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## *Imagine a World Where Employers Are Required to Bargain with Minority Unions*

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# Imagine a World Where Employers Are Required to Bargain with Minority Unions

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## I. Introduction

Under section 7 of the National Labor Relations Act (NLRA),<sup>1</sup> employees are entitled “to bargain collectively through representatives of their own choosing.”<sup>2</sup> Surveys of employee support for unions show a majority want collective representation.<sup>3</sup> Yet union organizing efforts often fail before employees have a chance to vote, at the ballot box, or in subsequent litigation. For decades, scholars and union-side lawyers explained the gap between employee desire for unionization and declining rates of unionization by hypothesizing that employers are able to coerce, intimidate, or persuade employees to abandon their support for unions.<sup>4</sup> They have faulted the NLRA for failing to protect the section 7 right to organize by providing statutory remedies for employer unfair labor practices that are too weak and slow to deter illegal coercion. Conversely, employer advocates insist that employees do not wish to unionize, that unions are the ones that are guilty of intimidation and coercion during the organizing process,<sup>5</sup> and that unions do not

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1. National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151–69 (2006).

2. NLRA § 7, 29 U.S.C. § 157 (2006).

3. See RICHARD B. FREEMAN, ECON. POLICY INST., DO WORKERS STILL WANT UNIONS? MORE THAN EVER (2007), <http://www.sharedprosperity.org/bp182/bp182.pdf>; cf. Dennis Cauchon, *Poll: Americans Favor Union Bargaining Rights*, USA TODAY (Feb. 22, 2011), [http://www.usatoday.com/news/nation/2011-02-22-poll-public-unions-wisconsin\\_N.htm](http://www.usatoday.com/news/nation/2011-02-22-poll-public-unions-wisconsin_N.htm); Jeffrey M. Jones, *Americans Remain Broadly Supportive of Labor Unions*, GALLUP (Dec. 1, 2008), <http://www.gallup.com/poll/112717/americans-remain-broadly-supportive-labor-unions.aspx>. But see Mark Blumenthal, *How Many Would Unionize?*, POLLSTER.COM (Mar. 20, 2009), [http://www.pollster.com/blogs/how\\_many\\_would\\_unionize.php?nr=1](http://www.pollster.com/blogs/how_many_would_unionize.php?nr=1); cf. PEW RES. CTR. PUBLICATIONS, FAVORABILITY RATINGS OF LABOR UNIONS FALL SHARPLY (2010), <http://pewresearch.org/pubs/1505/labor-unions-support-falls-public-now-evenly-split-on-purpose-power>.

4. See, e.g., Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?*, 26 A.B.A. J. LAB. & EMP. L. 327, 330–31, 334–36 (2011); cf. Terry Thomason, *The Effect of Accelerated Certification Procedures on Union Organizing Success in Ontario*, 47 INDUS. & LAB. REL. REV. 207, 210 (1994).

5. Cf. James J. Brudney, *Gathering Moss: The NLRA’s Resistance to Legislative Change*, 26 A.B.A. J. LAB. & EMP. L. 161, 174 (2011).

adequately represent the interests of all employees once they establish a bargaining relationship.<sup>6</sup> One way to test these competing hypotheses is to eliminate the long organizing process and allow only those employees who support a union to bargain collectively, leaving other employees free from union representation. This is known as members-only or minority unionism.

The law currently *allows* members-only representation.<sup>7</sup> The question we consider is whether the NLRA may be read to *require* an employer to negotiate with a union only on behalf of those who join it. Imposing a duty to bargain with a minority union would be a significant change in federal labor law. The National Labor Relations Board (NLRB or Board) has construed section 7 to mandate employers to bargain only with unions that enjoy majority support,<sup>8</sup> but, under section 9(a),<sup>9</sup> when a union designated by a majority of the employees in a bargaining unit signs a contract with the employer, the terms generally bind the entire bargaining unit. In *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*,<sup>10</sup> Charles Morris urged the NLRB to extend mandatory bargaining to encompass minority unions in units that lack majority unions, resulting in contracts that would only cover the union members.<sup>11</sup>

In the past, the General Counsel of the NLRB has rejected all invitations to require members-only bargaining. In *Dick's Sporting Goods*, a minority of Dick's employees formed the Dick's Employee Council (Council),<sup>12</sup> which charged union dues of \$4 per month and offered member benefits including training and counseling.<sup>13</sup> When Dick's management declined to recognize the Council, it filed a section 8(a) (5) charge.<sup>14</sup> Stating that the rule against requiring members-only bargaining "is well-settled and is not an open issue," the General Counsel refused to issue a complaint.<sup>15</sup> Although the General Counsel's refusal

6. Cf. Michael A. Scodro, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1936 (1996).

7. See *Retail Clerks Int'l Ass'n v. Lion Dry Goods*, 369 U.S. 17, 29 (1962); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 237 (1938); *Dana Corp.*, 356 N.L.R.B. No. 49, at 4 (Dec. 6, 2010) (dictum).

8. Nelson Cary, *Minority Unions: A Next Step for the NLRB?*, VORYS ON LABOR (June 21, 2010), <http://www.vorysonlabor.com/2010/06/articles/nlrb/minority-unions-a-next-step-for-the-nlrb/>.

9. NLRA § 9(a), 29 U.S.C. § 159(a) (2006).

10. CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2005).

11. See *id.* at 215.

12. OFF. OF THE GEN. COUNS., NLRB, ADVICE MEM. GC 07-02, *DICK'S SPORTING GOODS 1* (June 22, 2006), <http://mynlrb.nlrb.gov/link/document.aspx/09031d45800da97d>.

13. Carl Horowitz, *Seven Unions Petition NLRB to Mandate Minority Bargaining*, NAT'L LEGAL & POL'Y CTR. (Sept. 10, 2007), <http://www.nlpc.org/stories/2007/09/10/seven-unions-petition-nlrb-mandate-minority-bargaining>.

14. OFF. OF THE GEN. COUNS., *supra* note 12, at 2.

15. *Id.* at 1.

to pursue a charge is non-reviewable, the *Dick's* General Counsel Memorandum sparked a flurry of activity, and the issue is before the NLRB again. In 2007, seven unions filed a rulemaking petition asking the NLRB to adopt the rule:

Pursuant to Sections 7, 8(a)(1), and 8(a)(5) of the Act, in workplaces where employees are not currently represented by a certified or recognized Section 9(a) majority/exclusive collective-bargaining representative in an appropriate bargaining unit, the employer, upon request, has a duty to bargain collectively with a labor organization that represents less than an employee-majority with regard to the employees who are its members, but not for any other employees.<sup>16</sup>

Since the 2007 union petition, the NLRB has received at least three requests to adopt a members-only bargaining rule: a 2007 letter from twenty-five professors of labor law,<sup>17</sup> a 2008 petition from various unions,<sup>18</sup> and a 2010 amicus brief signed by several dozen professors.<sup>19</sup> So far, the NLRB has maintained the status quo.

After exploring the members-only bargaining proposal, this article will assess the advantages and risks of members-only bargaining. In Part II, we begin with a brief analysis of statutory language and legislative history. We note that cases interpreting the NLRA, especially recent cases, offer only weak support for members-only bargaining. However, as we explain, we find nothing determinative one way or another on the proper interpretation of the NLRA. Because legislative change to the NLRA is unlikely until either the Democratic or the Republican Party controls both houses of Congress, more than sixty seats in the Senate, and the White House, we believe that any change must come from the NLRB. Thus, we believe that prior interpretations of

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16. Petition of United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, and other labor organizations, as "interested persons" under 29 U.S.C. § 2(1), 29 C.F.R. § 102.124, 5 U.S.C. § 551(2), and 5 U.S.C. § 553(3) In the Matter of Rulemaking Regarding Members-Only Minority-Union Collective Bargaining (Aug. 14, 2007), <http://www.laborrelationstoday.com/uploads/file/PetitionRequestingRulemakingMinorityUnion.pdf>.

17. See Steven Greenhouse, *Seven Unions Ask Labor Board to Order Employers to Bargain*, N.Y. TIMES, Aug. 15, 2007, at A14, available at 2007 WLNR 15770922; Richard Bales, Morris, *Craver Circulate Proposed NLRB Rule*, WORKPLACE PROF. BLOG (Mar. 21, 2007), [http://lawprofessors.typepad.com/laborprof\\_blog/2007/03/morris\\_craver\\_c.html](http://lawprofessors.typepad.com/laborprof_blog/2007/03/morris_craver_c.html).

18. See *Change to Win Joins Other Unions Seeking Rule on Minority-Union Bargaining*, Daily Lab. Rep. (BNA) No. 04, at A-1 (Jan. 8, 2008). The combined signatories of the 2007 and 2008 petitions represent the overwhelming majority of union members who are subject to the NLRA.

19. See Michael Grubbs, *Will NLRB Rulemaking Turn Labor Law on Its Head?*, SHERMAN & HOWARD (July 7, 2010), <http://www.sah.com/NewsAndEvents/View/A8A1C16C-5056-9125-63A6F45B045622E0/RevolutionaryDevelopmentsin2011AreontheHorizonattheNationalLaborRelationsBoard>, JACKSON, SHIELDS, YEISER, & HOLT (Jan. 6, 2011), <http://www.jsylawfirm.com/news/revolutionary-developments-in-2011-are-on-the-horizon-at-the-national-labor-relations-board/>. One of the authors of this article signed the amicus brief.

the NLRA by the Board or the courts should be of less interest in the debate than what the statute should be read to say. In Part III, we turn to the heart of our argument, which examines the implications of members-only bargaining. We consider its impact for organizing campaigns (they would become less significant), for unions (they would need actively to seek support from members on an ongoing basis, rather than just at the time of a certification election), for employer-employee relations, and for relations among employees. Requiring members-only bargaining would allow those employees who wish it the benefits of collective representation. It could permit employees to preview the effectiveness of every potential union *before* electing a representative, thereby empowering employees to exercise their section 7 rights more intelligently. However, it could also permit employers to utilize inter-union competition to undermine collective bargaining, thus making full protection of section 7 rights more difficult.<sup>20</sup> We conclude that it is difficult to predict whether the benefits of members-only bargaining would outweigh the costs. We suggest that, at minimum, the NLRB should commence a rulemaking proceeding in order to obtain full and fair input and thorough study of these costs and benefits.

To harness the benefits and reduce the costs of *Blue Eagle's*<sup>21</sup> proposal, the NLRB should adopt Morris' rule only in conjunction with thorough guidelines setting the scope and explaining the procedures for members-only bargaining. The NLRB has recently taken a cue from other administrative agencies and utilized rulemaking to promulgate labor policy.<sup>22</sup> At minimum, the NLRB should address the issues of permissible bargaining strategy, post-majority contractual enforceability, and minority union entrenchment.

Although much of the discussion of adjudication as opposed to rulemaking as applied to the NLRB focuses on the quality of the rules produced by the two processes, in this case, it is more important to focus on the process by which the rules are adopted. The proposal for non-majority unions offers the NLRB an important opportunity to gather data and analysis on the likely effects of members-only bargaining from a wide swath of businesses, unions, and labor scholars. It thus responds to the well-known criticism that the Board's data gathering

20. See OFF. OF THE GEN. COUNS., *supra* note 12, at 10 (arguing that "minority representation could provide employers a ready method of precluding true collective bargaining by playing the different minority representatives off against each other").

21. See MORRIS, *supra* note 10.

22. *NLRB Proposed Rule Requires Notice Posting By All Employers Under Board's Jurisdiction*, Daily Lab. Rep. (BNA) No. 244, at AA-1 (Dec. 21, 2010). The proposed rule was to go into effect November 14, 2011; however, the NLRB has postponed its effective date until January 31, 2012. See *NLRB Delays New Notice Posting Deadline As Republicans Offer Bill, Continue Criticism*, Daily Lab. Rep. (BNA) No. 193, at A-1 (Oct. 5, 2011).

and analysis is less rigorous than would be ideal.<sup>23</sup> While adjudications are limited to issues that are raised by the parties in their appeals from the administrative law judges' (ALJ) rulings,<sup>24</sup> rulemaking can encompass anything within the NLRB's regulatory jurisdiction.<sup>25</sup> Accordingly, rulemaking will allow the NLRB to preempt potential problems with members-only bargaining processes *before* they become appealable issues.

## II. The Legality of Minority Unions Under the NLRA

Proponents and opponents of members-only bargaining disagree over whether the language, the legislative history, the early interpretations of the NLRA and its predecessors, and the cases construing the NLRA since 1935 contemplate members-only bargaining as an alternative and supplement to majority unionism and exclusivity. As we explain below, the statute is susceptible to a reading requiring members-only bargaining, and the cases addressing the issue are both so old and so inconclusive that the NLRB could approach the matter afresh. Reasonable minds could differ on the question of whether members-only bargaining is the best labor policy, so the Board should approach the matter as a permissible alternative that should be studied through rulemaking, and not as a legal question that has been definitively answered by prior Board or Supreme Court caselaw.

### A. Statutory Language

Section 7 grants employees the rights "to self-organization" and "to bargain collectively through representatives of their own choosing."<sup>26</sup> Nothing in the language of section 7 explicitly limits the right to self-organize to those workplaces where a majority of employees choose one union or grants the right to bargain collectively only when a majority choose the same union. Section 8(a)(1) prohibits employers from interfering with, restraining, or coercing the exercise of section 7 rights and does not expressly condition the prohibition on the majority of the employees having chosen the same union.<sup>27</sup> Members-only bargaining is thus consistent with the language of sections 7 and 8(a)(1).

The majority-rule principle finds support in section 9(a), which provides that once a majority of the employees in a bargaining unit choose

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23. *E.g.*, Robin Stryker, *Limits on Technocratization of the Law: The Elimination of the National Labor Relations Board's Division of Economic Research*, 54 AM. SOC. REV. 341, 344 (1989); *cf.* Cary, *supra* note 8.

24. *See The NLRB Process*, NLRB, <http://www.nlr.gov/nlr-process> (last visited Sept. 30, 2011); *What We Do: Decide Cases*, NLRB, <http://www.nlr.gov/what-we-do/decide-cases> (last visited Sept. 30, 2011). *See generally* NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (rev. ed. 1997) (1962).

25. *See* Cary, *supra* note 8.

26. NLRA § 7, 29 U.S.C. § 157 (2006).

27. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (2006).

a majority union, the employees' *majority* representative becomes their *exclusive* representative,<sup>28</sup> and in section 8(a)(5), which imposes a duty to bargain with the representatives of the employees, "subject to the provisions of section 9(a)."<sup>29</sup> The reference to majority rule in section 9 applies only to *exclusivity*, not (explicitly) to the duty to bargain at all. Section 8(a)(5) could be read to impose a duty to bargain with a union selected by any group of employees, and the "subject to the provisions of section 9(a)"<sup>30</sup> language could be read to mean that the duty to bargain exclusively with only one union applies only where a majority has selected it. The language does not expressly preclude a duty to bargain with minority unions until a majority has selected the same union. There is thus a basis for reading the statute to require members-only bargaining. The views of commentators other than Morris are divided on whether the NLRA's plain language restricts mandatory bargaining to majority unions.<sup>31</sup> At minimum, the plain language raises the possibility of requiring members-only bargaining.

One might reasonably conclude that the NLRA is ambiguous on the question of whether majority rule is required always or only as a requisite for exclusivity. If the statute is ambiguous, the NLRB could interpret the NLRA to require members-only bargaining. An interpretation allowing minority unions would not be "arbitrary, capricious, or manifestly contrary to the statute,"<sup>32</sup> and therefore, under the *Chevron* rule governing judicial review of agency action, a court reviewing the NLRB's determination on members-only bargaining would have to uphold it.<sup>33</sup>

### B. Legislative History

Those who have studied the legislative history of the NLRA have reached different conclusions on the question whether Congress intended to impose a duty to bargain with minority unions. *Blue Eagle* is the most detailed and thorough study of the history of the NLRA on the question of members-only bargaining.<sup>34</sup> Morris argues that before the

28. NLRA § 9(a), 29 U.S.C. § 159(a) (2006).

29. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (2006).

30. NLRA § 9(a), 29 U.S.C. § 159(a) (2006).

31. See, e.g., Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 136–37 (2003). Getman reasons that "agreement[s] which appl[y] to union members only would violate § 8(a)(3)," while agreements that apply to employees more generally would "violate[] the concept of exclusivity and therefore violate[] § 8(a)(2)." *Id.* Morris addressed the Getman arguments in Charles J. Morris, *Minority Union Collective Bargaining: A Commentary on John True's Review Essay on The Blue Eagle at Work, and a Reply to Skeptics Regarding Members-Only Bargaining Under the NLRA*, 27 BERKELEY J. EMP. & LAB. L. 179, 188–94 (2006) (article review).

32. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

33. See *id.* at 843–44.

34. MORRIS, *supra* note 10.

NLRA was enacted in 1935: (1) employers often engaged in members-only recognition and bargaining;<sup>35</sup> (2) the National Labor Board (NLB) interpreted the National Industrial Recovery Act (NIRA) to prohibit refusal to bargain with minority unions;<sup>36</sup> and (3) Congress rejected a version of section 8(a)(5) that confined the employer's duty to bargain to majority unions.<sup>37</sup> The most controversial interpretation of this history is the maximalist position that the statute *compels* the NLRB to require recognition of minority unions. An intermediate position is that the history establishes that the Act *allows* the NLRB to require it. Morris himself concedes that after the NLRA was enacted, the NLRB and unions both favored official elections—the NLRB because “they provided a relatively simple pattern for bargaining-unit determinations, conduct of elections, and certification of majorities for exclusive union representation,”<sup>38</sup> and the unions “out of sheer convenience”;<sup>39</sup> but, in his view, this establishes only that the NLRB has expressed a preference for majority bargaining based on exclusivity, not that the legislative history allows only that. Most who have studied the legislative history of the NLRA agree with at least the minimalist position that the legislative history shows that the statute allows members-only bargaining if an employer wishes to recognize the minority union.

The 2007 General Counsel memo in *Dick's Sporting Goods* adopted the minimalist position and concluded that the legislative history shows only:

In the early enforcement of the Act, the Board held that an employer *may* recognize and bargain with a minority, members-only union, as long as the employer does not extend that union exclusive status. However, nothing in the statutory language, legislative history of the Act, or decisions interpreting the Act, establish[es] an employer's *duty* to do so.<sup>40</sup>

The scholarly community that analyzed Morris' historical research divided between concluding that the legislative history supports the maximalist position and concluding that it supports only the intermediate position. One reviewer hailed the book as “remarkably compelling,

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35. *Id.* at 26–31.

36. *Id.* at 35–40 (discussing Nat'l Lock Co., 1 N.L.B. (Part II) 15 (1934); Bee Line Bus Co., 1 N.L.B. (Part II) 24 (1934); and Eagle Rubber Co., 1 N.L.B. (Part II) 31 (1934)). The National Labor Board and the National Industrial Recovery Act were the predecessors of the NLRB and the NLRA. See generally IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* (1950); STANLEY VITTOZ & JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* (1974); NEW DEAL LABOR POLICY AND THE AMERICAN INDUSTRIAL ECONOMY (1987).

37. MORRIS, *supra* note 10, at 62–63.

38. *Id.* at 87.

39. *Id.* at 88.

40. OFF. OF THE GEN. COUNS., *supra* note 12 (footnote omitted).



innovative”<sup>41</sup> scholarship and found persuasive its analysis of the legislative history supporting the maximalist position.<sup>42</sup> Another was persuaded only by the argument that the legislative history supports an intermediate position that the NLRA *permitted* rather than *compelled* the NLRB to allow minority unions. He said that while “the NLRB *should* have required employers to meet with organizations representing only a fraction of their workforce, I do not find a clear Congressional command that *requires* the Board to do so.”<sup>43</sup> Instead, he “read this history to mean that Congress delegated this issue, along with many others, to the new NLRB.”<sup>44</sup>

Statutory interpretation is soundest when it is based on more than plain language, which is rarely plain, and legislative history, which, even when it is clear, does not answer the question of whether the practices of seventy-five years ago should continue today. Because the statute is susceptible to a reading allowing minority unions, and because the chorus of criticism of the current law governing organizing is so loud and so much in harmony, the Board can and should conduct rulemaking on the question of whether members-only bargaining represents sound public policy.

### C. Cases and Other Precedent

For decades, lawyers have generally assumed that the NLRA imposes a duty to bargain only where a majority of employees choose the same union; as a consequence, cases actually deciding the issue are scant. *Blue Eagle* therefore finds support for members-only bargaining in the Constitution, international law, and old cases. In our view, none of them is determinative.

Morris asserts that the NLRB should require members-only bargaining to protect the First Amendment freedom of association.<sup>45</sup> He argues that a statute conferring a right to bargain collectively only on a

41. John True, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*, 26 BERKELEY J. EMP. & LAB. L. 181, 189 (2005) (book review).

42. *See id.* at 190–91, 196.

43. Alan Hyde, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*, 58 LABOUR/LE TRAVAIL 230, 231 (2006) (book review) (emphasis added).

44. *Id.*

45. Morris finds the state action requirement met under *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); and *NAACP v. Alabama*, 357 U.S. 449 (1958). MORRIS, *supra* note 10, at 114–16. Morris further cites *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to show that the Supreme Court has long recognized the involvement of indirect state action in labor legislation. MORRIS, *supra* note 10, at 115. With the constitutional implications established, Morris argues that the constitutional avoidance principle of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), should lead to a reading that avoids a construction limiting the First Amendment rights of those employees seeking to associate for purposes of members-only bargaining. MORRIS, *supra* note 10, at 129–30.

union designated by a majority impermissibly grants freedom of association only to those employees in the majority.<sup>46</sup> However, one scholar questioned whether the First Amendment compels minority bargaining, finding the existence of state action to be problematic and doubting the persuasiveness of the cases on which Morris' constitutional argument rests.<sup>47</sup>

Morris also argues that international labor rights treaties, including the International Labour Organization's (ILO) Declaration on Fundamental Principles and Rights at Work<sup>48</sup> and International Covenant on Civil and Political Rights (ICCPR),<sup>49</sup> compel the United States to recognize a right to members-only bargaining.<sup>50</sup> Skeptics of this portion of *Blue Eagle* observe that "the United States does not comply with ILO standards" on a number of issues, including collective bargaining,<sup>51</sup> and that the ICCPR does not permit private suits in U.S. courts.<sup>52</sup> Instead, Morris argues the ICCPR authorizes the NLRB to hear these claims.<sup>53</sup> Here, as elsewhere, Morris advances a plausible argument for why international law compels the United States to read its law as granting a right to members-only bargaining, but as skeptics note, compliance with international human rights law has not historically been and is not now the strongest argument for a change in U.S. law.<sup>54</sup>

The central point of contention about the law governing members-only bargaining concerns whether cases since the 1930s have accepted, rejected, or remained agnostic on arguments that the NLRA can be read to *compel* employers to bargain with minority unions. As noted, the minimalist position is well-settled in the law: members-only bargaining has long been permissible when the employer chooses to work with it.<sup>55</sup> On the intermediate and maximalist positions, which would

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46. See MORRIS, *supra* note 10, at 129–30.

47. Joseph E. Slater, *Do Unions Representing a Minority of Employees Have the Right to Bargain Collectively?: A Review of Charles Morris, The Blue Eagle at Work*, 9 EMP. RTS. & EMP. POL'Y J. 383, 396–97 (2005) (book review).

48. ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233.

49. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, at art. 22 (Dec. 16, 1966).

50. MORRIS, *supra* note 10, at 147–51.

51. Slater, *supra* note 47, at 399 (quoting MORRIS, *supra* note 10, at 151).

52. *Id.* at 399 n.119 (citing MORRIS, *supra* note 10, at 146).

53. MORRIS, *supra* note 10, at 146.

54. Matthew W. Finkin, *International Governance and Domestic Convergence in Labor Law as Seen from the American Midwest*, 76 IND. L.J. 143, 143 (2001) ("It [is] extremely unlikely that a body of international labor law governing the United States will come into existence in the foreseeable future.")

55. See *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 237 (1938); *Dana Corp.*, 356 N.L.R.B. No. 49, at 4 (Dec. 6, 2010) ("[E]mployers and unions may enter into 'members-only' agreements, which establish terms and conditions of employment only for those employees who are members of the union.") (dictum).

impose a duty to bargain on the employer, the cases are mainly old and ambiguous. Focusing on twelve decisions, Morris argues that eight cases prohibit minority unions from representing the entire bargaining unit,<sup>56</sup> which is a relatively uncontroversial reading of section 8(a) (2), and finds that only four cases find no duty to bargain with non-union employee groups.<sup>57</sup> In his view, none of the cases squarely rejects a duty to engage in members-only bargaining.<sup>58</sup> While disputing some aspects of Morris' reading of the cases, most critics concede that "none of them squarely disposes" of the argument for members-only bargaining.<sup>59</sup>

The search for caselaw deciding whether the NLRA requires employers to recognize a minority union is misguided. The cases are old, and circumstances regarding unionization and organizing have changed. The job of the NLRB, like any administrative agency, is to interpret and enforce the statute in a manner that is responsive to changing needs. If members-only bargaining is a permissible reading of the language of the statute (as we have shown it is), and if it makes policy sense (which we discuss below), then the Board is free to read the statute to require it, regardless of what the Board or the courts may have opined on the subject decades ago.

### III. The Implications of Members-Only Bargaining

The petitions for rulemaking on members-only bargaining invite the Board to exercise its statutory authority to examine the desirability of this alternative form of union representation and bargaining. Since the door is open, the NLRB should explore the opportunities this proposal may offer. To aid the Board in its task, we analyze the possible impact of members-only bargaining on aspects of labor-management relations.

56. The eight "false-majority" cases are *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961); *Olin Industries, Inc.*, 86 N.L.R.B. 203 (1949), enforced, 191 F.2d 613 (5th Cir. 1951); *Agar Packing & Provision Corp.*, 81 N.L.R.B. 1262 (1949); *National Linen Service Corp.*, 48 N.L.R.B. 171 (1943); *Brashear Freight Lines, Inc.*, 13 N.L.R.B. 191 (1939), enforced as modified, 119 F.2d 379 (8th Cir. 1941); *Wallace Manufacturing Co.*, 2 N.L.R.B. 1081 (1937); *Mooresville Cotton Mills*, 2 N.L.R.B. 952 (1937), enforced as modified, 94 F.2d 61 (4th Cir. 1938) (modification unrelated to members-only issue); and *Segall-Maigen, Inc.*, 1 N.L.R.B. 749 (1936) (modification unrelated to member-only issue). MORRIS, *supra* note 10, at 159–62.

57. The four "group-dealing" cases are *Charleston Nursing Center*, 257 N.L.R.B. 554 (1981); *Pennypower Shopping News, Inc.*, 244 N.L.R.B. 536 (1979); *Swearingen Aviation Corp.*, 227 N.L.R.B. 228 (1976), enforced in part and denied in part, 568 F.2d 458 (5th Cir. 1978); and *Lundy Manufacturing Corp.*, 136 N.L.R.B. 1230 (1962), enforced, 316 F.2d 921 (2d Cir. 1963). MORRIS, *supra* note 10, at 162–69.

58. MORRIS, *supra* note 10, at 169–70.

59. See, e.g., True, *supra* note 42, at 195.

A. *The Effect of Minority Union Bargaining on Organizing*

Members-only bargaining would dramatically alter the landscape of organizing. It would introduce the union into the workplace as soon as employees wanted, rather than forcing them to endure a campaign lasting weeks or months. It would reduce the incentive for the employer to hire consultants to keep the union out. A union that loses a certification election would not disappear because it could still represent its members and bargain on their behalf. Labor lawyers on both the management and union sides would spend far less time and money litigating issues about union access, *Excelsior* lists, and the like. Either lawyers would become less important, or in workplaces with determined opposition to unions, they might devote more attention to bringing or defending unfair labor practices associated with bargaining and differential treatment of union and nonunion members.

Both the Wagner Act<sup>60</sup> and the Taft-Hartley Act<sup>61</sup> acknowledge that collective bargaining promotes stability and fairness in labor relations, the nation's general welfare, and employers' and employees' best interests.<sup>62</sup> Accepting the benefits of collective bargaining processes, the strongest and most certain advantage of requiring members-only bargaining would be to reduce the necessity for, and acrimony of, organizing campaigns. It would allow those employees who wish to form unions and bargain collectively to do so without imposing collective representation on co-workers who do not favor it. It would thus reduce the resources expended on union representation elections by both employers and unions, and allow employees to exercise their section 7 rights more effectively.

Reducing the difficulty of obtaining union representation for those employees who wish it should be uncontroversial. Scholars have complained for decades that the law and procedure governing union organizing and first contract negotiation offers employers abundant opportunities to engage in anti-union tactics with few penalties, even for flagrantly unlawful acts like firing union supporters<sup>63</sup> or refusing to negotiate a collective bargaining agreement with a newly certified union.<sup>64</sup> Within the last fifty years, America's private-sector union

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60. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2006)).

61. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

62. See 29 U.S.C. §§ 151, 141(b) (2006).

63. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1780-81 (1983); Lisa Schur, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*, 31 LAB. STUD. J. 107, 107 (2006) (book review).

64. See Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 358 (1984).

membership has dropped over fourfold.<sup>65</sup> Explaining this decline, some scholars cite NLRB election procedures that often drag out, giving employers strong financial incentives to violate the NLRA because the delay in paying damages for violating workers' rights undermines any compensatory or deterrent effect.<sup>66</sup> Because members-only bargaining may allow the unions to "focus their attention on building organizations rather than winning elections,"<sup>67</sup> at least for purposes of bargaining, it might counteract this failing.

Further, the NLRB's election policies do not require the employer to afford the union equal time to appeal to employees.<sup>68</sup> Accordingly, a lengthy election campaign also permits an employer to reap the benefits of greater employee access. Employers frequently argue at length that union representation will achieve nothing but enmity and difficulty in employee-management relations, that union representation prohibits individual adjustment of grievances, and that it hampers the formation of productive, congenial supervisor-subordinate relations. With limited access to employees, unions attempt to convince them of the falsity of the employer's characterization of the law (that individual communication and adjustment of grievances is not prohibited by majority-rule unionism), and of facts (that unions can enhance rather than hamper workplace relationships). By providing a preview of collective bargaining processes, the proposal may permit the union to neutralize employer rhetoric with demonstrations of added bargaining value.<sup>69</sup> Instead of attempting to prophesy union performance by looking to how it did in other bargaining units, employees may compare their results to those of other unions or individual contracts within the same bargaining unit. Consequently, employees could formulate informed decisions on whether to support a union.

Minority bargaining may improve union effectiveness in changing labor environments. For example, some observers suggest that the failure to unionize Wal-Mart reflects the incompatibility of NLRB

65. Horowitz, *supra* note 13 (citing News Release, Bureau of Labor Statistics, U.S. Dept't of Lab., Union Members in 2006 (Jan. 25, 2007), which reported private-sector union membership at 7.4 percent and general union membership at 12 percent). Private-sector union membership was over four times that number fifty years ago. *Id.*

66. See Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 49, 55-59 (2009) (collecting citations).

67. John W. Budd, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*, 43 BRIT. J. IND. REL. 326, 328 (2005) (book review).

68. See *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 364 (1958) (holding an employer who enforces a valid no-solicitation rule while engaging in anti-union solicitation does not per se violate the NLRA).

69. See Budd, *supra* note 67, at 328 ("Morris shows how Senator Wagner—the father of the NLRA—viewed minority unionism as a stepping stone to full-fledged majority unionism, especially as the benefits of union representation are vividly demonstrated to skeptical co-workers.").

certification strategies with large, complex employers.<sup>70</sup> Learning from countries like India, which allows an array of federations and unions to share a workplace,<sup>71</sup> America's minority unions may shift to "democratic, bottom-up" organizing<sup>72</sup> and coalition-building.<sup>73</sup> Instead of waiting for unions to arrive, worker centers and community organizations could take the lead on organizing and bargaining, with training and backup from unions. To maximize their effectiveness, bottom-up organizers may need to coordinate their demands across regions or industries, which might require "new forms" of umbrella labor organizations.<sup>74</sup>

Reasonable minds may differ on whether requiring minority bargaining would increase or decrease the likelihood of achieving majority unionization. While arguing that minority bargaining merits NLRA protection, Morris admits that majority bargaining "was certainly the ultimate goal intended by the Act."<sup>75</sup> Indeed, the unions that flirted with building minority unions in the 1980s and 1990s did so "as a prelude to winning majority support."<sup>76</sup>

However, adopting the proposed rule provides no guarantee that minority unions will transition into majority unions. The law under section 8(a)(2), prohibiting an employer from recognizing or negotiating a contract with a union before it gains majority support, is premised on the assumption that employer recognition of a minority union will sway employees to support that union and will thus make it more likely that the union will gain majority support.<sup>77</sup> Of course, the accuracy of that factual assumption has never been empirically studied. It is possible that members-only bargaining will instead prevent any one union from gaining majority support; unions may satisfy themselves with representing a minority and not exert the effort to win over the others. Furthermore, employers facing unionization may cut their losses by supporting permanent minorities, and employees lacking opportunities to engage in whole-workplace debate may decline to support the move toward majority unionization. An entrenched minority

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70. *E.g.*, Wade Rathke, *Bargaining Rights for Non-Majority Unions*, CHIEF ORGANIZER BLOG (Sept. 3, 2011), <http://chieforganizer.org/2010/09/03/bargaining-rights-for-non-majority-unions>.

71. *Id.*

72. Judy Atkins & David Cohen, *Should Nonmajority Unions Have Right to Bargain?*, LAB. NOTES (Sept. 14, 2010), <http://labornotes.org/2010/08/should-nonmajority-unions-have-right-bargain>.

73. *See* Rathke, *supra* note 70.

74. Atkins & Cohen, *supra* note 72.

75. MORRIS, *supra* note 10, at 88.

76. Atkins & Cohen, *supra* note 72.

77. *See, e.g.*, *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961); *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *enforcement denied*, 355 F.2d 854 (2d Cir. 1966).

regime might generate unions powerless to conduct effective strikes for fear of shrinking employer demand or sparking workplace conflict. To protect minority bargaining, the NLRB will need rules discouraging minority entrenchment, along with a comprehensive regulatory framework to ease the transition to minority organizing strategies.

### *B. Union-Member Relations*

In the early stages of a union's presence in the workplace, members-only bargaining will change the union's focus. The union will have to get *members*, not just authorization cards. Employees will have to make a commitment by paying dues and participating in union governance. They will also have to make their union membership known, which means they will risk retaliation from their supervisors and the enmity of nonunion co-workers. Additionally, a duty to bargain will impose nontrivial burdens on the union. It will need to involve employees more actively in governance and strategy development. If it gets a contract, it will have to process grievances, even in workplaces with relatively few members. On the other hand, a union that bargains only for its members may raise less concern about the duty of fair representation because it will owe a duty only to its supporters, not to the minority in a bargaining unit represented by a majority union.

Economic theory indicates that competition promotes efficiency. By forcing several unions to compete for members, or a union to win over the non-union employees in the workplace, the proposal may encourage unions to negotiate the best possible terms and maintain good member relations. A non-majority union would want to negotiate terms that protect its members and convey to all employees in the workplace that unionization results in better pay, better conditions, better enforcement of safety laws, and fairer processes in discipline cases. The union would find itself constantly pressed to negotiate only for those terms that are mutually beneficial to the employer and the employees to forestall the possibility that its wage demands or work rules would impose inefficiencies that would cause the employer to shift work from the unionized to the non-union employees. And of course, to the extent that employees detect a pattern of exploiting the wage gains or other improvements negotiated by the union by shifting work to the non-union segment of its workforce, the non-union employees might sense that they are being exploited and want to join the union. The constant state of flux would force both the union and the employer to prevent employees from defecting.

In theory, members-only bargaining is no different than non-union bargaining. Absent a collective agreement, every employee with enough labor market power can negotiate individual terms of employment on wages, hours, job duties, and the like. Highly sought-after managers and executives routinely do so and may hire lawyers to negotiate elaborate individual employment contracts. Even at the lower end of the

wage spectrum, employees are not paid uniformly and may have special work arrangements to accommodate a disability or other needs. Skeptics worry that members-only bargaining is unworkable because it will prevent employers from imposing uniform personnel rules on all employees in the same job category and require employers to bargain on similar subjects “with possibly numerous different unions governing pockets of employees in the same or similar positions,”<sup>78</sup> some of which, such as wages and grievance procedures, “will have an effect upon non-members and potentially all other non-represented employees.”<sup>79</sup>

However, the same lack of uniformity can, and does, occur in non-union workplaces. Even some unionized workplaces have different terms for employees doing the same job, as employers and unions have negotiated two-tier wage and benefit structures.<sup>80</sup> What becomes different is that an employer faced with a minority union must consider not only the personnel consequences of non-uniform working conditions, as all employers consider, but also the impact granting certain terms has on the prospect of the minority union becoming a majority union.

For example, imagine that *Employer X* contemplates firing an alleged thief from a minority union workplace. Ordinarily, an at-will employee has no effective legal recourse, and the employer will consider only the effect of the firing on morale and workflow. However, an employee covered by a collective bargaining agreement may have a contractual opportunity for grievance arbitration, and, if the grievance is successful, the employee will be reinstated with backpay. While this may force the employer to approach its human resources procedures more thoughtfully, it might also mobilize antiunion sentiment by appearing to reward bad actors for unionization. On the other hand, it might prompt the union to grieve only the most meritorious discharge or discipline cases for fear of losing its support by defending employees who deserve discipline. The threat of invoking a grievance for a truly unjustly discharged employee might prompt an employer to refrain from arbitrarily firing non-member employees for fear that employees would gain an incentive to join a union.

### C. *The Effect of Members-Only Agreements on Company Personnel Policies*

In addition to the matters concerning the union’s relations with its members and with the company, members-only bargaining presents

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78. Horowitz, *supra* note 13 (quoting Randel Johnson, vice president of labor, immigration, and employee benefits for the U.S. Chamber of Commerce).

79. David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 506 (2006) (book review).

80. See, e.g., Bill Vlasic, *Detroit Sets Its Future on a Foundation of Two-Tier Wages*, N.Y. TIMES (Sept. 12, 2011), <http://www.nytimes.com/2011/09/13/business/in-detroit-two-wage-levels-are-the-new-way-of-work.html?pagewanted=all>.



a host of questions about the company's relations with its union and non-union employees: What would be the effect of a members-only agreement on other employees? If the minority union achieves majority status, is the agreement still enforceable? If the employer also signed members-only agreements with other minority unions, are those agreements still enforceable, too? Since an employer's willingness to enter agreements with unions "may turn on the employer's ability to predict the consequences of doing so,"<sup>81</sup> an increase in ambiguity may decrease the likelihood of striking voluntary bargains. These issues could be resolved by the NLRB adopting rules to govern the effect of minority agreements on other employees, or on all employees if the union later gains majority support. If there were binding rules, or at least default rules that the parties could bargain around, the parties would not have to negotiate these issues for every contract.

Moreover, if the Board were to require members-only bargaining, it would have to make clear whether the scope of the duty to bargain is as broad as it is when the union is the exclusive representative, and whether the employer violates the duty to bargain by unilaterally changing the terms of the agreement. It would have to determine whether an employer violates section 8(a)(3) by offering better, or worse, wages to employees represented, or not represented, by the union, even if the evidence suggests that a wage increase for the non-member group was motivated by a desire to discourage union members from continuing to support the union. Would a union violate section 8(b)(2)<sup>82</sup> if it objected to the employer applying the same terms to non-union employees that the union negotiated for its members? If it would not violate section 8(b)(2) for a union to negotiate better terms for its members than the employer offers to non-members, one might argue that it should not violate section 8(a)(3) for the employer to offer better terms to the non-members. Proof of motive will then be crucial. The union might argue that an employer violates section 8(a)(3)<sup>83</sup> if it provides higher pay for non-members if motivated by a desire to prompt members to defect. The Board would have to determine whether the employer was motivated to chill union support. Because members-only bargaining raises complex new questions about, for example, employees' section 7 rights and employers' contractual duties, the rule suggested by the Steelworkers Union<sup>84</sup> is unlikely to create a fully workable regime.

81. Dana Corp., 356 N.L.R.B. No. 49, at 8 (Dec. 6, 2010) (discussing voluntary recognition agreements).

82. NLRA § 8(b)(2), 29 U.S.C. § 158(b)(2) (2006).

83. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (2006).

84. Petition of United Steelworkers Union, *supra* note 16; see Letter from Charles Morris and Charles Craver, to the National Labor Relations Board, [http://lawprofessors.typepad.com/laborprof\\_blog/files/letter\\_to\\_the\\_national\\_labor\\_relations\\_board.doc](http://lawprofessors.typepad.com/laborprof_blog/files/letter_to_the_national_labor_relations_board.doc).

D. *Effect of Members-Only Bargaining on Co-worker Relations: Factionalism or Pluralism?*

By allowing workers in the same job at the same site to choose whether or not to bargain collectively, members-only bargaining would allow unions to exist for some employees and not for others who work side by side. This could enhance employee free choice by allowing collective bargaining only for those who want it and eliminating the need to impose collective bargaining on those who do not. As noted, the need to gain members might prompt employees who support the union to be extremely responsive to their skeptical co-workers in order to avoid losing them as members. Consequently, unless there were some limits on the ability of employees frequently to switch back and forth between the collective agreement and individual negotiations, members-only bargaining could reduce the stability of labor relations, which is sometimes asserted as an important policy of the NLRA.<sup>85</sup>

The possibility of multiple unions existing within the same work-site alarms some who fear that inter-union competition may harm employees' interests by inviting employer gamesmanship and by distorting election decisions. "[M]inority representation could provide employers a ready method of precluding true collective bargaining by playing the different minority representatives off against each other."<sup>86</sup> Knowing the interests at stake, employers may take hard lines to cast unions as ineffective or strategically to offer concessions to promote the unions they prefer, thus subtly shaping their employees' choices under section 7.<sup>87</sup> Unions would have to exercise care to promote unity. They could look abroad and to industries in the United States, such as construction, health care, and entertainment, where different unions represent employees working in similar jobs on the same site, to see how unions have developed common strategy for negotiations and facilitated coordination by forming councils of the leadership of many different unions. While it is possible that an employer and the union would have an incentive to prevent employees from defecting or joining the different union, it might also be the case that either or both sides would try to exploit the differences rather than minimize them. This is fundamentally an empirical question that would benefit from careful study based on solid data. It is also possible, as one commentator suggested, that "allowing employees who work side-by-side performing the same tasks to be represented by different minority unions, or a minority union as opposed to unrepresented employees, could create tension that would preclude them from 'pooling their economic

85. See, e.g., NLRA § 1(a), 29 U.S.C. § 151(a) (2006).

86. OFF. OF THE GEN. COUNS., *supra* note 12, at 10.

87. See NLRA § 7, 29 U.S.C. § 157 (2006).

strength' in an effective manner."<sup>88</sup> Instead of "focus[ing] . . . on building organizations,"<sup>89</sup> members-only unions may have to focus on beating rival unions. Because a members-only union may encounter a unique combination of employer gamesmanship and inter-union competition, its performance before gaining a majority may not be indicative of its performance after gaining a majority. As a result, inter-union competition may fail to assist the employees in using their section 7 rights intelligently, or at least not enough to justify the costs. As with the other possible drawbacks and benefits, this, too, raises an empirical question for which one would need solid data to provide a persuasive answer.

The absence of uniformity may create inter-employee conflict and undermine intra-company unity.<sup>90</sup> If a workplace is split along demographic or political lines, such as race, ethnicity, etc., then introducing minority bargaining could exacerbate existing conflicts. The history of union discrimination by race, gender, and ethnicity, and employer efforts to exploit these tensions to defeat unionization, is instructive but not determinative. As illustrated by *Emporium Capwell Co. v. Western Addition Community Organization*,<sup>91</sup> workplace racial tensions can shape the decision to support a union.<sup>92</sup> Holding that African-American employees' demand for separate bargaining violated the exclusivity rule even when some employees believed the union had failed adequately to prioritize racial equality in bargaining and contract administration, Justice Marshall noted that minority bargaining hampers the union's ability to present a united front, damaging union influence and diverting union resources.<sup>93</sup> In highly polarized workplaces, the union will have to learn the lessons of *Emporium Capwell* and avoid exacerbating existing conflicts, lest the union/non-union distinction become a proxy for undesirable demographic divisions.

Ideally, the NLRB's proposed rules should prohibit the employer from playing the representatives off against each other and protect the employer from charges of violating sections 8(a)(1) or 8(a)(5) for engaging in good-faith bargaining with multiple rival unions. The NLRB would have to decide which employer decisions that differentiate among union and non-union workers constitute discrimination

88. OFF. OF THE GEN. COUNS., *supra* note 12, at 10.

89. Budd, *supra* note 67, at 328.

90. Of course, the same could occur if the employer had reached several members-only agreements voluntarily. Under *Dana Corp.*, voluntary recognition agreements are legal and enforceable. *Dana Corp.*, 356 N.L.R.B. No. 49 (Dec. 6, 2010).

91. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975).

92. See, e.g., Calvin William Sharpe, Marion G. Crain & Reuel E. Schiller, *The Story of Emporium Capwell: Civil Rights, Collective Action, and the Constraints of Union Power*, in *LABOR LAW STORIES* 241-79 (Laura J. Cooper & Catherine L. Fisk eds., 2005) (describing a conflict over whether a majority union was adequately representing its minority members in pursuing claims of racial discrimination).

93. See *Emporium Capwell*, 420 U.S. at 60-73.

under section 8(a)(3). Further, if the employer reached agreements with several minority unions, one of which then achieved majority status, the NLRB might consider a rule that forbids the employer from breaking its agreement with the majority union but allows it to break its agreements with the minority unions, thus balancing the interests of predictability and uniformity. It might also limit the lifespan of minority unions to promote majority organizing and prevent minority entrenchment.

Further, if the NLRB wanted to undertake research regarding this issue, it would have obstacles to overcome: the modern NLRB was effectively deprived of its ability to employ people for economic analysis,<sup>94</sup> has no capacity to research labor realities,<sup>95</sup> and lacks independent access to social science studies.<sup>96</sup> Accordingly, “even when the Board infrequently attempts to take advantage of social science research, the agency is poorly equipped to evaluate it.”<sup>97</sup> By forcing the NLRB to observe rulemaking standards (which require a public notice and comment period and render the use of information judicially reviewable), rulemaking can force the NLRB to engage the evidence.

If the NLRB ultimately implements the *Blue Eagle* proposal, it will need to investigate empirical information in order accurately to gauge whether its labor policy changes are vital and useful. For example, the NLRB might need to know the prevalence of members-only agreements, the prevalence of units with several minority unions, and the percentage of employers who enter members-only agreements with several minority unions for similarly-situated employees, as well as their effects on inter-employee conflict and inter-company unity. By encouraging evidentiary engagement, rulemaking may allow the NLRB to address the inevitable growing pains more effectively.

#### IV. Conclusion

Like other markets, the market for members-only bargaining services features multiple complex interactions of supply and demand.

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94. Stryker, *supra* note 23, at 344.

95. See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2065 (2009).

96. *Id.*

97. Stryker, *supra* note 23, at 344. In contrast, most rulemaking agencies generate and evaluate empirical evidence on the needs for and effects of its activities. Thus, many federal regulatory agencies have economic research divisions. “These include the Department of Agriculture’s (DEA) Economic Research Service (ERS), the Secretary of Commerce’s (SOC) Bureau of Economic Analysis (BEA), and the Department of Labor’s (DOL) Bureau of Labor Statistics (BLS) and Division of Economic and Labor Research (ELR).” Xenia Tashlitsky, *A Critique of Supplying the NLRB with Social Science Expertise Through Party/Amicus Briefs* at 2 n.13 (2011) (unpublished manuscript) (on file with author).

Unlike other markets, the *goal* of members-only bargaining is monopoly, a single minority union achieving majority status,<sup>98</sup> while the *danger* is lack of providers, or the failure to satisfy employee desires for union representation. As we have shown, the NLRA *can* be read to allow the NLRB to require employers to bargain with non-majority unions. The real debate is over whether it *should* be read that way. Will it improve on the current regime at protecting the section 7 rights of those employees who want unionization without causing unfair discrimination against those who do not, or will it license discrimination against those who do? Will it cause too much complexity for employers? Will it lead to permanent entrenchment of non-majority unions in workplaces that could otherwise have secured majority representation? Will it empower desirable unions? Will it encourage or discourage unions to provide effective member services? These questions suggest that non-majority unionization is too important a matter of labor policy to be decided on speculation.

Moreover, if the Board were to change its longstanding assumptions about the right of employees to non-majority unionization, it would need to address a host of collateral issues about how the new system would work. The complexity of interests only accentuates that members-only bargaining will require comprehensive regulations to realize its potential and extensive empirical evidence to assess its effectiveness. Because it is so policy-oriented, members-only bargaining is the ideal issue to address by rulemaking as opposed to adjudication.

That the Board now seems inclined to experiment with rulemaking is a good sign, although the furious opposition to its modest new rules is not encouraging. On June 21, 2011, the Board released a notice of a proposed rule streamlining the procedures for handling representation cases,<sup>99</sup> and on August 30, 2011, it published a new rule that requires all employers to post a notice that informs their employees of their rights under the NLRA.<sup>100</sup> The rule was set to take effect November 14, 2011; however, on October 5, 2011, the Board announced it would postpone the effective date of its final rule until January 31, 2012.<sup>101</sup> Even these modest changes became embroiled in the extraordinary political

98. MORRIS, *supra* note 10, at 88 (acknowledging that “majority-union bargaining . . . was certainly the ultimate goal intended by the [NLRA]”).

99. See Press Release, Nat’l Labor Relations Bd., Board Proposes Rules to Reform Pre-and Post-election Representation Case Procedures (June 21, 2011), <http://www.nlr.gov/news/board-proposes-rules-reform-pre-and-post-election-representation-case-procedures>.

100. See Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80410 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104).

101. *NLRB Delays New Notice Posting Deadline As Republicans Offer Bill, Continue Criticism*, Daily Lab. Rep. (BNA) No. 193, at A-1 (Oct. 5, 2011).

attacks on the NLRB in 2011, including multiple oversight hearings,<sup>102</sup> an unsuccessful House vote to defund the agency,<sup>103</sup> subpoenas of the Acting General Counsel and of litigation documents in the Boeing case,<sup>104</sup> and histrionic assaults on the proposed rule governing election procedures.<sup>105</sup> Employer organizations have filed litigation challenging the NLRB's rulemaking authority.<sup>106</sup> The employer groups argue, e.g., that since the Board is only authorized to act when a representation petition has been filed under section 9(c)(1), or when an unfair labor practice charge has been filed under section 10(b),<sup>107</sup> the NLRA does not authorize the NLRB to issue a rights notification rule.<sup>108</sup> And, of course, the ongoing opposition to nominees to the NLRB raises the specter that the Board will be deprived of a quorum and thus cease to function when the current recess appointment expires in December 2011 because the House of Representatives has attempted to block the President from making a recess appointment by preventing the Senate from recessing.<sup>109</sup> In this political climate, it is highly unlikely that the Board will consider any reform to labor law as significant as

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102. Republican-controlled committees in the House of Representative held several oversight hearings on the NLRB in February, May, June, and July 2011. *See House Panel Holds Hearing on NLRB Proposal to Revise Its Representation Case Procedures*, Daily Lab. Rep. (BNA) No. 130, at AA-1 (July 7, 2011); *House Panel Conducts Boeing Field Hearing But Breaks Little New Ground in Controversy*, Daily Lab. Rep. (BNA) No. 117, at AA-1 (June 17, 2011); *House Panel Debates Union Pressure Tactics, NLRB Actions, Congressional Oversight*, Daily Lab. Rep. (BNA) No. 102, at A-1 (May 16, 2011); *House Panel Hears Divergent Views on NLRB as Witnesses Criticize, Defend Board Actions*, Daily Lab. Rep. (BNA) No. 29, at AA-1 (Feb. 11, 2011).

103. The House vote happened on February 17, 2011. Seth Borden, *Amendment to Defund National Labor Relations Board Fails House Floor Vote*, LAB. REL. TODAY (Feb. 17, 2011), <http://www.laborrelationstoday.com/2011/02/articles/house-of-representatives/amendment-to-defund-national-labor-relations-board-fails-house-floor-vote/>; U.S. House Floor, TWITTER (Feb. 17, 2011, 11:00 AM), <http://twitter.com/#!/HouseFloor/statuses/38266959019638784>.

104. *Issa Issues Subpoena to Compel NLRB, Solomon to Hand Over Boeing Documents*, Daily Lab. Rep. (BNA) No. 152, at A-1 (Aug. 8, 2011); *Rep. Issa Threatens to Eliminate National Labor Relations Board Over Boeing Dispute*, ABC NEWS (June 17, 2011), <http://abcnews.go.com/News/rep-darrell-issa-threatens-eliminate-labor-board-boeing/story?id=13871074>.

105. *NLRB Completes Meeting on Rule Revisions As Speakers Challenge, Defend Board Action*, Daily Lab. Rep. (BNA) No. 138, at A-1 (July 19, 2011) (quoting G. Roger King as describing the rulemaking proposal as part of a "regulatory tsunami" in the eyes of employers).

106. The litigation alleges that the rules exceed the NLRB's jurisdiction; the Chamber of Commerce (COC) and National Association of Manufacturers (NAM) complaints can be found on each organization's website, <http://www.chamberlitigation.com>; <http://www.nam.org>. *See also NLRB Delays New Notice Posting Deadline*, *supra* note 101.

107. Complaint at 5–6, National Association of Manufacturers v. National Labor Relations Board et al., No. 1:11-cv-01629 (D. D.C. Sept. 8, 2011); Complaint at 6, Chamber of Commerce of America et al. v. National Labor Relations Board et al., No. 2:11-cv-02516-PMD (D. S.C. Sept. 19, 2011).

108. NAM Complaint, *supra* note 107, at 5–6; COC Complaint, *supra* note 107, at 6.

109. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010).

members-only bargaining. In the long term, particularly if one party gains control of both the White House and Congress, and assuming the Board survives the political firestorm over its rulemaking efforts, we may expect to see the Board respond to the longstanding calls that it engage in more rulemaking in other areas as well. By combining Morris' proposal with thorough guidelines setting the scope and explaining the procedures for members-only bargaining, the NLRB may succeed in effectuating the NLRA's ultimate intent of reducing labor unrest and promoting industrial peace.

Considering the controversy over the legitimacy of the agency, the Board is unlikely to implement any true innovations in the current political climate. However, this proposal is really an intriguing thought experiment that may resurface once politics change. Even if the Board ultimately decides that the costs of members-only bargaining exceed its benefits and thus rejects the proposed rule, the labor policy-making process will benefit from careful study of the issue. While one part of the benefit of any legislative process, whether through legislative enactment or agency rulemaking, is judged by the rules that are adopted, another part of the value is the process itself. All the stakeholders in the labor law world would benefit if the NLRB were to conduct rigorous study of this important policy question and offer substantive reasons for its decision to issue or reject a rule.