individual worker is the very stuff of the collective system, indeed its \textit{raison d’etre}: if the individual \textit{qua} individual is unable to secure justifiable aims due to an imbalance of economic power in relation to the opposing bearer of power, do we not subsume him to another collective which will have
the power? Is the establishment by governmental fiat of individually vested rights, by what has been called labor standards legislation necessary? Strong arguments can be made that they are indeed superfluous, where (a) an effective collective has come into being which (b) asserts traditional economic claims in the areas of wages, hours and other terms and conditions of employment. But either condition may, and often does fail: in some labor markets, the supply of labor is such that it is unlikely that a collective will be organized, and even if it is, that it will be sufficiently strong to offset employer power. In that case, legislative power is substituted (itself a species of collective power) to prevent the harsher effects of the unequal relationship.

Moreover, subsumption of the individual to the collective gains him nothing as to claims which the collective does not vigorously pursue, either from an historical lack of concern, or even from hostility to the rights asserted, but which claims the government affirmatively endorses as fundamental. As to the first of these, one may cite by way of example, occupational safety and health; as to the latter, antidiscrimination or perhaps, pension security. Obviously, too, if the government deems these rights of fundamental concern to society and the individual, it attempts to establish a mechanism for their vindication which can operate in the absence of a collective, that is, on the simple employee-employer relationship. We shall see shortly that these employee interests, at least in the context of a preexisting collective, might be protected otherwise than by government fiat, that is, by the duty of fair representation. The harder question will be whether they ought to be.

The idea of a contractually vested right (vested, I mean, in the individual) is again an individualistic notion which implies a need not met by the proper functioning of the collective system of right-assertion and right-vindication. Since in the United States a collectively bargained agreement is a legally enforceable contract (between whom is a subject of some dispute), the exercise of a collective right (to contract to receive $X$ dollars per hours worked) may lead to the creation of an individual right: once Doe works the hour under the agreement, he has an independent and primary right to the dollars, independent of the collective agreement. This seems clearly to be Professor Summers' view. And Professor Cox (who I should think would differ substantially with Professor Summers on this point) has observed that: "manifestly each worker has a strong and intensely personal interest in his compensation. He did the work. The

122. Contrast the British position set forth in note 89 supra. The legal nature of individually vested rights is well discussed in the Summers and Cox articles cited in note 104 supra.
money will be his, if recovered. His right is vested in the sense that the events giving rise to the employer's obligations are past and the claim is accrued. The law's traditional concern for such rights is testimony to the importance which society accords them."

Conceding the traditional concern with such expectations, one has not answered but merely restated the question: what should be the mechanism for their recognition? Professor Summers suggests that "[t]he collective agreement creates rights in the individual employee which are enforceable" under the provision of the Taft-Hartley Act permitting suits for breach of collective agreements. Addressing specifically the problem of a "matured expectation" (the right to overtime pay for work already performed) under a labor agreement, Professor Summers finds that the expectation of the employees when they ratified the agreement was that they would receive the benefits promised in the contract, "not something less later deemed adequate by the business agent. Those expectations are rooted in legal rights." But is it necessary that this right be primarily and independently vested in the employee, rather than in the collective which represents him? This notion of virtually absolute ex post liability introduces a rigidity into an industrial system of reciprocal give-and-take whose very virtue is its tendency toward conformity with actual industrial necessity. There are often persuasive reasons why facially legitimate claims of individuals ought not be pursued for reasons of the greater good of the collective, and it is only as a last resort that we should foreclose that possibility.

The corporate world may offer an analogy in its shareholder's derivative suit. While one recognizes expectations which may naturally arise in individual shareholders from the dealings of his capital collective with another capital collective, we do not say that the right to the benefits from the transaction is his, but only that upon a certain showing that his corporation has acted unreasonably with respect to him or his fellows, he may assert the right properly held juridically by the corporation, since the latter by its misconduct has shown itself unwilling or unfit to do so. The employment analogue is, of course, the duty of fair representation.

### 3. The duty of fair representation in a collective system.

A full treatment of the duty of fair representation is well without the

124. Cox, supra note 104, at 615-16.
125. The device is rhetorical and Professor Cox is not at all guilty of it.
126. Summers, supra note 104, at 256 (emphasis added).
127. Id. at 264.
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scope of this article. But, as we have seen, it is an alternative to the vested-rights theory suggested just above. Hence, it is necessary to examine its contours, its role in a collective system, and the manner in which it functions.

Section 9(a) of the NLRA creates, it has been held, a duty on the part of the statutory representatives fairly to represent all employees within the bargaining unit. "It is a principle of general application," the Supreme Court said in first enunciating the doctrine, "that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed." The recognition of this right is a necessary product of a system of collective rights operating within a larger legal, social and political context which rightfully respects individual expectations. Constant himself saw collective liberty threatened by its own peculiar danger, "that men might make individual rights too cheap." That the individual's rights may be subsumed to the collective may be necessary; that those rights, now held by the collective may be bartered away, is permitted; but that such collective rights, rights mirroring justifiable individual expectations of individual members, should be frivolously abandoned, is collective liberty degraded to a caricature of itself, to unprincipled majoritarianism or ochlocracy. Like a governor on an overheating engine, the duty of fair representation places limits upon the otherwise desirable tendency within the system to emphasize the collective over the individual. We are not so unwise as to rely solely upon the ideals of participatory democracy: not in our political affairs, where we place the due process and equal protection clauses alongside the right to vote; nor in our business activities, where we may recur to the derivative suit if our voice through vote unreasonably is ignored; neither should we in the employment relation, where despite our participatory rights, we erect the duty of fair representation.

The duty, as a restraint upon collective action, has the virtue which its alternative, the individual vested right, does not: it is relatively inobtru-

128. Indeed, it has been masterfully treated by Professors Summers, Feller and Cox, see note 116 supra, and more recently so, by Professor Finkin, Finkin. The Limits of Majority Rule in Collective Bargaining, 64 MINN. L. REV. 183 (1980). See also R. Gorman, supra note 86 at 695-728; Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 MICH. L. REV. 1435 (1963); Blumrosen, Legal Protection for Critical Job Interests: Union Management Authority Versus Employee Autonomy, 13 RUT. L. REV. 631 (1959).
130. B. Constant, supra note 92, at 162. The original reads: "qu[e]... les hommes ne fissent trop bon marché des droits et des jouissances individuelles."
sive in the reciprocal give-and-take of joint industrial management. To be sure, all *ex post* mechanisms are designed to have a normative effect felt *ex ante*. But while the vested-rights approach establishes a rigid rule, the duty of fair representation restrains only when it would be unfair not to. One may well say, as Professor Cox intimates, that in most instances it will be an easily demonstrable breach of the duty not to pursue an accrued wage claim on behalf of an individual employee. But in those several instances in which the collective reasonably and fairly decides that it is in the best interests of all employees not fully to pursue the expectations of a single individual, the duty of fair representation allows the adjustment to be made; and to me, there is value in that.

IV. THE THEORY APPLIED: THE COLLECTIVE PRINCIPLE IN THE BOARD AND COURTS

Earlier I put forward a series of actual cases which set off the subtlety of the system we have been addressing. The resolution by the Board and courts of these concrete disputes appeared unsatisfactory. I intend now to re-examine those cases to illustrate the possibilities for analysis and adjudication suggested in the foregoing section.

A. Employer-Employee Confrontation

Here, two cases—one old, one new—nicely demonstrate the difficulty adjudicators face in attempting to deal with labor cases much as they would with tort or criminal cases.

*Blue Flash Express, Inc.*, to refresh your memory, posed the dilemma faced by an employer uncertain whether his employees had unionized or whether their union enjoyed majority status. If the union has attained a majority it is unlawful not to bargain with it. But how does the employer determine if a union indeed represents a majority, for if it does not, the employer has no obligation to treat with it? The most obvious way was simply to ask the individuals whether they had joined the union. The Board initially held this per se coercive employer conduct, thereby recognizing explicitly one of the socioeconomic data of labor law: the justifiability of employees’ fear when queried as to union affiliation.

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131. This seems to be the purport of Professor Cox’s continuum of rights analysis and his corollary “suggestions of principles” and accompanying presumptions developed in Cox, *supra* note 104, at 617–18 (1956).
133. 29 U.S.C. § 159(a) (1976). See also note 7 and accompanying text *supra*. 
The finger which espionage might merely direct is actually pointed at him by the inquiry from his employer. He fears that a refusal to answer or a truthful answer may cost him his job.\textsuperscript{134}

After \textit{Blue Flash} such a sensitive accommodation of employee behavior was impossible. There, Golden, the general manager, summoned the employees, one by one, into his office where each denied that he had signed up with the union, although in fact, every one of them had done so.\textsuperscript{135} "[T]here is no credible evidence that the Respondent at any time had made any threats. . . . resorted to any reprisals, or exhibited any antiunion animus," wrote the Board.\textsuperscript{135} "Although the employees who had signed union authorization cards gave false answers to Golden's inquiries, the Respondent did nothing to afford them a reasonable basis for believing that the Respondent might resort to reprisals because of their union membership or activity."\textsuperscript{136}

By concentrating on individuals, rather than the facts of industrial power, the majority opinion failed to see the forest for the trees, missing the whole because it was looking at the part. Why did they all lie? The dissent bespoke a full awareness of the roles of fear, power and collectives. Observing that in their judgment the majority opinion was unsound and ignored the realities of industrial life, and that employees can exercise fully their right to engage in or refrain from self-organization only if they are free from employer prying and investigation, the dissenters continued:

When an employer inquires into organizational activity whether by espionage, surveillance, polling, or direct questioning, he invades the privacy in which employees are entitled to exercise the rights given them by the Act. When [the employer] . . . questions an employee about union organization . . . he forces the employee to take a stand on such issues whether or not the employee desires to take a position or has had full opportunity to consider the various arguments offered on the subject. \textit{And the employer compels the employee to take this stand alone, without the anonymity and support of group action}.\textsuperscript{137}


\textsuperscript{136.} \textit{Id.}

\textsuperscript{137.} \textit{Id.} at 596-97, 34 L.R.R.M. at 1388 (members Murdock and Peterson, dissenting) (emphasis added). The dissenters suggested the correct employer response:

Several approved methods of determining whether a labor organization represents a majority of his employees are available to an employer. He may ask the labor organization to offer proof of its majority; he may request the organization to file a petition for a Board determination by election; or he may file a similar petition himself. He may agree . . . to submit authorization
In sum, the majority opinion looks distressingly like something Lord Abinger might have written in the nineteenth century.\textsuperscript{138} The individual employee is culled from the mass of his fellows and faced with an ominous question which principles of collective liberty dictate ought not to be asked, at least not of him. The union’s collective right to speak for—indeed in Constant’s terms, subjugate—the individual in any affair affecting labor relations is violated. Moreover, the participatory right of self-organization, that is, to bring into being the collective which will be the individual’s sword, and here, his shield, is also impaired.

I said in introducing it that \textit{Blue Flash} was of waning impact, and that is as much a statement of fact as of desire, first because much of the sting was taken out of the decision by the subsequent \textit{Struksnes Construction Co.},\textsuperscript{139} but more importantly because of the 1974 \textit{Linden Lumber}\textsuperscript{140} decision, squarely placing the onus of proving majority status on unions, by petitioning for a Board election if necessary, thereby relieving management of the dilemma which created the \textit{Blue Flash} situation in the first place. It is the hour to overrule \textit{Blue Flash}, at least in its cruder forms,\textsuperscript{141} for there is now no need for it in union organizational cases and \textit{Linden Lumber} can with ease be extended, and should be, to the employer’s doubt as to a continuing majority status after the union’s initial certification year.\textsuperscript{142} Interrogation in that circumstance is just as coercive as in the organizational setting and just as inimical to the collective principle. An

\begin{flushright}
\textsuperscript{138}See note 52 supra.
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\textsuperscript{139}165 N.L.R.B. 1062, 65 L.R.R.M. 1385 (1967). The “\textit{Struksnes standards}” are contained in the following passage; obviously, number four is the key:
\begin{quote}
Absent unusual circumstances, the polling of employees by an employer will be violative . . . of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union’s claim of majority. (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.
\end{quote}
\textsuperscript{140}Id. at 1063, 65 L.R.R.M. at 1386.
\textsuperscript{141}Id. at 600, 34 L.R.R.M. at 1390 (emphasis in original).
\textsuperscript{142}See \textit{Blue Flash} was of waning impact, and that is as much a statement of fact as of desire, first because much of the sting was taken out of the decision by the subsequent \textit{Struksnes Construction Co.}, but more importantly because of the 1974 \textit{Linden Lumber} decision, squarely placing the onus of proving majority status on unions, by petitioning for a Board election if necessary, thereby relieving management of the dilemma which created the \textit{Blue Flash} situation in the first place. It is the hour to overrule \textit{Blue Flash}, at least in its cruder forms, for there is now no need for it in union organizational cases and \textit{Linden Lumber} can with ease be extended, and should be, to the employer’s doubt as to a continuing majority status after the union’s initial certification year. Interrogation in that circumstance is just as coercive as in the organizational setting and just as inimical to the collective principle. An
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election is clearly superior, clearly available, and not destructive of im-
portant participatory and collective rights.143

Employer-employee confrontation was also involved in NLRB v. J.
Weingarten, Inc.,144 the case of Leura Collins, accused of stealing $1.95
of fried chicken. I said before that it was but the last act in a drama. The
Supreme Court’s appearance, deus ex machina, now seems regrettable.
Its opinion is steeped in individualism. The Court, in what was most
likely a sincerely motivated desire to aid the common worker in accord-
ance with Congress’ section 7 mandate, in fact subtly impaired the effec-
tive functioning of labor law and labor relations, giving an employee a
“right” as harshly empty as that of Abinger’s employee, who could
choose not to work if he pleased.145

You will recall that Leura Collins was reported to have purchased a
$2.95 box of chicken but to have placed only $1.00 in the till. A store
detective Hardy and the store manager called her in and questioned her,
refusing to call the shop steward she repeatedly requested. They soon
found that she had taken but $1 worth of chicken. Collins, however,
bursting into tears, cried that the only thing she had ever gotten from the
store without paying for it was her free lunch. Assuming “free lunches”
were against company policy, the two managers thereupon closely inter-
rogated her about her alleged violations of the assumed company rule,
while she repeated her request for a shop steward. Her request was de-
nied. In retrospect we know that Collins’ perception of the “free lunch”
issue was in fact correct.

Let us for the moment assume that union representation—and here we
are using “representation” in a sense less familiar to labor law, namely,
counsel—at disciplinary interviews is a good thing and one mandated by
the statutory scheme of the NLRA as well as by considerations of the
labor policy of the country.146 Assume all these things, arguendo, an
then read these short paragraphs earlier quoted from the Supreme Court’s opinion reaffirming the Board’s finding:

The Board’s construction that § 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline was announced in . . . Quality Mfg. Co., 195 N.L.R.B. 197. . . .

First, the right inheres in § 7’s guarantee of the right of employees to act in concert for mutual aid and protection. . . .

Second, the right arises only in situations where the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.

Third, the employee’s right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.\(^{147}\)

All of this is demonstrably wrong if what has gone before is at all correct. The Court’s implication that the right created turns upon the reasonableness of the employee’s fear of punishment is inconsistent with the data and assumptions upon which labor law are based. Without indulging in undue repetition, have we not yet learned that a fairly high level of employee fear is an inevitable and justifiable adjunct of the employment relation, a relationship between a bearer of power and a non-bearer? The Court, mirabile dictu, at once rejecting “unreasonable fear” and accepting “reasonable fear,” continues: “[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated or too ignorant to raise extenuating factors.”\(^{148}\) His fear now being reasonable rather than unreasonable (however that is to be demonstrated), the employee acquires a section 7 right. The truly marvelous part of the syllogism, however, is the corollary: this “ignorant,” “fearful” and “inarticulate” employee may intelligently and effectively waive this right.\(^{149}\)

\(^{147}\) 420 U.S. 256–57 (emphasis added except for words “First,” “Second,” and “Third”) (footnotes omitted).

\(^{148}\) Id. at 262–63.

\(^{149}\) Any analogy to the criminal law precepts of waiver and consent, while of surface appeal because of the apparent similarity of the factual settings, is nonetheless jurisprudentially inappropriate. The applications of waiver in criminal law are themselves not beyond criticism. See Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 56–57 (1974). More importantly, one
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What is wrong here? If there is to be the right which we have assumed there should be, it cannot be the employee’s. It must of necessity be a collective right, assertable and waivable only by the collective authority, the labor union. The whole point of our labor law is to take the individual off the front line in labor matters and replace him with the power agglomerate. Moreover, the collective has an intense interest in assuring that its authority and effectiveness are not being undermined in confrontations between the employer and the employees it exists to protect. The statutory right which the Board and the Court have labored so mightily to create in Weingarten is misstated, miscategorized and thus misunderstood: it is not a right of the employee to have the union present, it is the right of the union to be present. Strangely again, the Court’s opinion is laden with statements emphasizing the communal benefits of the right of representation, references which are logically harmonizable only with a collective right. “The union representative whose participation the employee seeks is . . . safeguarding not only the particular employee’s interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative’s presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.” Palpably, the right is a collective one under our scheme of labor rights. The Court perceived a duty, that employers accede to union representa-

ought not lightly shuttle concepts from area to area of the law. Labor law is an essentially collective phenomenon, specifically recognizes employee fear as justifiable, and is designed even to prevent the employee’s being put in a position where economic fear may play a role such as this. The criminal law has none of these characteristics. Moreover, in the criminal law, in theory at least, a heavy burden of proving guilt is on the state and in abstract terms the individual is presumed innocent; in ordinary labor law, the employee’s “guilt” may be established to whatever degree pleases the employer. Absent contractual considerations, the burden is always on the employee to show why he should not be dismissed.

150. It is also a trifle troublesome that the Court creates a “right” literally unavailable to most employees, as only about a quarter of the eligible private sector workforce is unionized. Who will “represent” the harassed employee in the non-union shop? This, too, I think points logically to the collective nature of the right which the Court deems individual. One might say that a non-union employee in Collins’ position, by seeking aid from a co-worker, is seeking to form a collective, rather than to assert a collective right to mutual aid. But the waiver problem persists even if one does find a participatory right: if this persecuted employee so needs aid, can she also be said to be able to waive it? See note 112 and accompanying text supra.

151. 420 U.S. at 260–61 (footnote omitted). The Court even says that the “statutory right confirmed today is in full harmony with actual industrial practice. Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews.” Id. at 267 (footnote omitted). This statement does not at all support the Court’s basic premise: it was the collective representatives who negotiated and established this “actual industrial practice.”
tion at disciplinary hearings, but in Hohfeldian terms, found the correlative right in the wrong person.

B. Communicational Rights

Employees, we saw in Part I, have communicational rights guaranteed by section 7 of the Act. It remains, however, to be seen, what the nature of these rights is. The vehicle is *NLRB v. Magnavox Co.*,\(^1\) with whose facts the reader is already familiar. It presented the refreshing occurrence of the highest court reflecting upon collective principles in collective terms. "The sole issue," wrote Justice Douglas for the Court, "concerns the power of the collective-bargaining representative to waive those rights."\(^1\) The Court decided that issue in the negative: the union had no power to waive these section 7 rights, involving only the distribution of literature, although the ability of a union to waive the right to strike, the union member's Excalibur, goes unquestioned.\(^1\) The difference in treatment is not lightly to be justified.\(^1\) It is not analytically helpful to say simply that some rights can be waived and others cannot, that some are less important than others. I should hazard the guess that most observers would have said the right to strike is more important to union and member than the right to handbill on the premises, and yet it is the latter and not the former which cannot be waived. Is there an analytically sound basis for this disparity of treatment? I maintain that there is. Simply told, the section 7 communicatory rights here in play are participatory, not collective, and inhere in the individual: they are part and parcel of the democratic rights of representation and participation which are necessary if the "liberty of the ancients" is to function in a manner fair to all. It is the first of the liberties which Constant mentions, the liberty "to deliberate in public places," just as it is necessary that union members have the right "to examine the conduct of the affairs of [union] officials . . . , to accuse them, to condemn or absolve them."\(^\) Rights of communication in the public place of the laborer, his worksite, whether exercised in favor of

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\(^{153}\) Id. at 325.


\(^{155}\) The Court's own reasoning, as the dissent well illustrates, is not persuasive.

\(^{156}\) B. Constant, supra note 92, at 159. The extension of *Magnavox* in *General Motors Corp. v. NLRB*, 512 F.2d 447, 448 (6th Cir. 1975), makes the point well: the court declared invalid collective bargaining provisions which ban the distribution of intraunion campaign literature concerning election to union office. Less satisfactory is the Board's position in *GTE Lenkurt, Inc.*, 204 N.L.R.B. 921, 83 L.R.R.M. 1684 (1973), and that of the court of appeals in *Diamond Shamrock Co.*
or in opposition to the incumbent authority, are not collective rights and hence cannot be waived by the union acting in its collective capacity. This right must be preserved to the individual, and not put at the disposal of the collective, for it was one of Constant’s warnings—come true in *Gale Products* and *Magnavox*—that the danger exists that the rights of individuals may otherwise be too cheaply sold.

C. Employer Responses to Concerted Activity

Section 8(a)(3) of the Act forbids an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization,” while section 8(b)(2) establishes a corollary duty in the union to refrain from causing or attempting to cause an employer to violate 8(a)(3). Together, these sections are generally treated as giving rise to discrimination cases, that is, discrimination against an employee because of his membership in a union or because of his engagement in activity protected under section 7. These provisions, Professor Gorman correctly observes, present “[t]he most vexing problems of statutory construction” under the Act. But what is the nature of the right or

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157. It is here that the partial dissenters part ways with the majority: they would allow an incumbent union to waive its members’ right to distribute literature favorable to it. 415 U.S. 327–32. Under my analysis, this view is erroneous.

158. Under this view of communicational rights as participatory-individual, the Board’s recent decision in Teamsters Local 515 (Roadway Express), 248 N.L.R.B. No. 20, (March 3, 1980), 103 L.R.R.M. 1318, is clearly wrong. There, a Teamster’s local had a collective bargaining agreement allowing it use of a bulletin board in the breakroom for “official union business.” Helton, a member of the Union as well as of PROD (Professional Drivers Council), a dissident Teamsters organization, posted there a PROD newsletter critical of the Teamsters’ hierarchy. When the job steward removed it, Helton filed a charge of a union unfair labor practice, which the Board dismissed, overruling its Administrative Law Judge. Member Jenkins dissented.

159. 142 N.L.R.B. 1246, 53 L.R.R.M. 1242 (1963). It was much clearer in *Gale Products* that the union was attempting by its “waiver” to gag opposition. Id. at 1247, 53 L.R.R.M. at 1243.

160. See note 130 and accompanying text supra.


163. Some cases do involve employer discrimination in favor of an employee to encourage union membership.

164. R. Gorman, supra note 86, at 326.
rights which arise out of these provisions, and are they distinct from section 7 rights?

"Discrimination," says Professor Gorman, can have at least four meanings.\textsuperscript{165} Professor Getman, too, has noted that discrimination in this context can mean more than one thing.\textsuperscript{166} Much of the discussion in the area has centered upon whether antionion animus is a necessary element of proof of an offense under 8(a)(3).\textsuperscript{167} This, however, leaps over a preliminary inquiry of paramount importance: what interests of the employees are sought to be protected? The now classic statement of the purport of these anti-discrimination provisions is found in \textit{Radio Officers' Union \textit{v. NLRB}}.\textsuperscript{168} "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus, Sections 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." This is, then, essentially a mechanism for the protection of the participatory right of employees to form, join or assist labor organizations or to refrain therefrom.\textsuperscript{169} As noted above,\textsuperscript{170} these participatory rights, fundamental to the fair and successful operation of a collective system, are (within that system) personal. This sort of right is at the very heart of our system of industrial bargaining. The Board and the courts, however, have gone further, holding that measures taken by the employer against employees for having engaged in concerted activities also fall under this section. This result seems difficult to justify under the present analysis, unless mere engagement in concerted activity, even concerted economic activity, is equated tautologically with the "assistance" of a labor organization. If this is the case, then an employer might never take any counteraction, for inevitably the success of the employer would be the defeat, total or partial, of the union; and that would discourage union membership. The Supreme Court has

\textsuperscript{165} (1) treating employee A different from employee B, even though the difference is warranted by business reasons, such as the skill or length of service of the two employees; (2) treating employee A different from employee B, when the difference is arbitrary and unwarranted by business reasons but is unrelated to union activity, \textit{e.g.}, the religion or political beliefs of the two employees; (3) treating employee A different from employee B, when the difference is related to their union membership or activities; (4) treating employee A different from the way employee B would be treated were it not for his union membership or activities.

\textit{Id.} at 327.

\textsuperscript{166} \textit{Getman, Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice}, 32 \textit{U. Chi. L. Rev.} 735, 736–38 (1965).

\textsuperscript{167} \textit{See, e.g.}, R. GORMAN, \textit{supra} note 86, at 326–38 for an excellent analysis.

\textsuperscript{168} \textit{347 U.S. 17, 40 (1954)}.

\textsuperscript{169} \textit{Id.} at 40.

\textsuperscript{170} \textit{See Part III–E–I supra}.

\textsuperscript{171} \textit{NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960)}.
eschewed such a view. A ban of that kind of "discrimination" is inconsistent with the "economic battle" theory of its opinions in *Insurance Agents*\(^\text{171}\) and *American Ship Building*.\(^\text{172}\)

The difficulty in determining the nature of the rights created as the correlates of the sections 8(a)(3) and 8(b)(2) duties is exposed in a constellation of cases describing the limits of permissible employer response to concerted employee activity.\(^\text{173}\) In large measure this substantive body of law which developed around the two subsections is unobjectionable, and provides a reasonable balance between competing forces: an employer may not discharge its employees for striking,\(^\text{174}\) but may replace them for business reasons,\(^\text{175}\) and yet must reinstate them upon certain conditions.\(^\text{176}\) In fact, an employer must affirmatively seek out economic strikers who have been legitimately replaced during a strike as positions for which they are qualified become available.\(^\text{177}\) If these results are in fact correct—and for argument here I concede them to be so—then the Board's opinion in the *United Aircraft* case which I earlier noted,\(^\text{178}\) must necessarily be wrong, for there it was held proper for the union, in negotiating in good faith a strike settlement agreement, substantially to curtail employees' preferential recall rights assured under heretofore unassailed interpretations of section 8(a)(3). If management may unilaterally preclude reemployment of economic strikers for legitimate and substantial business reasons,\(^\text{179}\) wrote the Board, then certainly such reinstatement claims may be adjusted by mutual accord of management and the union.\(^\text{180}\)

They are in the most favored position to know the business needs of the employer and the prospects of substantially equivalent employment elsewhere. A union may also by agreement obtain other benefits for employees

\(^{171}\) American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965). "There is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes." *Id.* at 313.


\(^{175}\) Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956) (upon unconditional request by an unfair labor practice striker); NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381 (1967) (upon request by an economic striker, when a job becomes available).


\(^{177}\) See notes 21–26 and accompanying text supra.

\(^{178}\) See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

\(^{179}\) 192 N.L.R.B. at 388, 77 L.R.R.M. at 1792–93.
in return for a concession as to a reinstatement cutoff date. So long, therefore, as the period fixed by agreement for the reinstatement of economic strikers is not unreasonably short, is not intended to be discriminatory, or misused by either party with the object of accomplishing a discriminatory objective, was not insisted upon by the employer in order to undermine the status of the bargaining representative, and was the result of good-faith collective bargaining, the Board ought to accept the agreement of the parties as effectuating the policies of the Act which . . . includes as a principal objective encouragement of the practice and procedure of collective bargaining as a means of settling labor disputes.  

If section 8(a)(3) protects only participatory rights, this waiver of them by the collective is unpardonable. Yet the Board’s opinion in United Aircraft does not lack persuasion. One’s job is to be immune from his union membership and his zeal or tepidness for it; but it is not immune to all consequences flowing from collective activity. Just as it is the collective which may waive the right to strike or preserve the right to call it, and just as it is a collective decision when to end it, so it is the collective which may determine the terms upon which the employees return to work.

The difficulty lies in the assumption, firmly grounded in the case law, I concede, that the right guaranteed is a right of the employee protected under section 8(a)(3). The error is the inevitable result of confusing the duties imposed upon employers by sections 8(a)(3) and 8(a)(1). It is a failure to examine the nature of the corollary rights, one a participatory right, the other collective. Many of the cases decided under section 8(a)(3), including Laidlaw, which created the preferential recall rights diluted in United Aircraft, have strayed from the protection of participatory rights, for which section 8(a)(3) clearly was designed. They seek basically to impose restraints upon the use of economic warfare, and should more logically be decided under section 8(a)(1) which assures that unfair advantage shall not be taken of the superior position of one bearer of power, here management, just as other provisions are designed.

181. Id.
182. See note 172 and accompanying text supra.
183. See note 154 supra.
184. 29 U.S.C. §§ 158(a)(3), (1) (1976). Sections 8(a)(3) and 8(a)(1) are set out at text accompanying note 161 supra, and note 187 infra, respectively.
186. Professor Gorman has placed his discussion of 8(a)(3) in that section of his book devoted to The Balance of Economic Weapons. See R. GORMAN, supra note 86, at 296.
to curb unfair uses of collective employee power. These are intercollec-
tive adjustments, a governmental balancing of power between the
bearers of power to assure that the economic sparring will be Marquis-of-
Queensberry, and that each side will have a fighting chance.

The peril in all this is, of course, that individual interests may be
cheapened and lost in the dealings between management and union. A
vigorous enforcement of the duty of fair representation is the coun-
terweight to that. I have no doubt, however, that there may be a class of
employer response which amounts to antunion discrimination, no matter
in what garb it is paraded, and may properly be treated under section
8(a)(3).

For example, discharge of an unfair-labor-practice striker may pre-
sent such a situation. Illicit employer activity may have so threatened or
weakened the collective as to leave employees no alternative but to strike.
With the very existence of the collective now put in question, an em-
ployer attempt to replace the strikers may justifiably be seen solely as the
product of his antunion animus. This violates the employees' participa-
tory rights and must be disallowed. But, in other cases, crippling eco-
nomic responses are just that: they are a collective uppercut to a collective
jab. If the use of such tactics strikes at the heart of a union's ability to

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188. Most notable among such provisions are § 8(b)(4) (secondary boycotts) and § 8(b)(7) (un-

189. There is unfortunately broad language in American Ship Bldg. Co. v. NLRB, 380 U.S.
300, 317 (1965), that it is not the place of the Board to engage in "balance of power" politics, a
sphere the Court says is exclusively Congress's:

Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative eco-
nomic power of the adversaries in the bargaining process and to deny weapons to one party or
the other because of its assessment of that party's bargaining power.

It is not clear whether the Supreme Court meant to preclude balancing of power in concreto, that is
between the parties to the case, or in abstracto, between management and unions generally. Professor
Gorman has observed that, despite this language, "balancing of harm" is a common practice. R.
GORMAN, supra note 86, at 338 (1976). Instances of each may be found. Compare NLRB v. Fleet-
wood Trailer Co., 389 U.S. 376 (1967) (balance of harm between the parties?) with NLRB v. Erie
Resistor Corp., 373 U.S. 221 (1963) (balance of harm between employers and unions generally?). Of
course, it may be argued that any "pure" 8(a)(1) (i.e., non-derivative) violation is necessarily an in
abstracto balancing of power, rights and harms.

190. An employee who strikes not to secure some change in wages, hours or other term or condi-
tion of employment, but rather to protest employer conduct in violation of the Act (thus, an employer
unfair labor practice), is called an "unfair-labor-practice striker."

191. Stauffer Chem. Co., 242 N.L.R.B. No. 21 (May 9, 1979), 101 L.R.R.M. 1123, may also
present such a case, although, as Professor Finkin points out, the Board's failure to address at all
United Aircraft is most troublesome. Finkin, supra note 21, at 597 n.32. In Stauffer a strike settle-
ment agreement provided for reinstatement of economic strikers by a certain date, with latecomers
considered as having quit. Anderson, one of the striking employees, appeared at the plant shortly
after the expiration of what Finkin calls the "truncated-Laidlaw" period, and was denied reinstate-
ment, even though she had not been replaced. Under any analysis of Laidlaw—the Board's, the
courts', Finkin's or mine—Stauffer is difficult to justify. If the second element of the Laidlaw right,
bargain collectively or to engage in concerted activity,¹⁹² it may be banned by statute, by rule or, (in the Board’s case) by adjudication. Much of the confusion in the cases to which Professors Getman and Gorman advert¹⁹³ is the result of calling up section 8(a)(3) to do service in protection of analytically distinct, collective rights, instead of the participatory rights for which it was designed.

D. Labor Standards and Equal Employment Opportunity

This, too, we have seen to be a most troubling area. As noted above,¹⁹⁴ labor standards and equal employment legislation reflect a lack of faith in the collective system’s ability to vindicate important social interests. It seems unlikely that the cumbersome, statutory mechanisms would have been brought into being otherwise. Passage of the legislation implicitly asserts that the collective cannot or is unlikely to seek to assure compliance with the fundamental social norms which are embodied in the legislation. One may add the additional ground, that the legislation intends to assure vindication of rights even where a collective does not exist. It is where there is a union, which could vindicate the statutory interest, that creation of these statutorily vested individual rights presents problems. Some cases will illustrate them.

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¹⁹² See note 21 supra, is keyed to replacement, then Laidlaw (and hence United Aircraft) is simply inapplicable, as Anderson’s position was still available. It falls more neatly (although not precisely) under NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967), which guaranteed—under § 8(a)(3)—preferential recall rights to unreplaced economic strikers.

¹⁹³ Fleetwood Trailer’s assumption was that an employer’s refusal to reinstate an unreplaced economic striker in the absence of legitimate and substantial business justification is “inherently discriminatory” under 8(a)(3), and there ought be some inquiry as to why Anderson was not offered her position. Absent such a showing, one may legitimately say that while the settlement agreement did not violate 8(a)(3), its purposeless application to her of necessity draws into question the very real possibility that she was victimized solely for her “zeal or tepidness” in the assertion of her § 7 rights, and was not merely reaping the “consequences flowing from” them. See text accompanying note 182 supra.

¹⁹⁴ It may well be that this is the case presented by Laidlaw and United Aircraft. If the Board views the mere possibility of refusal to offer reinstatement after an economic strike in the Laidlaw circumstances as creating an unacceptable shift in the “balance of power” it may outlaw it under § 8(a)(1), just as Congress has for the union outlawed secondary boycotts under § 8(b)(4). But see note 189 supra. This does not, however, solve the waiver problem. It seems clear that one cannot consent to a secondary boycott. Perhaps some notion of ordre public is required: these duties to refrain from conduct deemed impermissibly to affect the balance of power are of a public nature and necessary to the functioning of the legal microcosm of labor.

¹⁹³ See notes 164–67 and accompanying text supra.

¹⁹⁴ See Section III—E–2 supra.
1. **Employment discrimination claims**

Harrell Alexander, the black drill operator, was fired. The collective agreement between his union and Gardner-Denver provided that “there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry.” Alexander filed a grievance under the general grievance clause although he later amended it to assert a claim of racial discrimination. When the arbitrator held for the company, Alexander filed a private action under Title VII of the Civil Rights Act of 1964, alleging that his discharge was a racially discriminatory employment practice. The Supreme Court, in *Alexander v. Gardner-Denver Co.*, held that Gardner-Denver could not rely in the Title VII action on the contractual arbitral award.

In allowing Alexander a judicial reinvestigation of the claim he had twice pursued unsuccessfully, the Court squarely addressed the individual-collective distinction. There can be no prospective waiver, it held, of an employee's Title VII rights, although it conceded that a union may waive important statutory rights such as the right to strike. The difference, the Court observed, was that “[t]hese rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective bargaining agent to obtain economic benefits for unit members.” The Court continued:

Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual’s right to equal employment opportunities. Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. The actual submission of petitioner’s grievance to the arbitration does not alter the situation.

The language could not be clearer. A statutorily vested individual right has been created, necessarily reflecting the belief that collective resol...
tion does not, cannot, or may not, adequately protect the individual’s right to be free of illicit discrimination. Observe that this determination of inadequacy is made in advance and in general: no inquiry is made here into the system’s actual functioning. Whether the union pursued Alexander’s claim fairly, vigorously, dilatorily or reluctantly has not been investigated. Alexander has not shown that he was unfairly represented. The right is his, personal, and cognizable in a court of law.

Gardner-Denver is not the last word, however. After Emporium Capwell Co. v. Western Addition Community Organization,202 decided the next term, it appears that while the rights conferred by Title VII are “absolute,”7 they do not exist in a juridical void; that while they cannot be “waived,” they can be effectively canalized; that while they “can form no part of the collective-bargaining process,” ongoing collective bargaining with respect to them renders the employee subject to discharge should he assert those rights in a manner deemed inconsistent with the policies of the National Labor Relations Act. The company and union had signed an agreement banning racial discrimination; the union was to all appearances diligently prosecuting complaints of racial discrimination and had formed a special investigating committee. It had drafted reports on the issue and called meetings with Emporium, the latter’s collective bargaining association, the California Fair Employment Practices Committee and an anti-poverty agency. Clearly the eradication of discrimination was de facto a “part of the collective-bargaining process” at Emporium; yet the Court in Gardner-Denver had said just as clearly that it could not be so de jure. Two employees who refused to take part in the negotiations but who engaged in a consumer picket urging customers not to patronize their employer were fired.

The Supreme Court’s opinion in Gardner-Denver does not prepare one for the result in Emporium Capwell: the Court, upholding a Board finding of no employer violation of section 8(a)(1) of the Act, stated that the employees’ argument that their conduct was protected concerted activity under section 7 “confuses the employees’ substantive right to be free of racial discrimination with the procedures available under the NLRA for securing these rights . . . . [T]hey cannot be pursued at the expense of the orderly collective bargaining process contemplated by the NLRA.”203 Contrary to its language in Gardner-Denver, the Court observed that “the elimination of discrimination and its vestiges is an appropriate subject of bargaining . . . [for] an employer . . . may have strong and legitimate objections to bargaining on several fronts over the implementation

203. 415 U.S. at 69.
of the right to be free of discrimination. . . .”204 Were it not for its racial context, the case would be a relatively simple example of an unauthorized or “wildcat” strike, which, although concededly concerted activity for mutual aid or protection within the language of the statute, loses its protection since the unauthorized activity undermines the union’s status as exclusive representative under section 9(a) and is inconsistent with “a concept of orderly bargaining premised upon democratic union processes.”205 As Professor Gorman has suggested, this notion has in Emporium Capwell been “endorsed by the Supreme Court in what is its most severe test.”206 Before attempting to reconcile these cases, however, we should examine two more.

2. The wage and hour cases

The Fair Labor Standards Act,207 assuring a minimum wage and overtime pay to covered workers, provides a facially similar context to the discrimination cases. As in the racial discrimination cases, two cases decided under this Act seem to reflect divergent philosophies. In Leone v. Mobil Oil Corp.,208 the collective agreement between Mobil and the Oil Workers Union made no mention of pay during employee OSHA “walkarounds.”209 The scope of the grievance and arbitration clause210 was sufficiently broad that an arbitrator might interpret such time spent “walking around” with the OSHA inspector to be paid time under the contract.211 The employees chose rather to sue individually under the Fair Labor Standards Act for pay due them for “hours worked.”212 The court

204. Id. at 69–70 (emphasis added).
205. NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216, 221 (9th Cir. 1969). The Tanner court also suggested that NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) “at least implied that ‘by joining a union an employee gives up or waives some of his § 7 rights.’” Tanner Motor, 419 F.2d. at 220 (quoting Allis Chalmers, 388 U.S. at 199–200 (Black, J., dissenting)).
208. 523 F.2d 1153 (D.C. Cir. 1975).
209. 29 U.S.C. § 657(e) (1976) provides: “Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace. . . .” This is the so-called “walkaround” provision of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (1976).
210. The clause provided: “Disputes as to the interpretation of or an alleged violation of the application of the terms of this Agreement, or as to working conditions . . . shall be considered a grievance. . . .” Leone, 523 F.2d at 1156 n.3.
211. The court of appeals expressly declined to resolve the issue, as its decision on the requirement of exhaustion rendered it unnecessary. Id. at 1159.
212. Id. at 1155 (citing 29 U.S.C. § 203(o) (1976)).
of appeals held that an employee asserting his statutory rights under FLSA need not exhaust contractual remedies before seeking judicial relief.\textsuperscript{213} The \textit{Steelworkers Trilogy}\textsuperscript{214} and its application to labor standards disputes notwithstanding,\textsuperscript{215} the court stated that an employee may not be denied the statutory relief.\textsuperscript{216} \textit{Gardner-Denver} supplied the "underlying rationale," the court said,\textsuperscript{217} thus implying some sort of statutorily vested individual right.

We saw in Part II–D, though, that this statutory right appeared to be of an altogether different dimension in \textit{Satterwhite v. United Parcel Service}.\textsuperscript{218} The employer eliminated two coffee breaks, and the union grieved under a clause and procedure functionally similar to those in \textit{Leone}. After the arbitrator held that the employees were entitled to an additional half hour pay for the omitted breaks, both company and union requested a clarification: were the employees to be paid the additional half hour at straight time or at time and a half for overtime pay? In what the Court recognized as a compromise, the arbitrator declared only straight-time wages be paid.\textsuperscript{219} When the affected employees sued under the same Act involved in \textit{Leone} for statutory overtime due them for hours over forty, their suit was held barred by the earlier contractual award. The statutorily vested, nonwaivable right to overtime pay under the Fair Labor Standards Act, was somehow lost in the contractual process.\textsuperscript{220} The employee had in fact been paid one-third less than the Act requires. Can \textit{Gardner-Denver} be reconciled with \textit{Emporium Capwell} or \textit{Leone} with

\begin{itemize}
\item \textsuperscript{213} 523 F.2d at 1155.
\item \textsuperscript{215} 523 F.2d at 1156 (citing Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974), which extended the \textit{Steelworkers Trilogy} to safety disputes).
\item \textsuperscript{216} The court relied on U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971), where the Supreme Court held that exhaustion of grievance procedures was not required before a seaman might sue under 46 U.S.C. § 596 (1976), regulating the payment of maritime wages. 523 F.2d at 1157.
\item \textsuperscript{217} 523 F.2d at 1159.
\item \textsuperscript{218} 496 F.2d 448 (10th Cir.), \textit{cert. denied}, 419 U.S. 1079 (1974). \textit{Accord}, Union de Tronquistas, Local 901 v. Flagship Corp., 554 F.2d 8 (1st Cir. 1977). \textit{See} notes 48–49 \textsuperscript{supra}.
\item \textsuperscript{219} 496 F.2d at 449.
\item \textsuperscript{220} It has long been thought that a wage-and-hour claim under the Act could not be prospectively waived, or even compromised by settlement where there is a dispute as to coverage under the wage-hour laws. \textit{See} D.A. Schult, Inc. v. Gangi, 328 U.S. 108 (1946). Recently there have been inroads to the contrary. \textit{See} Thomas v. Louisiana, 534 F.2d 613, 614 n.6 (5th Cir. 1976) and cases cited therein.
\end{itemize}

Needless to say, an employee cannot go to his employer and say "Although my work is covered by the Act, I waive my right to the minimum wage and shall work for $1.00 an hour." \textit{Cf.} Wage & Hour Release No. 4–229 (March 23, 1939).
Theory of Employment Rights

*Satterwhite,* or more provocatively, can they or any of them be reconciled with the theory of rights here propounded?

3. A tentative reconciliation

Were one to draw a continuum and place the four principal cases discussed in this subsection upon it, one would be inclined to place *Gardner-Denver* and *Leone* at one terminus and *Emporium Capwell* and *Satterwhite* at the other. But what do these pairs of cases share internally, what brings them in opposition, and what is the role to which each is attracted?

*Gardner-Denver* and *Leone* share an essentially individualistic orientation, a view not at all to be criticized when the important social values which undergird the statutes they interpret are considered. Harrell Alexander had an absolute right to a judicial inquiry into his statutory claim. The term statutorily vested right is, in this context, of my own coining and it thus scarcely seems fair to criticize it, for as Justice Black wrote, one can give a doctrine an ugly name to hasten its demise. But one should recall that even vested rights can be divested: even a vested fee can be defeasible upon a condition subsequent. Perhaps the courts in *Satterwhite* and *Emporium Capwell,* while recognizing the right created in individuals by these social statutes, are groping for that event upon which the right ceases to be isolated and untouchable, and enters the more fluid calculus of collective liberty. It is true that Title VII and the Fair Labor Standards Act evince a disbelief, for one reason or another, in the efficacy of the collective system: but cannot that system prove itself, show affirmatively that valuable human rights to racial dignity and a decent wage, as well as more mundane rights under the collective agreements, are respected and vindicated? The two suggested rectifying mechanisms to the perceived defects in a majoritarian system, *ex ante* standards giving rise to vested rights on the one hand, and the duty of fair representation on the other, may reflect a difference in legal, and necessarily social and economic, maturation between Title VII and the Fair Labor Standards Act: Considerations of appropriate wage and hour standards have become intricately and inextricably interwoven into the fabric of industrial relations. Unions show no hostility to them; in fact they are areas of traditional union concern and arbitrators are expert in the resolution of disputes as to them. Subject to the salutary restraints of a vigorous duty of fair representation, it may not be at all unjust to say that an employee’s

222. My colleague Professor Finkin supplied this useful analogy.
statutory right merges in the resolution of a corollary claim under the collective agreement, just as collective agreements thirty-five years ago displaced what were until then thought to be vested contract rights.\textsuperscript{223}

In questions of race, our past is bitter, as is its fruit. The dimension of the problem and the nation's profound commitment to its eradication justify a less than perfect system of unitary legislation. The collective system in the past failed to protect the interests of racial and other minorities; its democratic, participatory rights similarly availed them nothing. The duty of fair representation in fact arose in the context of racial discrimination, and was thought to be the counterbalance which would prevent the cheapening of individual rights in the interest of an oppressive majority. But it too failed us. When the individual finds his protection within the collective system, then there is no need to tinker with it. Where he is helpless within it, however, then he is as helpless as Abinger's employee;\textsuperscript{224} perhaps more so, for he is opposed by two bearers of power. At that point, the government, through Title VII and similar legislation, must come to his aid. In the next century, perhaps these concerns, too, will have entered the fiber of industrial relations. It may be that the expectations of individuals to be free of racial, sexual, ethnic or religious discrimination will become embodied in the custom and morality of the workplace so that they, too, will be protected by the internal processes of collective bargaining. At present it seems utopian, but it is a hope worth nurturing.

IV. CONCLUSION

There are two sorts of conclusions. One is a masquerade, a summary of what has gone before, only more concisely put. This obviously discourages the reading of the corpus of the work and is a dubious undertaking for any serious writer. Mine is more simple. The call of this article has not been to abandon an individualistic mode of legal thinking which has served us well: where it functions well, it properly belongs. Conceptions of individual liberty, however, should not be imported in bulk, uncritically, into the law of labor relations. There is indeed room for them there, but in restrained number; substantial room must be left to principles of collective right. Moreover, an analysis of rights in the employment relation in collective terms can and does produce solutions "more satisfactory than those which would result without it."\textsuperscript{225}

\textsuperscript{223} See J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).
\textsuperscript{224} See note 52 and accompanying text supra.