Labor Policy in Late Twentieth Century Capitalism: New Paradoxes for the Democratic State

Daniel J. Gifford
University of Minnesota Law School, giffo001@umn.edu

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LABOR POLICY IN LATE TWENTIETH CENTURY CAPITALISM: NEW PARADOXES FOR THE DEMOCRATIC STATE

Daniel J. Gifford

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* Robins, Kaplan, Miller & Ciresi Professor of Law, University of Minnesota. The Author acknowledges helpful comments on an earlier draft of this Article from Professors Edward S. Adams, Stephen Befort, Karen Burke, Jim Chen, Laura Cooper, John J. Cound, Daniel A. Farber, Leo Raskind, and Dean E. Thomas Sullivan.
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INTRODUCTION

The enactment of the National Labor Relations Act\(^1\) ("NLRA") in 1935 was an economic and social watershed. The NLRA was the successor to section 7(a) of the National Industrial Recovery Act\(^2\) ("NIRA"), the initial experiment in American corporatist governance.\(^3\) The NLRA gave the United States a radically new labor policy, one dramatically more effective in facilitating union organization than its immediate predecessor. Following the path identified by the predecessor NIRA, which had contemplated a network of industry "codes," labor relations under the NLRA have developed in significant part along industry lines.\(^4\) And until the mid-1960s, the NLRA itself generated a set of labor relations which, because they were a compound of union, industry, and government input, could accurately be described as an American version of postwar European neocorporatist approaches to labor/management relations.\(^5\) Because organized labor's role in the national economy has steadily diminished, however, the results of collective bargaining no longer merit close government oversight. In this Article, the labor policy of the NLRA is evaluated comparatively in the

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3. See DONALD R. BRAND, *CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION* 81-91 (1988). Corporatism is a label widely applied to a system in which issues of social concern are resolved through interest group bargaining carried on under the supervision of the state but outside of the normal legislative process. See CHARLES S. MAIER, *RECASTING BOURGEOIS EUROPE* 9-10, 353-54, 582 (1975); see also Philippe C. Schmitter, *Still the Century of Corporatism?*, 36 Rev. Pol. 88, 86-93 (1974) (defining the term "corporatism" to produce a more utilitarian definition). The NIRA followed the corporatist model by authorizing each industry to work out for itself a "code or codes of fair competition" which would be effective upon Presidential approval. National Industrial Recovery Act § 3(a). Brand believes that the NIRA and its administering agency, the National Recovery Administration, produced an emergent societal corporatism. See BRAND, supra, at 19.


5. Melvyn Dubofsky describes government during the Eisenhower period as actively fostering cooperation between big business and big labor through a "politics of productivity" in which class conflicts over redistribution were transformed into a shared focus on improving economic performance. See MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 210 (1994).
light of the alternative labor policies followed in parts of Europe and in Japan.

The NLRA was crafted to meet the economic and political agenda of President Franklin Roosevelt's "New Deal." The NLRA was overtly designed, inter alia, to reduce labor unrest, to enhance the bargaining power of labor unions, and to facilitate a redistribution of income to the working classes. Many of the Act's underlying assumptions are no longer valid. The disparate bargaining power which the Act is designed to remedy was exacerbated in the 1930s by an oversupply of labor—unemployment in 1935 ran at approximately twenty percent of the civilian labor force. Congress believed that the Great Depression had been caused by inadequate spending. One of the assumptions underlying the NLRA was that, by aiding the organization of unions, the Act would divert income from the wealthier classes who saved to the working classes who spent proportionately more of their income on consumption. Congress also assumed that the markets in which goods were produced and sold were primarily domestic. Finally, Congress was not concerned with the integration of women, minorities, and immigrants into the workforce at the time that it enacted the NLRA. Despite the vast

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6. This redistributive objective appears in the legislative findings contained in section 1 of the NLRA. See 29 U.S.C. § 151 (1994) (stating "[t]he inequality of bargaining power . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners . . . ."). Senator Wagner asserted in the Senate that during the 1920s increases in productivity had vastly outdistanced wage increases on the order of nine to one. See 79 Cong. Rec. S7567 (1935). Senator Wagner argued that redistribution of income from capital to labor would raise overall demand, because of the higher propensity to consume in the working classes. See id. at S7567-68; 78 Cong. Rec. S12,018 (1934); see also S. Rep. No. 74-573, at 3-4 (1935) (presenting the Senate Committee on Education and Labor's findings on what would become the NLRA); 78 Cong. Rec. H9060-61 (1934) (statements of Rep. Carpenter); Arthur Schlesinger Jr., The Coming of the New Deal 123 (1959) (discussing New Deal proposals of price-fixing to stabilize the economy); Richard A. Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 Yale L.J. 1357, 1380-82 (1983) (noting that judges were unwilling "to address systemic economic issues," leaving such issues to be dealt with in the debates over the New Deal legislation).

7. In 1935 unemployment was 10,610,000 while the civilian labor force was 52,870,000. See U.S. Dep't of Commerce, Statistical Abstract of the United States 175 tbl.209 (71st ed. 1950).

8. Indeed, when Congress enacted the NLRA, it exacerbated the problem of blacks and other racial minorities. The NLRA (like the NIRA before it) established a system in which a majority of workers could select an exclusive bargaining representative. Moreover, the NLRA permitted closed shop agreements, i.e., agreements under which an employer would hire only union members. At that time, many labor unions, especially those affiliated with the American Federation of Labor, excluded racial minorities from membership. The result was that the NLRA created a system in which racial minorities would be unrepresented in collective bargaining and would be forced out of their jobs when a closed shop was negotiated. The National Association for the Advancement of Colored
economic and social changes which have occurred in this nation during the last sixty years, the labor policy formulated in the NLRA has remained in force, essentially unchanged.

The NLRA initially intensified labor unrest, but it was an unrest which accompanied, in the eyes of many New Dealers, a reformulation of the social contract, broadening the participation of the working classes in the economic fruits of capitalism. That unrest reached its zenith in the spring of 1937 when automobile workers seized General Motors production plants in Flint, Michigan. That seizure and the decision of then Governor (later U.S. Supreme Court Justice) Frank Murphy not to use force to retake the plants brought about the capitulation of most of the auto and steel industries to union demands for recognition. These union successes culminated an organizing drive in mass-production industries overseen by the new Committee for Industrial Organization (later to become the independent Congress of Industrial Organization ("CIO")), an association of American Federation of Labor ("AFL") dissidents who viewed AFL organizing efforts in the mass-production industries as inadequate. Most U.S. mass-production industries were

People and the Urban League anticipated these problems and lobbied unsuccessfully for changes in the NLRA to protect racial minorities. See HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 101 (1977).


9. Following the enactment of the NLRA a strike wave occurred in 1936-1937. See DUBOFSKY, supra note 5, at 201. That wave of strikes included sit down strikes at General Motors and other firms. See id. at 138-42, 163.

10. Professor Dubofsky refers to a "constitutional revolution" which made its formal appearance in the Supreme Court decision upholding the Wagner Act. See DUBOFSKY, supra note 5, at 145 (commenting on NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)). That, however, was the outward form of the revolution. Underlying the constitutional revolution were the mandate of the 1936 election, Roosevelt's Court-packing plan, and the spread of industrial warfare. See id. These several factors supporting the constitutional revolution, together with the revamped constitutional doctrine, produced a supporting social revolution, one in which the level of economic participation of the working class was enhanced. See John Batt, American Legal Populism: A Jurisprudential and Historical Narrative, Including Reflections on Critical Legal Studies, 22 N. KY. L. REV. 651, 715 (1995); see also Mark Barenberg, Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production, 94 COLUM. L. REV. 753, 944 (1994) (describing the social and economic context of the late 1930s and early 1940s). Barenberg is quoted infra note 13.

11. See DUBOFSKY, supra note 5, at 138-42.

12. The Committee for Industrial Organization was established in November 1935, largely through the efforts of United Mine Workers' President John L. Lewis. See id. at 133. As noted in the text, its goal was the unionization of mass-production industries. Subsequently, the Committee
organized within the next five years. After the initial period of turmoil, most major manufacturing companies accepted unionization. The model of labor relations in which a large industrial union representing all or most workers in an industry bargains with several employers in an oligopolistically structured industry became a common feature of American labor relations.

Through most of the 1950s, the labor union movement flowered. During that period, labor unions were widely perceived as an essential part of a society which aspired to liberal and democratic values. The proponents of the NLRA saw labor unions as a means for redirecting income streams from capital to labor, a result justified both normatively and pragmatically. They believed that this redistribution not only produced a more just social result, but that by increasing income in the hands of the working classes (who possessed a higher propensity to spend than did the entrepreneurial classes), this redistribution also helped to sustain overall demand for goods and services. The enactment in 1947 of the Taft-Hartley Act can be seen in retrospect as an effective formal recognition and acceptance by political conservatives of labor’s successes in organizing much of manufacturing, communications, and transportation during the preceding decade. Indeed, in the immediate postwar period, the U.S. government—seeing American labor policy as

for Industrial Organization formally split from the AFL to become the independent CIO. The CIO and the AFL merged in 1955. See id. at 133, 152, 208.

13. The particular economic and social conditions which supported union organizing efforts during the late 1930s and early 1940s have been succinctly summarized by Mark Barenberg:

That era was marked by grinding labor conditions and poverty; workers’ experience or recent memory of economic desperation and felt betrayal by employers in the aftermath of the Great Depression; the homogenization of mass production workforces; a general cultural milieu still in transition from “producerist” and work-ethic values to “consumerist” and hedonic norms; volcanic labor unrest and populist political movements; lower levels of product-market competition and capital mobility than today; a rising, progressive political-intellectual elite that was zealously committed to building a labor-corporatist society and that controlled decisive levers of state power; and the crucial clinching effect of a superheated labor market caused by state mobilization for all-out war.

Barenberg, supra note 10, at 944.

14. For an economic analysis of how the bargaining context is altered by the industrial structure of the product market level, see Daniel J. Gifford, Redefining the Antitrust Labor Exemption, 72 MINN. L. REV. 1379, 1399-1404 (1988).

15. See supra note 6 and accompanying text.


17. On the organization of the communications industry during the 1940s, see JOHN N. SCHACHT, THE MAKING OF TELEPHONE UNIONISM 1920-1947, at 130-81 (1985).
a triumph of democratic over reactionary values—sought to export the American model of labor policy to a recovering Europe in need of stable social institutions. 18

Today the labor policy of the NLRA is widely perceived as in need of reform. This perceived need for reform is reflected, inter alia, in President Clinton's appointment of the Dunlop Commission to study the labor laws and to make recommendations for their reform. 19 The Commission indicated its support for quality circles and other forms of employee involvement in the production process. Accordingly, the Commission recommended that Congress clarify section 8(a)(2) of the NLRA to eliminate uncertainty over the lawfulness of these forms of employee involvement. 20 Unfortunately, however, the Dunlop Commission took the politically expedient route of failing to reassess the adversary model on which present American labor relations are founded. The Commission avoided any comparative consideration of the industry-specific labor union model common to the United States and Canada with the alternative labor structures found in Europe and Japan. A wide array of critics, however, assert the need for labor law reform, although they differ sharply about the direction of reform. Labor union sympathizers—such as William Gould, the present Chair of the NLRB—call for legislation to strengthen the power of labor unions. 21 One of their principal goals is legislation forbidding employers to hire permanent replacements for strikers, an employer prerogative recognized since


20. See id. at S-34. The lawfulness of quality circles and other forms of employee participation in production decisions was brought into question as a result of the logical ramifications of recent NLRB decisions. See E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 896-97 (1993); Electromation, Inc., 309 N.L.R.B. 990, 997-98 (1992), enforced, 35 F.3d 1148 (7th Cir. 1994). Under the rationale of these decisions, groups of employees who participate with a management representative in making production decisions are vulnerable to being characterized as an employer dominated labor union and thus as an unfair labor practice under the NLRA. On July 30, 1996, President Clinton vetoed the Teamwork for Employees and Management Act (S. 295), a bill which would have authorized the establishment of cooperative workplace arrangements, such as quality circles. See President's Message to the House of Representatives Returning Without Approval the Teamwork for Employees and Managers Act of 1995, 32 WEEKLY COMP. PRES. DOC. 1378-79 (July 30, 1996) [hereinafter President's Message]; see also S. REP. No. 104-259, at 3 (1996) (summarizing arguments favoring the bill).

1938. These critics contend that although employers have held the legal right to replace strikers for almost sixty years, few employers had exercised that right until the 1980s, when President Reagan’s dismissal and replacement of striking air controllers removed employer inhibitions on the hiring of replacements. These critics argue that the mere power to replace strikers has strengthened the hand of employers in bargaining. By contrast, employer groups have focused their criticisms of the Act on ways in which it has impeded efforts to improve workplace efficiency or fostered inefficiency, especially on its threat to quality circles and other forms of worker participation in improving the production process.

Nonpartisan critics also have proposals for reform.

Labor union membership has declined both relative to the workforce and in absolute numbers. Labor unions are no longer widely viewed as mechanisms for bringing about more just social relations. Indeed, labor unions are widely viewed as another interest group, actively engaged in rent-seeking. Consumers have become increasingly conscious that prices have been inflated with labor rents in industries with strong unions and no foreign competition. Scholars have pointed out how

22. See id. at 184-85; see also Paul C. Weiler, Governing the Workplace 264-69 (1990) (characterizing the ability of employer’s to hire replacement workers during a strike as a “serious imbalance”). The legal right of employers to hire replacements has been recognized since the Supreme Court’s decision in NLRB v. Mackay Radio & Telegraph, Co., 304 U.S. 333 (1938). For a thoughtful analysis of the Mackay issue which differs from the conclusions of Gould and Weiler, see Samuel Estreicher, Collective Bargaining or “Collective Begging”?: Reflections on Antistrikebreaker Legislation, 93 Mich. L. Rev. 577, 580-82 (1994).

23. See Gould, supra note 21, at 185. Until President Reagan’s actions in the Professional Air Traffic Controllers Organization (“PATCO”) strike, employers had not made frequent use of their right under the NLRA to replace striking workers. The PATCO strike and its aftermath are described, inter alia, in Schapansky v. Department of Transportation, 735 F.2d 477, 479-81, 486-87 (Fed. Cir. 1984). For an example of interesting labor law issues connected with the practice of striker replacements, see NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786-93 (1990) (analyzing and affirming the NLRB’s rejection of the presumption that striker replacements are necessarily anti-union).

24. See supra note 20 and accompanying text.


particularly powerful unions, like the United Automobile Workers, have imposed differentially high costs upon their industries, disadvantaging those industries in competition with foreign rivals and reducing employment in their industries.\(^\text{27}\)

Labor unions have increasingly come to symbolize reactionary, rather than liberal, causes. Since 1967 organized labor has abandoned its previous support for free trade and opted for protectionism. Organized labor vigorously opposed the adoption of the North American Free Trade Agreement and the revision of the General Agreement on Tariffs and Trade under the new World Trade Organization Agreement.\(^\text{28}\) In its advocacy of protectionist policies, organized labor further visibly emphasizes its active rent-seeking. Worse, labor unions have come to be perceived as barriers to the full absorption of minorities and the underprivileged into the economic mainstream. Although labor union rhetoric has often drawn from the ideology of working class solidarity, labor union behavior has often been exclusionary in fact.\(^\text{29}\) Thus labor practices which had arisen in struggles with employers did not easily accommodate the relatively sudden and large scale changes in hiring practices which the civil rights movement sought. Labor unions had entrenched the practice of seniority, a practice which made new hires the first to be laid off.\(^\text{30}\) Craft unions had erected elaborate skill barriers to entry, and they often restricted entry still further through numerical quotas.\(^\text{31}\) These and other practices have brought them into open conflict


\(^{29}\) See Milton Friedman, \textit{Capitalism and Freedom} 124 (1962) ("[Unions] have also made the incomes of the working class more unequal by reducing the opportunities available to the most disadvantaged workers."); see also Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 774 (1952) (finding a union had used its “power to destroy colored workers’ jobs in order to bestow them on white workers”); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 211 (1944) (finding labor organizations have “the duty to represent all the employees in the craft without discrimination because of their race”); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 204 (1944) (finding the union failed “to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith”); Hill, \textit{supra} note 8, at 101 (commenting that neither the NLRA nor the Railway Labor Act explicitly protected minorities from discrimination).


This Article explores the kinds of reforms which would help to bring U.S. labor policy into a greater degree of harmony with current economic and social conditions. These conditions include rapidly diminishing barriers to international trade and the concomitant intensification of global competition. They also include a domestic workforce composed of a growing proportion of women, minorities, and immigrants. This Article examines institutional arrangements which have developed in the United States, Europe, and Japan for dealing with labor issues and the incentives which these several institutional arrangements generate.

In evaluating three collective bargaining models suggested by experience in the United States, Europe, and Japan, this Article employs organizational structure, economics, and public choice approaches. The analysis of this Article draws from Mancur Olson’s approach to private-interest organizations, from Martin Weitzman’s approach to profit sharing, from Junichi Goto’s approach to international trade, and from my own earlier work on the labor exemption from U.S. antitrust law. This Article takes note of Olson’s claim that the “encompassing” labor unions of Germany and Scandinavia are more likely to engage in public-regarding behavior than the less encompassing American unions. This Article concludes, however, that the encompassing labor union model is vulnerable to falling short of its theoretical potential. It further concludes that the public-regarding behavior predicted for encompassing labor unions can be generated by profit-sharing arrangements modeled on Japanese practices. This is something of a paradox; because labor unions in Japan are all enterprise (or “company”) unions, the Japanese labor union structure thus falling at the opposite end of the organizational spectrum from the Olsonian and German/Scandinavian encompassing model. Because of the small share of the American workforce represented by labor unions, and therefore the impracticality of reform along the lines of an encompassing union structure, the Japanese model is a more promising source of ideas and practices for the eventual

32. See Fact Finding Report, supra note 19, at S-12.
35. See Goto, supra note 27.
36. See Gifford, supra note 14.
37. See Olson, Rise and Decline, supra note 33, at 47-53.
reform of U.S. labor laws and policies.

I. LABOR, GOVERNMENT, AND THE WAGE RATE

A. Recent Governmental Approaches

Although President Franklin Roosevelt's Administration encouraged unionization as a means for redistributing income away from savers to spenders thereby stimulating demand for goods and services,\(^\text{38}\) government policies towards labor unions have, at least since the 1960s, been influenced by very different concerns. During the 1960s and 1970s, the concerns of the U.S. government were focused upon interactions between wage rates and inflation. Government then sought means for holding wage increases to increases in productivity. Successive governmental attempts to achieve these objectives were embodied in the Kennedy-Johnson wage-price guidelines, in the Nixon Phase I and Phase II incomes policies, and in the Carter system of voluntary wage standards.\(^\text{39}\) During the last two decades, federal anti-inflationary policy has moved out of the labor arena and now resides primarily in the Federal Reserve Board and its decisions over monetary policy.\(^\text{40}\) Today, a wide variety of critics call for labor law reform. Yet there is no consensus on the direction of that reform. This Article contends that a reexamination of the premises underlying our current labor policy would reveal the NLRA to be obsolete, and that the contemporary context of intense global competition and domestic social needs almost dictate the direction of reform.

In Europe, governments have sought to constrain union power in the interest of protecting the competitive position of export industries, of reducing unemployment, of restraining cost-push inflation,\(^\text{41}\) and of

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\(^{38}\) See supra note 6 and accompanying text.


\(^{40}\) See Jim Chen & Daniel J. Gifford, Law as Industrial Policy: Economic Analysis of Law in a New Key, 25 U. MEM. L. REV. 1315, 1354 (1995). Disciplined monetary policy will prevent or cure inflation, but governments sometimes try to avoid harsh remedial measures by pressuring unions to hold wage demands within limits of productivity increases. See also ASSAR LINDBECK, UNEMPLOYMENT AND MACROECONOMICS 148 (1993) (describing the effects of a newly imposed monetary discipline in Sweden); Chen & Gifford, supra, at 1354 (explaining the Kennedy administration's use of wage/price guidelines and persuasion to keep wage increases within the limits of productivity increases).

\(^{41}\) See LINDBECK, supra note 40, at 148.
enhancing profits—thereby encouraging investment. The premise for all of these governmental involvements is: (1) Unions pursue legitimate objectives when they seek higher wages for their members; but (2) the scope for higher wages consistent with national interest is limited by productivity increases, international competitiveness, or a need to decrease unemployment; and (3) in the absence of governmental involvement, there is a danger that employers may accede to excessive union demands.42 A review of traditional labor union rhetoric as well as of some elementary labor economics will be helpful to an understanding of the problems facing government.

B. Distributional Fairness

Labor unions frequently employ the language and rhetoric of distributional fairness and just wages to support wage demands. Because there are no generally accepted standards of distributional fairness or just wages,43 this rhetoric is conceptually indeterminate. It is helpful,

42. See supra notes 40-41 and accompanying text.

43. John Rawls, perhaps our leading thinker on fairness, believes that "income and wages will be just once a (workably) competitive price system is properly organized and embedded in a just basic structure." JOHN RAWLS, A THEORY OF JUSTICE 304 (1971). In addition to Rawls's specific remarks about wages, his difference principle can also contribute in an indirect way to an analysis of wage and other labor issues. Rawls's theory of justice—which he sometimes refers to as justice as fairness—is built upon two objectively fair principles: (1) A liberty principle under which each person is entitled to the maximum amount of liberty compatible with equal liberty for everyone else, and (2) a difference principle, under which social and economic inequalities are justified only in so far as they contribute to raising the level of well-being of the least advantaged class. See id. at 60. Rawls has recently rearticulated his theory of justice, confining it to the political realm. Its newer version, however, retains both principles. See JOHN RAWLS, POLITICAL LIBERALISM 5-6 (1993).

Under the difference principle, society's institutions should be structured in such a way that social and economic inequalities contribute to the betterment of the least advantaged class. Rawlsian analysis suffers from indeterminacy problems similar to those afflicting the "just wage" rhetoric. Thus, different individuals are apt to apply the difference principle differently, not only undermining its usefulness as a guide but stimulating hostility and mistrust. See Daniel J. Gifford, Interpersonal Distrust in the Modified Rawlsian Society, 48 SMU L. REV. 217, 226 (1994); Daniel J. Gifford, The Relevance of the Complexity of Social Arrangements to the Attainment of Rawlsian Justice, 51 TUL. L. REV. 510 (1977). Insofar as wages in a Rawlsian society would be determined by market mechanisms, however, the objection of indeterminacy would not lie.

Although the difference principle does not furnish a substantive standard for evaluating wages, it does provide a direction for assessing the institutions that determine them. Rawlsian analysis appears hostile to institutional mechanisms which facilitate the capture by one group of economic benefits which the free market would have allocated to less privileged others. Thus, it appears that under a Rawlsian approach, productivity gains normally should be passed on to customers whenever the customer class includes persons economically less well off than the production workers. Thus in this case (involving productivity gains) the direction indicated by the difference principle coincides with Rawls's specific endorsement of marketplace determination of wages.
however, to identify several underlying concepts of fairness to which reference is commonly made in the framework of industrial relations.

First, the free-market wage level itself is often perceived as unfair. This perception is reinforced by the differences in bargaining power between large employers and individual workers. Second, rivalry among employers to find sources of lower-wage labor is sometimes seen as unfair. It is seen as unfair to the employees receiving the lower wages, the preexisting higher wage being taken as the normative wage standard. It is seen as unfair to the employer paying the higher wages because its generosity is penalized in the product market when it is undercut by rivals incurring lower wage costs. It is unfair to the employees receiving the higher wages, because it threatens their jobs and/or their high wage levels. The normative proposition invoked in these cases is that competitive advantages in the product market should reflect only production, marketing, and product-development efficiencies.

Third, American industrial unions often contend that fairness requires that the wage rate in an industry should capture some or all of productivity advances. As far back as the immediate post-World War II period, the

Rawlsian objectives appear in the policies of the Swedish Confederation of Trade Unions (Landsorganisationen i Sverige or "LO"). The LO has pursued a "solidaristic" wage policy for many years under which it has sought to restrain wage increases in the profitable Swedish export industries in the interest of raising wages in the less profitable nontraded sectors where wages have been lower. The goal of passing on gains in productivity to customers does not appear to be widely shared by unions generally, however, and even the LO has deviated from that goal in practice. See Olle Hammarström, Swedish Industrial Relations, in INTERNATIONAL AND COMPARATIVE INDUSTRIAL RELATIONS 187, 190, 204-05 (Greg J. Bamber & Russell D. Lansbury eds., 1987).

44. See Estreicher, supra note 25, at 829-30. This inequality of bargaining power, however, should be assessed in the context of the market in which labor is sold. While employers' unwillingness to bargain with individual workers over wages is sometimes construed as an oppressive manifestation of unequal bargaining power, a large employer deals with many individuals, each of whom is equally valuable to that employer. Thus, each worker should expect to be offered precisely the same wage as the next.

45. Labor unions have been particularly vociferous in condemning competition among employers in the labor market because it undercuts their negotiating power. In the period immediately before and after World War II, the wage differential between the unionized textile mills of the northeastern United States and the nonunion textile mills of the southeastern United States was a source of discomfort to organized labor, as the southeastern mills constrained the bargaining power of the textile unions over the northern mills. The current union objections to free trade are also premised upon the view that competition between products made with union labor (or even with nonunion labor paid at North American wage levels) and products made abroad with lower-paid foreign workers is unfair. The unfairness results in both cases because of the differences in the wage levels. The normative proposition invoked in these cases is that competitive advantages gained in the product market from lower wages are unfair. Employers, it is said, ought to restrict their competition to efficiency in production, marketing and product development.

46. See Estreicher, supra note 22, at 598.
United Auto Workers ("UAW") succeeded in persuading the automobile manufacturers to recognize this norm. 47 The 1948 agreement between the UAW and General Motors provided for automatic annual wage increases geared to assumed advances in productivity; the UAW obtained similar agreements from the other automobile manufacturers and most of the automotive parts industry in 1950. 48 In Scandinavia, the powerful metalworkers' unions of Sweden and Norway have embraced the Aukrust model of wage determination, one that uses productivity advances for wage increases. 49

In the twentieth century, the publics of most industrial nations came to accept the view that the wage set by the market in the absence of labor unions was likely to be unfairly low. This view is manifested in the minimum wage laws. It is also reflected in legislation guaranteeing workers rights to organize and to bargain collectively. Indeed, as previously noted, Congress saw the NLRA, which provided such a guarantee to American workers, as a device for raising wages. 50 And at least in the past, the publics of many nations believed that workers in profitable industries ought to share in their employers' success.

Because there are no objective standards of fairness, disinterested observers have no way of evaluating the merits of union wage claims. Within most modern societies, however, unions operate in a political context which is broadly supportive procedurally. Modern legal systems generally recognize rights of workers to organize and to bargain


48. See id.

49. See Odd Aukrust, Inflation in the Open Economy: A Norwegian Model, in WORLDWIDE INFLATION 107, 113-14 (Lawrence B. Krause & Walter S. Salant, eds. 1977). The Aukrust model was adapted for Sweden in the so-called EFO model, named for Gösta Edgren, Karl-Olof Faxén, and Clas-Erik Odhner who so adapted it. See generally GÖSTA EDGREN ET AL., WAGE FORMATION AND THE ECONOMY (1973) (formulating an incomes policy for the long-term distribution of income in Sweden). The model assumes wage increases and postulates that export industries will resist increases eroding their long-term profitability. This means that wage increases will be held to productivity advances plus increases in the world-market prices for the exported products. The Aukrust/EFO model best fits a fixed exchange-rate system. See infra notes 89, 198 and accompanying text.

50. See supra note 6 and accompanying text. The view that a free labor market is likely to produce an unfair wage assumes that there are objective standards for determining when a wage is unfairly low. That view draws upon various moral discourses which speak about a "fair" or "just" wage. Generally these moral traditions arrive at their conclusions from the perspective of workers' basic needs for food and housing. Accordingly, above the subsistence levels, they provide little assistance in determining whether any particular wage is "fair" or "just."
collectively with their employers. That legal recognition has sometimes been reinforced when significant segments of the public have viewed organized labor as providing a form of countervailing power vis-à-vis powerful enterprises—a checking device helpful to the fluctuating equilibrium of a democratic society. Modern societies thus tend to be pragmatic in their approach to fairness. They largely regard wage levels as properly subject to determination through a process of individual or collective bargaining between employers and employees, where the result depends upon the relative strengths of the parties. The prevailing norms deal with the process of negotiation and bargaining rather than with the substantive result. Such an approach accords well with the lack of any generally accepted standard of fairness governing wages. It also avoids direct government involvement in the process of wage determination and so enables government to avoid responsibility for the results. Distancing government from the determination of the wage rate keeps the process nonpolitical and contributes to political stability.

The process does, however, expose the public to the ramifications of the bargains reached between unions and employers. These agreements in which bargainers find common ground may not always be advantageous to the public. But because the bargainers have deep stakes in the resulting agreement, while its negative effects are diffused throughout the broad economy (and are obscured by the complex economic and financial language in which the agreements are described and by the fairness rhetoric which often permeates those descriptions), the latent public interest in the results of the bargaining process is broadly underappreciated and is rarely asserted by governments in an effective manner.

II. SOME LABOR ECONOMICS AND RELATED MATTERS

A. The Wage Rate Equals the Value of the Marginal Product of Labor

Economic theory teaches that workers will be hired so long as the value of the marginal product of labor (i.e., the value produced by the last worker hired) exceeds the wage rate. When the value of the marginal product of labor falls to the wage rate, then no further workers will be hired. But when the labor market operates freely, unemployed workers will bid the wage rate down until the value of the marginal product of labor equals the wage rate at full employment. This, of course, is a simplified description, because what I have referred to as the wage rate is shorthand for a complex array of wages reflecting a host of talents and
skills and competencies. So understood, however, the theory indicates that wages will adjust to reflect the demand for various kinds of skilled and unskilled labor and to absorb all workers into the employed work force. And at this level, each worker will be paid the value of his or her contribution to production.\textsuperscript{51}

Corollaries of the assertion that an employer will hire workers until the value of the marginal product of labor equals the wage are: (1) that wage costs are a component in total production costs, (2) that they are variable costs, and (3) that the number of workers hired bears an inverse relationship to the wage rate. As the wage rate is an important component in the variable cost structure of most industries, it is important to examine the forces which help to determine the wage rate.

\textbf{B. The Demand for Labor}

1. As Affected by Industry Structure

Since labor is an input into the production process, it is the demand of an employer's customers for the final product that ultimately determines the demand of that employer for labor. The value of labor to an employer thus is the value added by labor to raw materials and other input, and that value is the difference between the sales price and the nonlabor input. As noted above, employers will hire workers so long as the value of the product produced by the last worker hired exceeds the

\textsuperscript{51} This theoretical result fails to hold in certain circumstances. When there is only one employer in a community (or even when there are a small number of employers in a given community) the employer is a monopsonistic buyer of labor, possessing power to choose the point on the labor supply curve which maximizes the employer's welfare, a point different from the point at which the wage rate equals the value of the marginal product of labor. Thus, by hiring fewer workers, an employer forfeits the value which would otherwise be produced by the marginal workers which it did not hire, but it trades off that value against the reduction in labor costs which it achieved by driving down the wage for its entire work force. Employers with monopsonistic or oligopsonistic power in the labor market would find the exercise of such power increasingly beneficial as their work forces increased in size. Again, oligopsonistic cooperation among employers would prove most effective in industries in which each employer employs large numbers of undifferentiated (i.e., unskilled) workers. In such circumstances, each employer would incur the maximum benefit from restricting its hiring in the manner described and the cooperation of each employer would be facilitated, because the oligopsonistically-set wage would be highly visible. Steel and other traditional mass-production industries in the early twentieth century employed large numbers of unskilled workers. Were these industries to be concentrated geographically, they might have exercised monopsonistic power in a local or regional labor market. When employers set the wage rate monopsonistically or oligopsonistically, the wage rate will be below the value of the marginal product of labor. For a general discussion on the interaction between wage rate and market demand, see EHRENBERG & SMITH, supra note 39, at 22-35.
wage which must be paid to hire that worker.

![Diagram](image)

**Figure 1**

$AC$ is the demand for the industry product. The vertical distance between $AC$ and $BD$ represents the cost of nonlabor inputs into production. The curve $BD$ is constructed by subtracting the cost of nonlabor inputs from the demand for the industry’s product ($AC$). $BD$ represents the industry’s demand for labor, stated in terms of demand for labor per unit of output. Multiplying $BD$ by the number of units produced per worker gives the industry’s demand for labor, stated in wage-rate terms.

Because an employer’s demand for labor is derivative of the demand for goods produced with that labor, the demand for labor is affected by several factors. First, the demand for labor in any particular industry is affected by the structure of that industry. As the degree of concentration in an industry increases, that industry is more likely to reflect oligopolistic restraints on production. As an industry manifests such production restraints, its demand for labor diminishes concomitantly from what its demand would be were the industry acting competitively. Thus, in a competitively structured industry, the demand for labor can be derived directly from the demand for the product. In such an industry, the demand for labor (stated in terms of labor cost per unit of output) can be represented as the product demand less the cost of nonlabor inputs.$^{52}$ The demand per unit of output can be transformed into an hourly wage by multiplying the per-unit-of-output amount by labor productivity per hour.

In a monopolistic or oligopolistic industry, however, the demand for labor is derivative of the industry’s marginal revenue curve. In such an industry, the representation of the demand for labor (stated in terms of labor cost per unit of output) now becomes the marginal revenue curve

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$^{52}$ *See supra fig.1.*
less the cost of nonlabor inputs. As before, the demand per unit of output can be transformed into an hourly wage by multiplying the per-unit-of-output amount by labor productivity per hour. In an industry bearing monopolistic characteristics, producers limit output to the amount indicated by the intersection of their marginal revenue and marginal cost curves. Thus the marginal cost curve less nonlabor inputs indicates the amounts which a producer would be willing to spend on labor. Note that at any point on the labor demand curve, so constructed, the labor cost plus the cost of nonlabor inputs equals the producer’s marginal cost which in turn is equal to its marginal revenue.

![Figure 2](image)

**Figure 2**

AC is the demand for the industry product. AF is the marginal revenue curve of the industry monopolist. The vertical distance between BE and AF represents the cost of nonlabor inputs. The curve BE is constructed by subtracting the cost of nonlabor inputs from the monopolist’s marginal curve (AF). BE represents the monopolist’s demand for labor, stated in terms of labor demand per unit of output. Multiplying BE by the number of units produced per worker gives the labor demand stated in wage-rate terms.

2. As Affected by Union Organization

The degree and structure of union organization also affects the demand for labor. In the textbook case of a completely free labor market, the demand for unskilled labor is derivative of the aggregate demand for all goods and services. And the supply of such labor consists of all unskilled people in the labor force. Within each industry, employment is determined by the intersection of the demand for labor within that industry with the economy-wide wage rate. The presence of unions alters this analytical picture. A union which organizes the workers of all of the

53. See infra fig.2.
employers in a particular industry obtains a monopoly upon the supply of labor specific to that industry. As a result, the economy-wide wage rate is no longer relevant. Now the union attempts to use its labor monopoly to bargain about raising the level at which the industry wage rate will be set.

In a competitively structured industry which has been only partially organized by a labor union, the product market provides a substantial constraint upon the power of the union to exact concessions from employers. The competitively set price in the product market determines the value of the marginal product of labor. In such a partially organized industry, employers cannot pass on any portion of a wage increase to customers. To the extent that a union in such an industry is able to pressure a given employer to raise wages above the preexisting level, the production costs of that employer will increase and it will cut back on the amount of the product produced. In more technical terms, that employer’s marginal cost curve will shift upwards and will intersect with the competitive product price sooner. The employer will therefore discharge workers at the margins, since the value of the marginal product of those workers will no longer exceed their wages. This employer’s reduction in production, however, will be offset in the product market by increased production from other companies with the lower customary wage, and hence with lower marginal costs. The latter companies will also increase their workforces at the margins, thus offsetting the loss of jobs of the union workers with new jobs for nonunion workers. Accordingly, competition in the product market exerts a constraining effect upon a union’s ability to extract concessions from an employer.

An industry whose labor force is entirely organized by a single union, however, escapes this constraint. In that circumstance, the union would attempt to bring about a standard industry wage structure so that all employers were paying the same wage. Indeed, at that level of generality, the union’s objective is likely to be shared by all, or most, employers. If all employers pay the same wage, then no employer has an advantage in the product market as a result of paying lower wages. Employers paying union wages would be anxious that their rivals would also be paying union wages. From the union’s perspective, when all employers pay the same wage, then no employer is constrained by

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competition in the product market from acceding to union demands for wage increases. A wage increase agreed to by all employers raises the marginal cost curve of all employers simultaneously. No employer is then disadvantaged vis-à-vis its rivals in the product market as a result of acceding to a union demand for a wage increase.\textsuperscript{55}

It is true that when the marginal cost curves of all companies in the industry shift upwards, the industry supply curve will also shift upwards. The result will be that the industry supply curve intersects sooner with the demand curve for the industry's product, resulting in a higher product price and a reduced amount of sales. There will, accordingly, be fewer persons employed. Figure 3 illustrates the effect on prices, output, and employment when a competitively structured industry is organized. The result is that the industry behavior replicates a hypothetical monopolist in order to produce labor rents. In the figure, the product price and output under competitive labor conditions are $P_I$ (price) and $O_N$ (output) respectively. When a union with control over the industry labor supply pressures wages upward, the product price is $O_P$ and the industry output is $O_M$. The resulting deadweight loss is equal to the area of a triangle with a base of length $M_N$ and a height equal to $P_I$.

When a monopolistic or oligopolistic industry is organized by an industrial union, a similar effect is produced upon prices, output, and employment, except that these effects are muted as the employer is forced to absorb some of the effects on prices. Hence, output and employment are not reduced as much as in the competitively structured industry. Nonetheless, the union monopoly combines with the market power of the employer to produce a combined restraint. The result not only oppresses the public, but is also likely to be suboptimal for both parties.\textsuperscript{56}

\textsuperscript{55} This description applies to a domestic industry of an insulated economy, where there is no significant competition from foreign producers. The description, therefore, roughly fits many U.S. industries of the period prior to the mid 1970s. During the last two decades, competition from abroad has generated constraints upon wage increases for domestic producers.

\textsuperscript{56} See Gifford, supra note 14, at 1402-03, 1414-17; infra note 58 (discussing off-the-labor-demand-curve bargaining).
FIGURE 3

AC represents the demand for the industry's product. The curve GL represents the aggregate marginal costs of nonlabor inputs. The vertical distance GH represents labor costs per unit of output in a competitive labor market. Thus, in a free labor market, the industry would incur aggregate marginal costs of the amounts represented by GL plus competitive labor costs in the amount GH. The aggregate marginal cost curve for the industry, i.e., the industry's supply curve, accordingly, is the curve HK. Industry output under such conditions would be ON and the price for the industry's product would be 01.

After the industry is organized, the union exerts upward pressure on the wage rate, forcing labor costs to increase from GH to GI. The new industry supply curve then becomes UJ, producing the lower output OM and the higher price OP.

C. The Objectives of Organized Labor

How organized labor reacts to the wage/employment tradeoff is a puzzle. The traditional approach of economic theory is to assume that business firms optimize their price/volume tradeoffs on a criterion of profit maximization (or loss minimization). Thus a firm with some market power determines when to sacrifice some profit margin for greater volume, or vice versa, by choosing the combination of volume and profit margin which it expects to produce the greatest profits. But labor unions have no analogous function to maximize. They want higher wages for their members, but they have no standard for dealing with the wage/employment tradeoff. Perhaps labor unions want to maximize the

57. See ALBERT REES, THE ECONOMICS OF TRADE UNIONS 47-53 (3d ed. 1989); see also OLSON, LOGIC, supra note 33, at 39 n.59 (noting there is uncertainty about what it is that labor unions maximize).

58. In traditional labor analysis, the union bargains with the employer about the wage rate, implicitly accepting the tradeoff between the wage rate and employment indicated by the employer's demand for labor. After the employer-union bargaining determines the wage rate, the employer then determines how many workers will be hired at that wage rate. A difficulty with the traditional
overall return to labor, i.e., the combination of wages and employment which will produce the greatest sum of aggregate wages. Maximizing the overall return to labor as a norm for labor union behavior would serve working class interests as well as maximizing profits serve the interests of stockholders. Yet there are reasons why such a criterion would be

analysis arises from the fact that wage-level bargaining necessarily involves the union in trading off employment for increases in the wage level and vice versa. Thus, at least in theory, a union possesses a utility function incorporating the relative weights it places on wage levels and employment in these tradeoffs. Such a utility function could be represented in a series of indifference curves, each of which expresses the union’s indifference to different combinations of wage levels and employment, higher wages compensating for reduced employment and vice versa.

In figure 4, the curve DD is the demand for labor. The indifference curves u0, u1, u2, and u3, symbolize various levels of utility for the union, u3 reflecting a higher level of utility than u2 which reflects a higher level of utility than u1, which, in turn reflects a higher level of utility than u0. The curves I1 and I2 are isoprofit curves, reflecting the various combinations of wage rates and employment levels which produce the same profit for the employer. All points on each isoprofit curve produce the same profit, but the lower curves produce greater profits than the higher curves. Thus the employer’s profit at points on curve I1 are greater than its profits on curve I2. Assume that the employer and union agreed on a wage at the point where the union’s indifference curve (u1) was tangent to the labor demand curve. The employer’s profit at that point is given by its isoprofit curve (I2). This, however, is not a Pareto result because the union could move up to indifference curve u2 without the employer being any worse off. Also, the employer could increase its profits to those reflected by isoprofit curve I2 without the union being worse off. These off the labor demand curve results are attainable if collective bargaining takes place over combinations of employment and wages rather than just over wages. See EHRENBERG & SMITH, supra note 39, at 406-10; BARRY T. HIRSCH & JOHN T. ADDISON, THE ECONOMIC ANALYSIS OF UNIONS 14-18 (1986); Kenneth G. Deuschmeid, A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace, 91 Mich. L. Rev. 419, 434-40 (1992); see also OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES 89-90 (1975) (discussing bilateral monopoly negotiations). A model of labor relations which made substantial use of profit-sharing or bonuses based upon the successes of the employer in the product market would produce Pareto superior results. Such a model is discussed infra Parts IV.C.2-3, V.C.
incompatible with the structures of the industrial and craft unions of North America.

Industrial unions share with craft unions an outlook which extends primarily to the welfare of their own members, and this outlook is further narrowed by two additional factors: (1) The membership of industrial unions reflects current employment in their industries. Workers who are laid off for extended periods drop off the rolls; (2) the wage/employment tradeoff affects the membership differentially because of the seniority system almost universally observed in North American employment. Thus the benefit of wage increases accrues to workers with greater seniority while the burdens of layoffs are borne by the workers with the lesser seniority. While some wage/employment tradeoff is necessary in the nature of collective bargaining, the internal dynamics of union organization naturally skew the tradeoff towards the acceptance of more (rather than fewer) layoffs. In the typical case, the great majority of workers benefit (and these are the long-term union members), while those who lose are fewer in number and by definition have been union members for a shorter time. Yet the aggregate number of workers laid off pursuant to wage/employment tradeoffs made over many years may be a significant portion of the original employment base. Each time the issue is approached, however, the adversely affected workers will be a small number in proportion to the large numbers benefited.

III. THE PUBLIC INTEREST IN RELATION TO THE GOALS AND ACTIVITIES OF ORGANIZED LABOR

The membership of all private-sector labor unions in the United States was only slightly over ten percent of the labor force in 1995. Each labor union is concerned with promoting the interests of its members, who constitute a minority of the work force and an even smaller minority of the population. Labor unions, including the AFL-CIO national federation, are therefore properly described as interest groups—groups of people or institutions organized to promote a shared interest different from, and possibly in conflict with, the interest of the public.

We commonly discuss the activities of interest groups in relation to the actions of government: How much has the lobbying efforts of an interest group, such as organized labor, influenced Congressional or
administrative action? To what extent have the activities of such an interest group skewed legislation or regulation away from a proper understanding of the public interest? Indeed, there is a substantial body of theory devoted to an understanding of interest groups on government.

Although interest groups routinely attempt to influence lawmaking and regulatory activities, some interest groups (such as organized labor) can affect the public welfare in ways other than lobbying legislators and administrators. They may cast burdens on society which arise as externalities to bargains which they have privately negotiated. Labor unions in particular and the companies with which they negotiate have sometimes been accused of reaching collective bargaining agreements which, while good for the parties, impose negative externalities on society. The most frequent claims are that such agreements may engender cost/push inflation, that they may inhibit exports, or that they may cause unemployment.

A. Interest Groups and the Public Interest

Thoughtful observers have expressed concern about interest groups and the way they relate to society and government since at least the late eighteenth century. The Federalist papers explore at length the problems presented by such groups, which they label as "factions." In The Federalist No. 10, James Madison defines a faction as follows:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.60

Madison further suggests that the sources of faction are often economic. Indeed, he says that "the most common and durable source of factions" lies in the "unequal distribution of property."61 He then goes on to identify more specific interests: "Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and

60. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed. 1961).
61. Id.
divide them into different classes, actuated by different sentiments and views." 62

Indeed, it is the regulation of these various economic interests which “forms the principal task of modern legislation” and necessarily “involves the spirit of party and faction in the necessary and ordinary operations of government.” 63 In his analysis, Madison is concerned with the relation of a faction (or interest group) to government. But Madison would probably have had no trouble applying much of his analysis to the way an interest group can impose externalities on society as a result of its activities.

The problem, as Madison sees it, is the conflict between the factional interests and “the permanent and aggregate interests of the community” 64—certainly a formulation which is potentially applicable to the imposition of negative externalities upon society by a self-regarding interest group. According to Madison, problematic factional interests come in two kinds. One kind of factional interest consists of a misperception of one’s own long-term interest. That is why Madison refers to persons united by a “common impulse of passion”—passion denoting a drive unduly centered on the present with insufficient attention to the long-term. 65

A second kind of problematic factional interest is consistent with the holder’s long-term interests but is inconsistent with “the permanent and aggregate interests of the community.” 66 This second type of factional interest, Madison believes, is likely to be controlled by the forces of majoritarian government, because a well-informed majority will not permit the public good to be subordinated to the interest of a minority. Note the ramifications of this conclusion by Madison for interest groups which impose externalities on societies. Society will eventually act either to restrict the abilities of interest groups to impose substantial negative externalities on it, or society will alter the context in which the interest group acts, so that the interest group will no longer be motivated to impose those externalities.

Based on this analysis, the crux of the problem of faction lies in the misperception by individuals and groups of their own long-term interests. The first kind of problematic faction is defined by such a misperception.

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62. Id. at 79.
63. Id.
64. Id. at 78.
65. Id.
66. Id.
It is dangerous when shared by interests which are powerful enough to influence legislative outcomes. And the second kind presents a danger when the majority fails to comprehend its own long-term interest, thus becoming vulnerable to factional interests incompatible with long-term public welfare.

Madison’s description of faction recognizes that some individuals possess shorter time horizons than the time horizon appropriate for the community as a whole. Some especially self-centered individuals—perhaps those with no offspring and little empathy towards future generations—might take no interest in events occurring after their deaths. Some individuals might take no interest in the successes or failures of the company for which they work which occur subsequent to their own retirement. It is helpful to recognize that different individuals employ different time horizons. The time horizon of an organization will reflect the aggregate time horizons of its members, just as the breadth of an organization’s vision will probably reflect the diversity and inclusiveness of its membership. As will be developed below, the degree to which an organization’s goals coincide or depart from the aggregate welfare of the community, both in reference to its time horizon and in reference to its concerns in the present period, depend critically upon the breadth and inclusiveness of the organization’s membership.

B. The Labor-Government Interface

In Europe, Japan, and the United States labor relations are, on the surface, matters between workers and their employers. Wages, hours of work, and other conditions of employment are the subjects of bargaining between employers and unions representing employees, and these matters are resolved in agreements between those parties. Yet in all of the jurisdictions, government is, or has been involved, at the margins. All advanced industrial nations regulate wages and working conditions directly in minimum wage laws, in plant safety laws, and frequently in laws governing dismissals. Indeed, in the United States, the complex web of federal and state laws governing plant safety and employment security have provided legal guarantees for matters traditionally protected by labor unions.

Most jurisdictions regulate the organizing and collective bargaining

68. See id. at 55-58.
process. In many jurisdictions, government is an active player in the bargaining process, seeking to ensure that wage increases do not exceed productivity gains. In some nations, such as Austria, the government has actively sought to limit wage increases in order to attract investment and to encourage exports; sometimes this has been done with the active collaboration of labor unions who are willing to trade off short-term gains for longer-term security.69

Thus, although collective bargaining is normally an activity carried on in the private sector, the bargaining itself, the subjects which it addresses, and its results are, or may at times be, matters of societal concern. Governments, accordingly, not only regulate the bargaining process, they often participate actively or on the sidelines. The directness and visibility of government involvement has varied over time in the various jurisdictions. The wage-price guidelines of the 1960s and the Phases I and II Nixon incomes policies70 are examples of government involvement in the United States, as are the various neocorporatist arrangements in Europe during the 1970s. In short, the process of bargaining over wage rates has been thought to have societal ramifications in most advanced economies. This Author contends that because the outcomes of wage negotiations have often been thought to produce consequences for the larger society—so much so that governments have been active players in those negotiations—it may be proper to view the bargaining process through the lens of interest group analysis and modern public choice theory.

C. Modern Public Choice Theory

Public choice theory examines how interest groups exert pressure on government to obtain legislation or policy initiatives favorable to themselves.71 First, this analysis notes that interest groups characteristically seek their own (rather than the general) welfare. Second, it observes that because of transaction costs and free rider problems, interests which are concentrated are likely to be more successful in organizing and in exerting pressure than are more diffuse interests. Thus business interests,

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70. See supra note 39.

especially monopolies or oligopolies, are most able to form successful pressure groups while consumers—who are widely dispersed and each of whom is likely to be affected only insubstantially—are among those least likely to form successful pressure groups. This is true even though the aggregate economic burden which a proposed government action may impose on consumers is at least as large as the aggregate benefit that the government action will bestow upon business. The overall result is likely to be a skewing of legislation and administration towards benefiting those interests which are concentrated and upon each of whom the impact of government action would amount to a significant portion of income or wealth.

Mancur Olson, who articulated this analysis in the 1960s in *The Logic of Collective Action* ("Logic"), later expanded its scope to embrace the comparative evaluation of institutional arrangements among nations. In his *Rise and Decline of Nations* ("Rise and Decline"), Olson posits that in free societies, interest groups will develop organizational means enabling them to pressure governments to skew legal and regulatory frameworks to benefit them, and to cartelize markets where possible. While the pressures and market restraints exerted by these interest groups benefit the groups, they are harmful to the society as a whole, because their activities result in misallocation of resources and other inefficiencies. Moreover, Olson believes that the number of interest groups pressuring government for favors grows with time. As a result, he postulates, the longer a society has remained free, the more its governing institutions are likely to be inefficiently skewed. Olson also believes that some interest groups are able to impose cartel-like constraints on markets, thus benefiting themselves at the expense of the larger public. Again, the opportunities for interest groups to cartelize extends with time, so that the oldest free societies are likely to have the most extensive array of impediments upon the operation of their markets.

Olson concludes that those nations—generally those with the oldest

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72. See Olson, Logic, supra note 33, at 126-27.
73. See id. at 33-36, 165-67.
74. Olson employs the term “cartel” to refer to special-interest groups (or distributional coalitions) which employ collusive action in the marketplace. Within the scope of that term are professional associations, labor unions, trade associations, and oligopolies. See Olson, Rise and Decline, supra note 33, at 44-46.
75. See id. at 77.
76. See id. at 44-46.
77. See id. at 77-80.
free governing institutions—which have the largest numbers of organized interest groups are likely to experience slower economic growth than are nations with fewer organized interest groups. This is because interest groups spend their efforts attempting to influence government to benefit themselves at the expense of the common good and imposing restraints and other cartel-like structures on markets, thus misallocating resources and thereby slowing economic growth.

D. The Olsonian Approach to Labor Union Behavior

Olson focuses upon the formation and organization of interest groups and the interaction between interest groups, government, and society. In Logic, he directed his attention to interest groups’ use of government power to further their own ends. In Rise and Decline, he expands his focus to include cartelization and special-interest organization within the private sector itself. Cartelization and special-interest organization hamper the response of the market to changes in demand and fluctuations in costs. Olson identifies labor unions as among those interest groups which have both used government to further their interests and which have cartelized the labor supply of a number of industries. Among Olson’s complaints are that decision-making over the wage rate is sluggish, collective bargaining contracts in the United States generally running for three years, and that wages are especially sticky downwards. He concludes that the ponderousness of collective bargaining procedures prevents unionized industries from responding to market changes, forcing the needed adjustments upon the nonunionized sectors: unemployed workers in the rigid unionized sectors seek and find work in the less rigid nonunionized sectors. The result is that the economy adjusts badly to economic fluctuations and is less than optimally productive. Olson, however, excludes from his analysis the large German and Swedish unions which embrace much of the work force. Such organizations are, in Olson’s terminology, “encompassing” organizations which—because of their large membership relative to the economy—take

78. See id. at 75.
79. See id. at 47.
80. See OLSON, LOGIC, supra note 33, at 3.
81. See OLSON, RISE AND DECLINE, supra note 33, at 44-46.
82. See id. at 102-06.
83. See id. at 204.
84. See id. at 204-05.
on a societal perspective. Such organizations are less likely than the industry-specific American unions to pursue goals which further their members’ interests at the expense of the larger society because the broad-based membership of the Swedish and German unions helps to ensure that the aggregate interests of their members largely coincide with the interest of society. Olson’s distinction between encompassing and nonencompassing organizations is especially helpful in addressing comparative union organization and industrial relations. So, too, is his concern with rapid and flexible responses of productive institutions to changes in demand and input costs.

It was noted above that collective bargaining has often been a subject of government concern and intervention, both in the United States and elsewhere. Neocorporatist arrangements within the United States during the 1950s, and in much of Europe during the entire post-World War II period, as well as the pursuit of incomes policies in the United States during the 1960s and 1970s evidence the concern of governments with the results of wage bargaining. The reason why the wage bargain was the subject of the express concern and involvement of the U.S. government during the three decades subsequent to World War II was because of its perceived potential for engendering inflation. European governments not only sought to restrain inflation, but they

85. See id. at 49.
86. However, even the broad base of the largest Swedish labor confederation may be insufficiently encompassing to guarantee public interest regarding behavior. See infra note 205 and accompanying text.
87. See Dubofsky, supra note 5, at 210, 216-17.
89. The Kennedy-Johnson wage-price guidelines, the Nixon Phase I and II income policies, and the Carter wage standards program all intervened in various degrees into the results of bargaining. See Ehrenberg & Smith, supra note 39, at 548-49 (discussing U.S. government intervention into the collective bargaining process).
90. Not all European governments have envisioned the wage bargain as directly connected with inflation. In Scandinavia, where wage negotiations have been viewed through the lens of the so-called Aukrust model of wage bargaining, inflation is seen as a function of world prices and differences in productivity trends in the trading and nontrading sectors of the economy. In this view, inflation is not a function of the wage bargain but is largely a condition imposed upon small trading nations by external conditions and differences in internal productivity growth rates. See Robert J. Flanagan, Efficiency and Equality in Swedish Labor Markets, in The Swedish Economy 125, 160 (Barry P. Bosworth & Alice M. Rivlin eds., 1987); see also Edgren et al., supra note 49, at 70-71 (noting that the “international competitiveness” of “small industrial countries with a large foreign trade . . . is placed at the centre of the analysis” when discussing incomes policies). The Swedish government ultimately sought to control inflation through monetary policy and by stabilizing the exchange rate. See Barry P. Bosworth & Robert Z. Lawrence, Economic Goals and the Policy Mix, in The Swedish Economy, supra, at 97, 103, 105.
sought as well to foster exports, induce investment, and increase employment. This government involvement has sought to impose limits upon what the parties might otherwise agree upon in order to safeguard the interests of the larger society.  

In these cases, the problem was whether labor unions and employers would reach agreements which would exceed productivity growth. If overall wage increases did exceed productivity growth, then labor costs would rise with a concomitant upward pressure on prices. As prices increased, demand would slacken, forcing the monetary authorities to make a hard choice. To maintain employment, the monetary authorities would have to expand the money supply, an action which would produce an upward pressure on prices, thus leading to inflation. Conversely, to resist inflation, the monetary authorities would have to contain the money supply, countenancing unemployment until the economy adjusted to this constraint. Because democratic governments have found the latter option unattractive, they have sought refuge in incomes policies, inducing restraint on wage rates, so that they would not have to face this dilemma.

In Europe, governments faced concerns in addition to, or apart from, the inflation problem. European governments concerned with exports and following an Aukrust wage model would see a comparable problem: unions and employers which negotiated wages which outran productivity increases would erode the international competitiveness of their export industries as well as generate inflation. The problem is mitigated when a single overall union represents all or most of the work force, because in that case, the union membership is representative of society generally and shares the burden of inflation with the rest of society. For that reason, it was easier, at least in theory, for European governments to succeed in moderating wage demands. By contrast, in the United States where union organization follows industry lines, powerful unions like the UAW and the United Steel Workers had more to gain than to lose by pushing for wage settlements that outran productivity gains. In
oligopolistic industries like the auto and steel industries of the 1970s, wage increases would be partially passed on in higher prices. The union gained disproportionately and the burden was spread over the entire society.

Let us now consider the impact of union organization following industry lines in terms of resource allocation (an issue identified in Olson's analysis of comparative institutional structure), sluggish responses to market fluctuations, and loss of productivity. This Author's particular focus is on the wage bargain. The goal of the UAW is to enhance the welfare of automobile workers. The UAW, accordingly, will attempt to force the wage level of automobile workers to ever higher levels. The union's likelihood of success in this endeavor depends upon the industry's profitability. The more profitable the industry, the more able the industry's employers will be to meet the union's demands. Note, further, that when a union successfully organizes an entire industry, the union is in the position of a monopoly supplier of labor to that industry's employers. Whether or not the employers bargain as a group, the union possesses substantial power over a critical input, and that power will ultimately be reflected in the product market.

Union control over the industry's labor supply is different from a monopoly which might be possessed by a business firm over some other input in that there is no profit-maximizing standard by which to make theoretical predictions about how that power might be exercised. At least in theory, a business concern possesses a clear economic goal: maximize short-run profits. By analogy, the union might decide to maximize the stream of compensation routed to labor. But it might not, because the union is not a profit-making enterprise. Moreover, the seniority system is likely to affect the way a union approaches the wage/unemployment tradeoff: Since the workers who have been longest employed will be laid off last, there is a built-in bias of the membership towards sacrificing the welfare of the most recently employed workers in favor of wage increases for the bulk with the greatest seniority. Restated, this bias is towards contraction and high labor costs, rather than towards expansion and moderate labor costs.

During most of the 1950s and 1960s, industry-wide union organization worked to further union goals, because American producers were not

96. See Olson, Rise and Decline, supra note 33, at 211-14.
97. See Rees, supra note 57, at 47.
98. See Gifford, supra note 14, at 1411-14.
exposed to substantial competition from foreign rivals. As a result, industrial unions could exploit their control over the industry labor supply, with opposition by employers tempered by the fact that wage costs could be passed on, in substantial part, to buyers in the product market. As foreign competition in many markets increased in intensity during the last three decades, many American producers found themselves saddled with high labor costs vis-à-vis their foreign rivals. Professor Junichi Goto has shown how American automobile producers have been disadvantaged vis-à-vis their Japanese rivals as a result of the high labor costs resulting from Big Three negotiations with the UAW. As Goto points out, the problem is not whether American wages are higher or lower than those in Japan. Rather, the problem is more complex and directly results from the organization of American unions on an industry-by-industry basis. While Japanese unions are organized on an even less encompassing company-by-company basis, wage increases are determined in the “Spring Offensive” from an economy-wide perspective. The comparative disadvantage in labor costs borne by the American producers results from the fact that the differential between auto workers and other manufacturing workers is higher in the United States than in Japan. This differential is a tribute to the success of the UAW in advancing the welfare of its members, but it may also constitute an indictment of the way American unions are structured.

Differences in overall wage levels will be washed out in the currency markets, where economy-wide effects are reflected in the way currencies relate to each other. But differences in wage levels among the industries of any one nation will not wash out. Thus, those industries with differentially high wage structures will bear the burden of those high wage structures in competition with foreign rivals whose wage structures are not so differentially high within their own countries. The result is that self-interested bargaining by industry-specific unions imposing differentially high labor costs upon American employers have handicapped their employers in international competition. This result works to the disadvantage of the American working class which would

99. See id. at 1403-04.
100. See GOTO, supra note 27, at 65-66.
101. See id. at 63-66.
102. See id. at 65-66; see also RONALD DORE, FLEXIBLE RIGIDITIES 24 (1986); infra Part IV.C.2.
103. See GOTO, supra note 27, at 59-61, 135.
benefit immensely from an expansion of the domestic auto industry and other high wage industries.

E. The Encompassing Unions in Sweden and Germany

Olson points out that organizations whose membership includes representation from all or much of the overall society are more likely to have interests and goals which coincide with society's aggregate welfare.\textsuperscript{104} Olson refers to these organizations as "encompassing" organizations.\textsuperscript{105} The Swedish Confederation of Trade Unions (Landsorganisationen i Sverige or "LO") bargains for the entire Swedish blue-collar labor force, cutting across all industries.\textsuperscript{106} Thus freed by its broad representational responsibility from seeking the welfare of workers in a narrow industrial sector at the expense of workers in other sectors, the LO approaches Olson's model of an encompassing organization. According to Olson, the LO would be expected to seek objectives which would be more consistent with the broad welfare of Swedish society than would unions organized on a more narrow focus, such as on an industry, enterprise, or craft basis.\textsuperscript{107} The broad representational role played by the LO has enabled wage bargaining in Sweden to take an effective tripartite form, with labor (through the LO), employers (through the Swedish Employers' Confederation (Svenska Arbetsgivareföreningen or "SAF")), and government periodically working out the framework of acceptable wage bargains.\textsuperscript{108} For a period of time the LO, in cooperation with the government, kept its overall wage demands within a framework which was designed to prevent wage/push inflation, while simultaneously (under a so-called "solidaristic wage policy") seeking to contain pressures for increases at the higher ends of the wage scale.\textsuperscript{109} Indeed, at one time Sweden was one of the leading practitioners of neocorporatism,\textsuperscript{110} an institutional arrangement under which labor, industry, and government work out wage settlements designed to

\textsuperscript{104} See OLSON, RISE AND DECLINE, supra note 33, at 48.
\textsuperscript{105} See id. at 47-48.
\textsuperscript{106} See Flanagan, supra note 90, at 129.
\textsuperscript{107} See OLSON, RISE AND DECLINE, supra note 33, at 48.
\textsuperscript{108} See Flanagan, supra note 90, at 129.
\textsuperscript{109} See id. at 131-32; see also Hammarström, supra note 43, at 189-90 (noting that Swedish unions "assumed partial responsibility for the national economic performance").
\textsuperscript{110} See Neil Elder, Corporatism in Sweden, in THE CORPORATE STATE, supra note 88, at 153-54.
reconcile long-term labor welfare with the overall economic national welfare.

Ultimately, the Swedish neocorporatist experiment broke down. The failure appears to have resulted from the LO’s being insufficiently encompassing. The LO did not represent public-sector workers nor did it represent white-collar workers. As a result, inter-union rivalries generated pressure on the LO and the other unions to compete in their wage demands, thus undermining their ability to further long term goals through short-term restraint—the approach which underlines neocorporatism.

IV. LABOR RELATIONS IN THE UNITED STATES, GERMANY, SWEDEN, AND JAPAN

A. The United States

1. Historical Background

In the early decades of the twentieth century, labor demands for government protection against the rigors of free labor markets were finding increasingly sympathetic responses from Congress and the various state legislatures, but were being resisted by the courts. The United States Supreme Court invalidated legislation establishing minimum wages, maximum hours, and the prohibition of child labor. Eventually, the Court reversed itself on all of these issues, implicitly conceding the validity of Justice Holmes admonition that “[t]he Fourteenth Amendment [is not an enactment of] Mr. Herbert Spencer’s Social Statics.” The courts were equally hostile to the efforts of workers to improve their position through self-help; indeed, the federal

111. See Flanagan, supra note 90, at 129.
112. See id. at 162-63; see also Wolfgang Streeck, The Rise and Decline of Neocorporatism, in LABOR AND AN INTEGRATED EUROPE 80, 85-86 (Lloyd Ulman et al. eds., 1993).
116. Lochner, 198 U.S. at 75 (Holmes, J., dissenting).
judiciary often used the antitrust laws against collective action by workers.117

During the early part of the century, many states enacted worker compensation statutes, providing limited but relatively certain compensation for work-related injuries.118 Most states also enacted legislation providing for minimum wages.119 At the national level, Congress enacted worker compensation type legislation applicable to longshoremen, seamen, and other areas, such as the District of Columbia, where the congressional power was widely recognized.120 In 1914, Congress included sections 6121 and 20122 in the Clayton Act in an attempt to free labor unions from judicial interference. Section 6 declared that "the labor of a human being [was] not [an] article of commerce" and so not subject to any of the antitrust laws.123 Section 20 expressly forbade the courts from interfering with strikes and other traditional ways in which labor sought redress.124

Active federal involvement in labor relations began no later than the Erdman Act of 1898,125 an act which recognized the right of railroad workers to organize and which established a system of voluntary arbitration for labor disputes, including disputes over wages. Federal involvement in labor relations reached new heights during World War I through the activities of a Special Mediation Commission, the War Labor Conference Board, the War Labor Policies Board, and a National War Labor Board.126 Under the aegis of these bodies, trade union member-

117. See, e.g., Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (finding that the use of secondary boycotts by unions was a block to free competition); Loewe v. Lawlor, 208 U.S. 274 (1908) (finding that a union was preventing an employer from manufacturing and participating in interstate commerce).
122. See id. § 20, 38 Stat. at 738 (current version at 29 U.S.C. § 52 (1994)).
123. Id. § 6.
124. See id. § 20.
125. Ch. 370, 30 Stat. 424 (1898) (repealed 1913).
126. See Dubofsky, supra note 5, at 70-72.
ship increased almost seventy percent to more than five million members and twenty percent of the work force during the period from 1917 to 1920.127 Continuing the federal involvement in labor relations, the Transportation Act of 1920128 contained extensive conciliation and arbitration provisions, employing tripartite boards composed of government, labor, and public representatives.129 Again, the Railway Labor Act of 1926 and its 1934 amendments established a system of exclusive bargaining representatives in the railroad industry.130

With the advent of the Great Depression, federal involvement broadened. President Franklin Roosevelt’s administration, newly selected in November 1932, successfully encouraged the Congress to enact the NIRA131 when it took office in the following spring. The NIRA was designed as a radical restructuring of American industry into a cartel-like format, pursuant to the economic approach of the early New Deal to “reflate” the economy by pushing up prices until business leaders found it profitable to expand production.132 Section 7 of the NIRA required that all of the cartel-like agreements (or industry “codes of fair competition” as the Act referred to them) established under the Act include a provision guaranteeing workers the right to organize labor unions and to bargain collectively with their employers.133

When the NIRA was invalidated by the Supreme Court in 1935,134 the labor provisions fell with the rest of the Act. Congress, however, was then moved to enact the NLRA—incorporating the substance of section 7 of the NIRA—in order to ensure continuing legal protection for workers to bargain collectively with employers.135 The NLRA creates statutory rights of workers to organize into labor unions, and through those unions to bargain collectively with their employers over wages,
hours, and working conditions. Employers have a corresponding statutory obligation to bargain in good faith with a union chosen by their employees. A refusal by an employer to bargain and various interferences by an employer with the process through which its employees select a collective bargaining representative are made "unfair labor practices," subjecting the offending employer to enforcement proceedings before the National Labor Relations Board ("NLRB"). In 1947 the Taft-Hartley Act amended the NLRA to include a set of union unfair labor practices.

2. The Rise of "Industrial" Unions

Until the 1930s, the "craft" unions were the predominant form of labor organization in the United States. Most of these unions were affiliated with the AFL. Both the NIRA and the NLRA encouraged the formation of unions on a wider basis than craft. By requiring industry code provisions recognizing the right of workers to organize, the NIRA encouraged this wider paradigm. Yet many employers evaded the NIRA's implicit endorsement of industrial unions by recognizing "company unions," unions whose memberships were limited to a particular company's employees and which were effectively dominated by that company's management. As the successor to the labor provisions in the NIRA, the NLRA included provisions carefully designed to outlaw company-dominated unions and the NLRA was widely perceived as fostering union organization on the broad scale of industrial unions. Indeed, in the immediate aftermath of the enactment of the NLRA, the then nascent CIO vigorously pursued a strategy of organizing mass-production workers into industrial unions. When an industrial union organizes the workers in all or most of the firms in its industry, employers no longer are constrained by competition from unorganized rivals from acceding to union demands. During the decade or so from the

136. See id.
137. See id. § 157(d).
138. See id. § 158(a).
140. See Weiler, supra note 22, at 194-95.
141. See id.
143. See Weiler, supra note 22, at 9.
144. See Freeman & Medoff, supra note 30, at 244.
late 1930s to the late 1940s, the CIO had overseen the full unionization of numerous industries.145

3. The Adversarial Model of Industrial Relations

Observers generally describe U.S. industrial relations as following an adversarial model.146 The focus of those relations has almost invariably been upon economic points of conflict between workers and employers. Unions historically have taken the position that the success or failure of the enterprise is solely the responsibility of the employer.147 The craft unions commit to high quality standards by their members, but they recognize no obligation beyond the quality of each individual’s work.148 Craft unions were accordingly comfortable with the Taylorite approach to efficiency, prevalent in the first quarter of the present century.149 Taylorite analysis identifies the techniques and quality levels required, generally breaking productive motions into component parts for analysis and control. The craft unions would meet the quality standards identified by Taylorite analysis, but they would do no more. Moreover, the craft unions have also adopted rules setting maximum quantitative standards for work. Craft unions have always defined the boundaries of their craft, as a means of identifying their jurisdiction to themselves and others, a practice which reinforces the limited obligation, metes-and-bounds approach to job commitment.150

The limited obligation approach to work characteristic of craft unions has analogues in industrial unions. Industrial unions typically identify jobs and negotiate work rules with employers. Work rules are, in part, a device to protect existing workers from excessive employer

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145. See id.; see also RICHARD VIGILANTE, STRIKE 216-17 (1994) (describing the strike tactics used by the CIO in the 1930s).

146. See DUBOFSKY, supra note 5, at 197 (discussing the power of unions in the twentieth century); VIGILANTE, supra note 145, at 11 (describing the struggle for control over the Daily News as a “holy war”). But cf. Morris, supra note 25, at 526 (claiming that the notion that the NLRA requires an adversarial relationship between employers and unions is a myth).

147. See DUBOFSKY, supra note 5, at 181-84.

148. See VIGILANTE, supra note 145, at 49-50.

149. See JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 12-22 (1958) (discussing Taylorism); see also VIGILANTE, supra note 145, at 48-49 (discussing the relation between the outlook of craft unions and Taylorism); Estreicher, supra note 142, at 133-34. See generally FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (Basic Books, Inc. 1985) (1911) (introducing Taylorite analysis, which identifies the techniques and quality levels required for each stage of production, generally breaking tasks into component parts for analysis and control).

150. See VIGILANTE, supra note 145, at 49-50.
demands and, in part, a device to force the employer to hire more workers. Management has sought to protect its control over production through the negotiation of management-rights clauses in collective bargaining contracts, clauses which generally recognize management's control over production decisions and decisions incidental thereto. Problems arise in the interface between the extensive management rights usually incorporated into collective bargaining contracts and preexisting work rules or practices which, in management's view, need to be modified in the interest of production efficiency.

The practices of defining union jurisdiction by job definition, defining work, establishing job definitions, and writing work rules become troublesome when technology changes. There is always a danger of jurisdictional disputes arising when a craft union's jurisdictional assertions are ambiguous or imprecise or overlap the jurisdictional assertions of another union. The potential for such disputes is enhanced when changing technologies alter the premises upon which jurisdictional definitions were written. Work rules written for a static work place raise costs when the efficient use of new technology requires different behavior from that contemplated by those rules. The New York Daily News strike is an extreme example of the problems which result from the clash of imbedded work rules and job definitions after a technological change.153

The NLRA assumes the conflict model and incorporates it in the legal structure it establishes over collective bargaining. The NLRA tries to insulate the organizing processes from employer influences and to confine bargaining to negotiations between company and union representatives. Because many employers had used "company unions" as a device for escaping their obligations under the NIRA, the NLRA is especially hostile to company unions. The NLRA, accordingly, draws

152. See id.
153. See VIGILANTE, supra note 145, at 61, 94-95, 97.
154. See Thomas C. Kohler, Models of Worker Participation: The Uncertain Significance of Section 8(a)(2), 27 B.C. L. REV. 499, 515 (1986); see also Estreicher, supra note 142, at 131 (noting that the NLRA established the NLRB to adjudicate employment claims). But see Barenberg, supra note 1, at 1385-89 (taking a revisionist view of the NLRA's origins). Barenberg argues that Senator Wagner and other supporters of the NLRA envisioned a cooperative relationship between labor and capital ultimately emerging from that Act's guarantee of workers' organizational and collective bargaining rights. See id.
155. See Martin T. Moe, Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union, 68 N.Y.U. L. REV. 1127, 1134-42
a sharp focus between legitimate labor organizations on the one hand and employers on the other. It assumes a Taylorite technology, in which communication about production between employees and employers proceeds primarily in one direction, from supervisory personnel to workers. The NLRA recognizes that some two-way communication between employers and workers is necessary, but assumes that the subjects for all two-way communications are wages, hours, and conditions of employment—matters which must be discussed only through company interaction with union representatives.

The conflict model of labor relations implicitly incorporated into the NLRA differs remarkably from German and Japanese models of labor relations. Although the German and Japanese approaches to labor relations are superficially very different from each other, industrial relations in both nations involve higher degrees of cooperation and joint decision-making than does the U.S. model. In recent years, U.S. industry has increasingly attempted to utilize the cooperative efforts of workers in expanding productivity and raising quality. A major device for securing such assistance from workers is the so-called "quality circle" device, through which small groups of workers discuss means of improving production and quality with a management representative. The best known examples of quality circles and related forms of employee involvement in workplace decision-making in the United States are at the General Motors’ Saturn Plant and at the General Motors/Toyota joint venture, New United Motors Manufacturing, Inc. (“NUMMI”) in Fremont, California; however, the use of quality circles and other forms of employee involvement is widespread. Unfortunately, the conflict model built into the NLRA has cast a cloud over the lawfulness

(1993).


157. See id. § 9.

158. See Clyde W. Summers, Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy, 16 COMP. LAB. L.J. 467, 468, 473, 475 (1995) (arguing that the U.S. model is an “adversarial” model; that the Japanese model is a “cooperative” model; and that the German model incorporates aspects of both the adversarial model and the cooperative model).

159. Employee involvement at the NUMMI and Saturn plants is discussed in Gould, supra note 21, at 123-31; see also Barenberg, supra note 10, at 888-89 (discussing the NUMMI and Saturn “team” practices).

160. Professor Estreicher lists Ford, Motorola, Texas Instruments, General Foods, Procter & Gamble, General Electric, TRW, and Eastman Kodak as among many leading business firms employing this form of employee involvement. See Estreicher, supra note 142, at 138.
of quality circles.\textsuperscript{161} NLRB Chairman William Gould has called for amendments to the NLRA which would "allow for cooperative relationships between employees and the employer,"\textsuperscript{162} but President Clinton has recently vetoed such legislation,\textsuperscript{163} thus reinforcing the adversary model built into the NLRA.

4. An "Industry" Focus to Collective Agreements

Because large industrial unions have controlled the labor supply of a number of industries (especially the traditional mass-production industries such as automobiles and steel), wage rates are negotiated for each industry. The union either negotiates with employers as a group, "multiemployer bargaining," or engages in so-called "pattern bargaining."\textsuperscript{164} In the normal course, an agreement in the former situation binds all employers. In pattern bargaining, the union negotiates an agreement with one employer which is used as a "pattern" for agreements with the other firms in the industry.\textsuperscript{165} Both the union and the employer with which it is negotiating understand that the union will do its utmost to ensure that each of the other firms in the industry accede to terms similar to the pattern agreement. These practices impose similar

\textsuperscript{161} See Electromation, Inc., 309 N.L.R.B. 990, 997 (1992), enforced, 35 F.3d 1148 (7th Cir. 1994); see also E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 897 (1993) (confirming the interpretation of the NLRA in Electromation); Chen & Gifford, \textit{supra} note 40, at 1334 ("American labor law operates dysfunctionally by blocking attempts at labor/management cooperation in the workplace through 'quality circles.'"). But see General Foods Corp., 231 N.L.R.B. 1232, 1235 (1977) (holding that autonomous employee committees were not labor organizations under the meaning of section 2(5) of the NLRA, and thus did not constitute a section 8(a)(2) violation).

\textsuperscript{162} Gould, \textit{supra} note 21, at 60; see also id. at 142 (advocating the reform of NLRA section 8(a)(2) and suggesting a more flexible demarcation between supervisors and employees); William B. Gould IV, \textit{Employee Participation and Labor Policy: Why the Team Act Should Be Defeated and the National Labor Relations Act Amended}, 30 CREIGHTON L. REV. 3, 8-11 (1996) (advocating that autonomous employee committees be permitted through reform of the NLRA). Professor Mark Barenberg provides an elaborate description of team organization and its evolution with a discussion of its efficiency potential. See Barenberg, \textit{supra} note 10, at 897-904. Barenberg, however, also criticizes some manifestations of team organization, particularly the so-called "Toyota System," which he finds oppressive. See id. at 911-12. Professor Samuel Estreicher has repeatedly called for amendments to the NLRA to facilitate increased employee involvement in workplace decision-making. See Estreicher, \textit{supra} note 142, at 150-55; Estreicher, \textit{supra} note 54, at 22-27, 35.

\textsuperscript{163} See President's Message, \textit{supra} note 20, at 1378-79.

\textsuperscript{164} Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2122 (1996) ("Multiemployer bargaining... is a well-established, pervasive method of collective bargaining... "); Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 722 (1965) (Goldberg, J., concurring in the result and dissenting from the opinion) ("[T]erms and conditions of employment in a given industry... are often secured... through bargaining with market leaders that sets a "pattern" for agreements on labor standards with other employers.").

\textsuperscript{165} See Jewel Tea, 381 U.S. at 722.
terms upon all employers, thus serving the interests of both the employers and the union. The employers have assurance that no rival possesses a labor cost advantage, and the union wage scale is protected from competitive pressure exerted by lower-wage employers.

Because bargaining occurs on an industry basis, wage increases are likely to reflect the profitability of the industry—the more profitable industries being able to afford the greater wage increases. Indeed, not surprisingly, high profits have generally acted as a stimulus to union wage demands. The wage/profit relationship has entered into the public discourse. Commentators upon labor relations frequently ask whether a wage increase has been held within the limits of productivity gains. The premise for such a question is that wage increases are expected as industries become more efficient, and efficiency gains are expected to be translated into higher wages.

In the quarter-century following the end of World War II, many of the most profitable industries (such as automobiles and steel) were mass production industries whose efficiencies were the result of scale economies. Because scale economies dictated that each firm account for a large volume of production, the number of producers in these industries was limited. The automobile, steel, and other mass production industries thus tended to be oligopolies. The expected result was that these industries priced their goods oligopolistically. Since the labor force of these industries generally was organized, the oligopolistic effects in the product market were exacerbated by the monopoly power exerted in the labor market by the industrial unions which negotiated the wage rates. These industries thus experienced a double monopoly effect, as the monopoly over the labor supply was compounded when the oligopolists in the output market added their own monopoly-profit component to the pricing of the final product.

B. Europe

European labor practices reflect wide divergence as well as long and complex histories. In France, the union movement is divided along ideological lines. There, several rival unions organize workers in each

166. See Dau-Schmidt, supra note 58, at 472-73.
167. See id.
169. See id. at 1808.
industry and occupation.\textsuperscript{170} The competition which this situation encourages among unions is further complicated by the fact that, under the law, a collective bargaining agreement applying across the board comes into effect when signed by the employer and a single union.\textsuperscript{171} Because of the poor quality of union representation and declining union membership, some observers believe that works councils, an institution borrowed by France from Germany, may ultimately replace unions as the effective negotiators of collective agreements.\textsuperscript{172} In contrast to the ineffective unions of France, the unions of Germany and Sweden provide a dramatically different picture. There, large and powerful unions control most of the industrial labor force.

1. Germany

a. Some Background and History

In Germany, the largest unions are the Union of Metal Industry Workers ("IG Metall"), the Union of Public Service, Transport and Communications Workers ("Gewerkschaft Öffentliche Dienste, Transport und Verkehr"), and the Union of Chemical, Paper and Ceramics Industry Workers ("IG Chemie-Papier-Keramik").\textsuperscript{173} Because the jurisdiction of IG Metall extends to workers dealing in any way with "metal," its jurisdiction extends across industry lines, representing the workers employed by most manufacturing companies.\textsuperscript{174}

German unions were not always as powerful as the metalworkers are today. At the end of World War I, Catholic, communist, and socialist unions competed for the allegiance of workers\textsuperscript{175} in the manner of the French unions of today. Inter-union rivalries, which continued throughout the Weimar Republic, ensured their weakness and also ensured that they

\begin{itemize}
    \item \textsuperscript{170} These are the Confédération Générale du Travail ("CGT"), the Confédération Française Démocratique du Travail ("CFDT"), the Force Ouvrière, and the Confédération Française des Travailleurs Chrétiens ("CFTC"). See Robert J. Flanagan et al., Unionism, Economic Stabilization, and Incomes Policies: European Experience 580 (1983).
    \item \textsuperscript{172} See id. at 348-49.
    \item \textsuperscript{173} See Friedrich Fuerstenberg, Industrial Relations in the Federal Republic of Germany, in International and Comparative Industrial Relations, supra note 43, at 165, 168.
    \item \textsuperscript{174} See Carol D. Rasnic, Who Holds the Employment Contract "Trump Card"? Comparing Labor Laws in Germany and the United States for the International Investor, 4 Ind. Int'l & Comp. L. Rev. 33, 37 (1993) (stating the German metal industry "includes automobile, electric, ship-building, and machine-building companies, among others").
    \item \textsuperscript{175} See Maier, supra note 3, at 449.
\end{itemize}
Labor Policy in the Democratic State

did not, by cooperating, achieve monopoly control over the labor supply. During the Weimar period, Germany operated under a regime in which wage disputes ultimately were disposed of through compulsory arbitration. The Weimar period also made a lasting contribution to German labor relations: the works councils. Works councils, originally mandated by legislation in 1920, are composed of representatives elected by the workers at each plant. They were abolished during the Nazi period, but were reestablished at the end of World War II. Works councils consult and negotiate with plant management about a variety of local matters. Under legislation enacted in 1972, works councils possess codetermination rights over changes in the pace of work and in the work environment. They also operate, inter alia, as a mechanism for resolving grievances. Germany has further enhanced worker participation in workplace governance by requiring representatives on company boards, first in the coal and steel industries and then in all industries. These extensive rights to

176. See id. at 446.
177. The official system of worker representation embodied in the works councils dates back to the end of World War I. At the end of the war, Germany was in turmoil. In the aftermath of the Bolshevik Revolution in Russia, many feared a repetition of that revolution in all or parts of Germany. During the 1919-1920 period, rhetoric about worker seizure of factories was widespread. By the end of 1920, however, this rhetoric had been transformed—partially through the efforts of the Social Democratic Party (“SPD”)—into a movement for “works councils” in factories. See id. at 138-40, 160-64. This modified movement was successful. German works councils were enacted into law. They flourished during the Weimar Republic. They were renewed at the end of World War II. Worker participation was dramatically expanded during the 1970s when legislation put worker representatives on company boards. See Clyde W. Summers, Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective, 28 AM. J. COMP. L. 367, 375, 384 (1980) (discussing the Works Council Act of 1920 and the Codetermination Act of 1976); see also Summers, supra note 158, at 475-76 (noting that the Works Constitution Act of 1972 does not approve of an antagonistic relationship between the employer and the works council).
178. See Summers, supra note 177, at 375.
179. See id.
180. See Fuerstenberg, supra note 173, at 176.
181. In 1951, codetermination legislation placed worker representatives on the supervisory boards of coal and steel companies and a labor representative on company managing boards. German companies have a managing board (Vorstand) which implements most decisions and a higher supervisory board (Aufsichtsrat) which appoints the top managers and approves major decisions but, because it meets only four times a year, cannot interfere in company management. See id. at 170. In 1976, codetermination legislation placed worker representatives on the supervisory boards of all companies with more than 2000 employees. In the coal and steel industries, the shareholders select their representatives and the labor representatives are chosen by works councils and unions. In industries other than coal and steel, at least one of the labor representatives is nominated by the senior executives and, in impasse situations, the chairman (who is a shareholders’ representative) casts the deciding vote. See id. at 177.
participate in workplace governance, created by the works council legislation and the codetermination laws, have engendered a union infrastructure which collects and synthesizes information essential to the active exercise of these participation rights. As a result, unions consult with employers on a wider range of issues than is customary in the United States. This means, in turn, that collective bargaining from the union side is broadly informed.

b. The Double Official/Unofficial Format to Bargaining and Negotiation

Present-day German labor relations takes place in two somewhat parallel formats. First is the format in which one of the major unions bargains with an employers' association at a regional or national level over wages and working conditions. Agreements on wages are negotiated for the entire metalworking sector between IG Metall and the employers' associations. The broad membership of the union (IG Metall) representing manufacturing workers means that bargaining, at least on the union side, is carried on with concern for broad-based economic effects extending beyond the impact on any one particular industry. Similarly, the manufacturers' associations bargaining with IG Metall embrace most major manufacturing industries. The manufacturers' associations thus also bargain with concern for economic effects extending beyond any one industry. As a result of this form of bargaining and intersectoral cooperation among employers, "interindustry wage spread [in Germany] is low by international standards." The second format involves a framework of worker representation established by law in which workers' representatives consult with plant and company officials and participate in important decisions affecting the company. The works councils negotiate with company officials at the plant level about implementing the union agreement. This system of worker representation is formally separate from the union and its representational functions. Both the union representation of workers at the national or regional level and the local

182. See id. at 178.
183. See id. at 172.
185. See Fuerstenberg, supra note 173, at 172 (discussing the dual structure of German industrial relations); Streeck, supra note 184, at 127 (discussing rights of works councils). An outline of the postwar law and politics of German labor relations can be found, inter alia, in Alan Hyde, A Theory of Labor Legislation, 38 BUFF. L. REV. 383, 407-12 (1990).
works councils which administer the union-negotiated agreement provide both checks and reinforcements for one another.

2. Sweden

a. Economy-wide Bargaining

In Sweden, the LO bargains over wages for substantially all blue-collar workers with the SAF, an association of all private-sector employers. Nationwide labor agreements, such as those between the LO and the SAF, are known as "central agreements." General pay increases were periodically negotiated over one to three year terms between the LO and the SAF from the 1950s to the mid 1980s.

Because the bargaining between the LO and the SAF is over a nationwide agreement extending across all industries, the bargaining is less affected by concerns central to a specific industry than is the bargaining conducted by an industrial union in the United States. Moreover, the broad, almost economy-wide membership of the LO ensures—even more than in Germany—that the perspectives of the union and its officials are also economy-wide. Similarly, on the other side of the bargaining table, because the membership of the employers' association consists of most private-sector manufacturing firms, that association is also likely to approach bargaining issues with an economy-wide perspective. As discussed below, Mancur Olson has suggested that both the LO and the SAF come close to meeting his definition of encompassing organizations, organizations whose interests approach the interests of the general public.

The tendency of economy-wide bargaining, unless modified by local negotiation, is to impose standard wage increases (in percentage terms or in absolute amounts) across all industries. Thus it avoids the effects of transforming the production efficiencies of profitable industries into differentially high labor costs, an effect which has characterized wage bargaining in the United States. These leveling tendencies of centralized bargaining have been reinforced by the "solidaristic wage policy"

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186. See Flanagan, supra note 90, at 129; Hammarström, supra note 43, at 192. On aspects of Swedish labor law forming the background to bargaining practices, see Hyde, supra note 185, at 418-21.
188. See id. at 194-95.
189. See id. at 191-93.
190. See infra text accompanying note 277.
pursued by the LO since the 1950s, a policy consciously designed to shrink differences in compensation among blue-collar workers.\textsuperscript{191} Despite the attempts of the LO and the SAF to deal on an economy-wide basis with wage increases, Sweden has experienced substantial "wage drift," that is, wage increases implemented in particular firms or industries induced by labor shortages.\textsuperscript{192} Wage drift, of course, offsets the solidaristic goals and has become increasingly important over time, accounting for fifty percent or more of negotiated wage increases in the late 1970s and early 1980s.\textsuperscript{193}

b. The Aukrust/EFO Bargaining Model

Consistent with a bargaining structure which places a high value upon economy-wide concerns, production costs, and the productivity of the export sector were accepted by both sides as prime constraints in bargaining.\textsuperscript{194} Indeed, Swedish collective bargaining appears to have followed a theoretical format articulated by the Norwegian economist Odd Aukrust, with modifications developed by three Swedish economists: Gösta Edgren, Karl-Olof Faxén, and Clas-Erik Odhner (the "Aukrust/EFO model").\textsuperscript{195} The Aukrust/EFO model is discussed below.\textsuperscript{196} According to Robert Flanagan, the Aukrust/EFO model employed by the LO and the SAF assumed that inflation was a function of world prices and differences in productivity trends in the tradable and nontradable goods sectors of the economy—factors for which the LO bore no responsibility.\textsuperscript{197} The wage level would determine profitability and international competitiveness. Prior to bargaining, the parties would be able to calculate, from existing trends in world prices and productivity, the amount of "room" for wage increases consistent with maintaining the competitiveness of Swedish export industries, a calculation which

\begin{itemize}
  \item \textsuperscript{191} See Hammarström, \textit{supra} note 43, at 190.
  \item \textsuperscript{192} See Flanagan, \textit{supra} note 90, at 151-53.
  \item \textsuperscript{193} See \textit{id.} at 140 (reporting that Swedish unions achieved about one-third of their goal of narrowing wage differentials in the 1964-1982 period and "the remaining two-thirds [having been] undone by wage drift"); Hammarström, \textit{supra} note 43, at 195. Flanagan and others reported earlier, however, that wage drift exceeded the total of negotiated wage increases from the mid-1950s to 1970. See \textit{FLANAGAN ET AL.}, \textit{supra} note 170, at 313. Thus, the strength of the drift during the 1970-1982 period appears less than in the preceding 15-year period.
  \item \textsuperscript{194} See Hammarström, \textit{supra} note 43, at 194.
  \item \textsuperscript{195} See \textit{supra} note 49 and accompanying text.
  \item \textsuperscript{196} See \textit{infra} note 198 and accompanying text.
  \item \textsuperscript{197} See Flanagan, \textit{supra} note 90, at 160.
\end{itemize}
narrowed the range within which bargaining would occur.¹⁹⁸

Under this model, the government bore the responsibility for the overall employment level, a responsibility which it met by expanding public-sector hiring to pick up slack in the labor market. Initially this public-sector hiring was understood as responding to temporary maladjustments in the labor market. In retrospect, it is possible that this government policy had the effect of encouraging the LO to inflate its wage demands.¹⁹⁹ Flanagan sees a more complex interaction. The expansion of the public sector increased the role and the aggressiveness of public-sector unions.²⁰⁰ Wage restraint by the LO was discouraged by rivalry with public-sector unions. The reluctance of the government (until the mid 1980s) to resist the demands in the public sector exacerbated the problem.²⁰¹ Ultimately, the maintenance of profitability in the traded sector itself required a succession of currency devaluations.²⁰² The Swedish bargaining model finally broke down in the 1980s as a result of the excessive wage demands which it encouraged.²⁰³

¹⁹⁸. See id. The Aukrust/EFO model fits a fixed exchange rate system such as the Bretton Woods System that prevailed worldwide until 1973; see also MORDECHAI E. KRENIN, INTERNATIONAL ECONOMICS: A POLICY APPROACH 53-56 (5th ed. 1987) (describing the Bretton Woods System). Under fixed exchange rates, excessive wage increases in the export sector would impair the marketability of exports when the wage increases were reflected in prices. In Sweden that would have damaged employment in the pace-setting export industries. Had the LO ignored the constraints indicated by the Aukrust/EFO model, the Swedish government would have been forced either to devalue its currency or to tighten its system of exchange controls. When a nation's currency floats freely, however, excessive wage increases imposed across the entire economy would both engender inflation and automatically depreciate its currency. The Bretton Woods (fixed-exchange rate) System collapsed in 1973. See id. at 190-91. Even after that collapse, Sweden tried to maintain a fixed exchange rate for the Swedish krona. It failed dramatically in the 1981-1982 period, when the krona was devalued by 24 percent against the currencies of its trading partners. See Bosworth & Lawrence, supra note 90, at 98. Again in 1992, Sweden had to abandon a peg of the krona to the European Currency Unit. See Janet Bush, *Euro-lessons from Sweden*, TIMES (London), Apr. 30, 1996, at 29.

¹⁹⁹. See Flanagan, supra note 90, at 161.

²⁰⁰. Public sector share of total employment expanded significantly during the 1970s. See LINDBECK, supra note 40, at 145-47 (discussing Swedish economic policy). Public sector employment grew from approximately 21 percent of total employment in 1970 to 28 percent in 1978. See id. at 143-44 & fig.8.4. The increasing importance of the public sector was also reflected in the amount of the GNP which it represented. In 1980 the government share of Swedish GNP was 64 percent. See FLANAGAN ET AL., supra note 170, at 316 ("[T]ax revenue increased from 40.5 percent of GNP in 1970 to 53.4 percent in 1977; Sweden became the only OECD country in which the tax burden exceeded half of GNP."). Not only did this growth of the public sector strain Sweden's resources and foster an aggressive public sector unionism, but it also created a severe tax crunch which exacerbated the collective bargaining problem. New money wage income gained at the bargaining table became subject to steep income taxes and value-added taxes. See id.

²⁰¹. See Flanagan, supra note 90, at 163.

²⁰². See id. at 161.

²⁰³. See id. at 164-65.
Despite its ultimate failure, there are positive aspects of the Swedish model of labor relations. When the LO, representing all blue-collar workers, bargains with the SAF, representing all private-sector employers, economy-wide interests are reflected on both sides of the bargaining table. During the 1950s and 1960s, the LO exercised restraint in its bargaining demands in the interests of ensuring international competitiveness. The practice of setting wage increases as percentages or absolute amounts applicable across the economy both furthered the LO's solidaristic wage policy as well as avoided the problem of imposing differentially high labor costs upon the nation's most profitable industries. In short, Swedish bargaining practices initially fostered exports.

c. The Breakdown of the Swedish Bargaining Model

Flanagan's analysis attributes the ultimate breakdown of the Swedish model to the LO's failure to be sufficiently encompassing in its membership. According to Flanagan, the model collapsed because of inter-union rivalries, each union being more concerned with advancing the interests of its members than with the social consequences of excessive wage demands. Even the LO, which represented all blue-collar workers, could not maintain a policy of restraint in the face of the aggressive demands of the public-sector unions. Once the public-sector unions began to compete with the LO to see who could obtain the largest wage increase, all of the unions confronted, as Flanagan puts it, a prisoner's dilemma. No union can afford to follow a policy of restraint when the other unions will, in effect, free-ride off of its restraint. Had the LO represented all public workers as well as the private-sector, blue-collar workers, it would have been able to follow a policy of restraint, benefiting the working class as a whole.

The models of labor relations which emerged in Germany and Sweden are now threatened from another direction: the drive towards a single European market. The new all-European market environment, besides providing employers with the enlarged market which facilitates scale economies in production, erodes the power of labor unions which previously controlled the available labor supply. That labor union power is being eroded by the enhanced intra-European competition to which

204. See id. at 162-63.
205. See id. at 163.
206. See id.
employers are becoming increasingly exposed and by the increasingly available opportunities of employers to expand (or move) their operations elsewhere within the European Union.207

C. Japan

1. Background and Union Structure

Japanese labor law dates from the period of the American occupation in the years immediately following World War II. The Trade Union law was enacted shortly after the end of the war and was substantially amended in 1949.208 Contrary to American law, Japanese law contains no requirement that any one union be the exclusive representative of the workers in a bargaining unit.209 In this, Japanese law and practice thereunder resembles France, where several unions can actively represent workers at the same factory.210 Also contrary to the American practice of union organization by industry or the German/Scandinavian practice of meta-industry organization, Japanese unions are all enterprise (or "company") unions.211 These enterprise unions appear to possess less power than the major American or European unions have traditionally possessed.212 This is partially because of the enterprise base of organization. Since no union controls any of the labor supply beyond the particular enterprise where its members are employed, employers who should be faced with a prolonged strike would be able to replace the strikers,213 a practice unavailable to employers in many nations and, until the mid-1980s, not widely used in the United States.214 Strikes, therefore, are generally limited in time. During the period in which

207. See Melvin Reder & Lloyd Ulman, Unionism and Unification, in LABOR AND AN INTEGRATED EUROPE, supra note 112, at 13, 38-39.
208. See WILLIAM B. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 23, 30 (1984); see also SHIGETO TSURI, JAPAN'S CAPITALISM: CREATIVE DEFEAT AND BEYOND 23 (1993) (noting that authorities of the American occupation "pressed the Japanese government to legislate the Trade Union Law").
209. See GOULD, supra note 208, at 37.
211. Most of the Japanese enterprise unions are affiliated with a national federation, the principal ones of which are the General Council of Trade Unions of Japan (Sohyo) and the Japanese Confederation of Labor (DomeO. See GOULD, supra note 208, at 7.
212. See id. at 8-9.
213. See id. at 143.
214. The NLRA permits employers to replace striking workers. Employers generally had not made significant use of that right until after President Reagan provided the example of replacing the striking air controllers in the PATCO strike. See supra note 22 and accompanying text.
bargaining takes place over new labor contracts, unions sometimes call strikes for periods ranging from one-half of a day to one day.\textsuperscript{215}

Union organization around particular enterprises means that Japanese industrial relations have no analogues to either the American craft union or to a "bargaining unit" smaller than the enterprise itself. Thus, within enterprise unions workers are not segregated or classified by skill or job, and hence are free to be reassigned, transferred, or to have their tasks modified at the discretion of the company.\textsuperscript{216} Work rules, which have limited the authority of management to reassign worker tasks, are thus largely absent in Japanese factories.

2. Wage Determinations

Wage agreements are generally for a one-year duration. Wage negotiations at all companies are conducted at the same time, in the spring of each year, during the Spring Offensive.\textsuperscript{217} Generally, an overall norm for wage increases in all industries is worked out over the months preceding the signing of the new agreements. This process involves the government, the leading figures from industry and banking, academics, and the union federations participating in an extended public discussion and debate.\textsuperscript{218} Ronald Dore, who has described this process, attributes its success, inter alia, to a "high level of macro-economic sophistication" among union leaders and to the fact that the enterprise unions "acknowledge their stake in the success of their firm."\textsuperscript{219} Indeed, NLRB Chairman William Gould has reported that the Japanese enterprise unions are so company-conscious that, in one year, only five percent engaged in negotiations in which union officials from outside of the company participated.\textsuperscript{220}

\textsuperscript{215} See Tadashi Hanami, Conflict Resolution in Industrial Relations, in CONFLICT RESOLUTION IN MARKET ECONOMIES 203, 210-11 & tbl.4 (Tadashi Hanami & Roger Blanpain eds., 2d ed. 1989); see also Gould, supra note 208, at 13 (stating that strikes in Japan are "of relatively brief duration").

\textsuperscript{216} See Gould, supra note 208, at 3; see also Dore, supra note 102, at 92 (stating that a worker in a Japanese firm "defines himself primarily as a member of that firm, not as a member of an occupation group").

\textsuperscript{217} See Dore, supra note 102, at 24-25; Gould, supra note 208, at 7.

\textsuperscript{218} See Dore, supra note 102, at 25.

\textsuperscript{219} Id.

\textsuperscript{220} See Gould, supra note 208, at 6.
3. The Bonus System

The wages negotiated in the spring constitute only about sixty-five percent of workers’ total compensation. The remainder is paid in bonuses and overtime, a practice which has interested a number of commentators because of the unusual flexibility it provides to employers to adjust worker compensation. Thus, according to Gould, because of the high percentage of wages paid in the form of bonuses, “wages can swing up or down as much as 30 percent a year.” Dore, writing about the 1970-1980 period, however, cautions that bonus payments are less flexible than they appear on the surface. They are “sticky downwards” Dore asserts. Martin Weitzman, while conceding that rigidities may affect downward flexibility, contends that the bonus system provides Japanese employers “with an important means of reducing labor costs during recessions.” Whatever degree of stickiness impedes employers from adjusting bonuses downward, the bonus system necessarily introduces a second decisional point into the determination of increases in employee compensation. Thus, the bonuses are agreed upon separately from increases in the overall wage rate, which is fixed in the Spring Offensive. (Bonuses are negotiated in an “Autumn Offensive.”) First, the Spring Offensive sets upper limits on wage increases across the entire economy. Second, the bonus system minimally permits particular enterprises to hold bonuses constant, thereby reducing compensation increases in those enterprises by up to one third less than the economy-wide norm. Third, the bonus system, despite its stickiness, does apparently permit downward adjustments, at least more readily than downward adjustments in wages proper.

4. “Permanent” Employment

Japanese industry is well-known for the practice of life time employment. Yet this practice is found primarily among the so-called “permanent” employment in the large firms. Japanese manufacturers tend to outsource substantially more than has traditionally been the practice at many American firms. The result is that suppliers and their

221. See id. at 7.
222. Id.
223. DORE, supra note 102, at 103.
224. WEITZMAN, supra note 34, at 75.
225. See DORE, supra note 102, at 103.
226. See GOULD, supra note 208, at 10-11.
employees bear a major portion of the burden of economic downturns.227 Thus, the Japanese economy has been described as a two-tiered. On the top tier are the large companies, providing “permanent” employment to their workers, almost all of whom are represented by enterprise unions. But on the lower tier, accounting for about eighty percent of the labor force, are temporary workers and employees of subcontractors, many of whom are not represented by unions.228

Within the upper tier, the institution of “permanent” employment provides advantages to employers as well as to the favored class of workers. First, it enables employers to respond flexibly to change. Because the “permanent” employees of large firms possess employment security, they need not fear the adoption of new technology and so do not resist it.229 Second, the institution of permanent employment aids management in acquiring useful information from workers; thus, workers need not be reluctant to disclose more efficient methods for performing their tasks, for fear of losing their jobs.230 Third, the institution of permanent employment transforms substantial amounts of labor cost into fixed cost, thus enhancing employers’ abilities to respond aggressively to declines in demand. Fourth, the institution of permanent employment reinforces the flexibility of management to reassign workers to tasks as the needs of the moment demand, since permanent workers need not rely upon work rules or job descriptions as protections against layoffs. Fifth, combined with the bonus system, the institution of permanent employment helps to generate employee loyalty, willingness to contribute ideas and information for improving production or product quality generated on the plant floor, and acceptance of extensive discretion by management to redefine and reassign tasks.

The Japanese system of industrial relations thus possesses a significant number of positive aspects. First, the economy-wide wage determination in the spring of each year means that industry-specific productivity gains are not transformed into differentially high labor costs, thus disadvantaging those industries in international trade. Second, the practice of setting wages annually enables both industry and labor to

229. See GOULD, supra note 208, at 11-12 (discussing the role of joint consultation in the handling of technology transfers).
230. See id. at 95; see also Summers, supra note 158, at 475 (discussing the role of quality circles and methods of employee input in decisions concerning the enterprise).
adjust to fluctuations in demand and cost. Third, the system of substantial worker bonuses helps to cushion sector-specific shocks. Fourth, the bonus system helps workers to identify with their employer and to cooperate in efforts to increase profitability. Fifth, the permanent employment system also engenders loyalty by workers to their company, encourages their participation in generating incremental advances in workplace efficiency, and removes their opposition to the implementation of new technologies. Sixth, the general absence of work rules provides a context in which permanent employment and worker identification with their company can foster worker cooperation in continuous efforts to increase efficiency. Seventh, the extensive use of outsourcing enables large employers to cast much of the burden of downturns on their suppliers and the labor forces of the suppliers. Eighth, the permanent employment system converts wages from a variable to a fixed cost, thus facilitating the company's ability to adjust to unfavorable economic conditions in the markets in which it competes. To the extent that the bonus system allows downward adjustments, Japanese employers gain an additional element of flexibility in the markets in which they compete.

V. MODELS OF LABOR RELATIONS

From these broad sketches of labor laws and practices in the United States, Germany and Sweden, and Japan it is possible to construct three ideal types or models of industrial relations which this Author calls, respectively, the U.S. model, the German/Scandinavian model, and the Japanese model.

A. The U.S. Model

Because all unions seek higher wages and other forms of compensation, slight but significant differences in union objectives are not always immediately apparent to nonparticipant observers. In the U.S. model, industry-wide unions negotiate with employers over the wage rate, with the objective of transforming industry profits into higher wages for workers in that industry. Thus, contrary to the German/Scandinavian and Japanese practices, bargaining in the United States generally focuses upon the industry. Wage increases are likely to be higher in the more profitable industries than in the less profitable industries. Wage increases thus always transform some actual or potential profits into higher labor

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231. See Gifford, supra note 14, at 1423.
costs. When wage increases are contained within the limits of productivity advances, then only potential profits are transformed into labor costs.\textsuperscript{232} When wage increases exceed the extent of productivity advances, as they did in the 1970s, then part of the previously realized earning power of the industry is permanently transformed into labor costs.\textsuperscript{233}

Although workers naturally wish to share in the success of their company, the traditional method for doing so, i.e., through increases in their hourly wage rates, has a number of disadvantages. First, it is extremely difficult to reverse wage increases. Should the economic fortunes of a once successful employer (or an industry) decline, the employer (or industry) is saddled with labor costs which are unduly high and difficult to modify. The wage rate is not generally modified in economic downturns and is extremely sticky downwards, even in structurally depressed industries. Second, the almost universal practice in the United States is for employers to adjust to economic downturns with layoffs rather than with reductions in wages.\textsuperscript{234} This practice of laying off workers is the necessary consequence of the downward stickiness of wages. The result of these practices is that companies are impeded in adjusting their operations to economic downturns or falling demand. Third, another almost universal practice in the United States is for workers to be laid off in reverse order of seniority.\textsuperscript{235} The worker last hired is the first to be laid off when adjustments are required in the labor market.

On the labor side, the current practice of adjusting to economic downturns through layoffs, rather than through downward adjustments in compensation, affects different classes of workers differently, and this inherent conflict of interest among workers is exacerbated by the seniority system. The interests of the mass of workers who possess greater seniority and who do not fear layoffs clash with the interests of the smaller number of workers who possess lesser seniority and who are laid off in a downturn. Fourth, this inherent conflict of interest which the seniority system generates in the situation of layoffs is replicated when a union chooses a bargaining strategy which implicates the

\begin{itemize}
\item \textsuperscript{232} See Dau-Schmidt, \textit{supra} note 58, at 433.
\item \textsuperscript{233} See \textit{id.} at 434.
\item \textsuperscript{234} See \textit{Weitzman}, \textit{supra} note 34, at 3-4.
\end{itemize}
wage/employment tradeoff. The mass of workers with the greatest seniority will always opt for a strategy which weighs wage increases greater than concerns about reduced employment. Thus, when dealing with a wage/employment tradeoff, union bargaining strategy—insofar as it reflects the preferences of the employed workforce who make up the bulk of its membership—will be skewed in favor of a higher wage goal and will be less concerned with any resulting adverse impact on employment.

When the U.S. economy operated in a largely insular fashion, the U.S. bargaining model produced high wages in the auto and steel oligopolies, wages which increased significantly over time. And the auto and steel companies passed on much of these periodic wage increases in the form of higher prices for their output. Because the employers were themselves oligopolists, the result in prices and output incorporated the double-monopoly effect. The economic consequence of the union’s control over the industry-specific labor supply was added to the existing oligopoly power of the auto and steel producers. As pointed out above, in such a situation the public loses, but so do the producers and the input suppliers because their returns are less than they could be.

It is here that the peculiar organization of an American industrial labor union is of special interest. In any other case, an input supplier and a final product producer who each possessed market power would find a way to avoid the double-monopoly effect. Business firms would be impelled to avoid the double-monopoly effect insofar as they were pursuing profit-maximizing objectives, since by avoiding that effect their profits could be increased. The objectives of an American industrial union, however, are not easily specified. Because a labor union is not a business, it does not seek profits as such. It does seek the economic betterment of its members. But it may not be possible to specify its goals with more precision. And when confronted with the wage/employment tradeoff, this lack of goal specificity means that its strategy will be indeterminate.

The seniority system is likely to affect the bargaining strategy of

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236. Even after those industries were subjected to significant foreign competition, voluntary restraint agreements and other forms of protection enabled wage bargaining to ignore product market restraints to a significant degree. Protection over steel lasted for approximately a twenty-three year period and protection of automobiles lasted for eleven years. See Daniel J. Gifford, Antitrust and Trade Issues: Similarities, Differences, and Relationships, 44 DEPAUL L. REV. 1049, 1076-78 (1995).

237. See supra text accompanying note 56.
every union. As noted above, the seniority system is likely to skew union decision-making towards a heavier weighing of higher wages when decisions about the wage/employment tradeoff have to be made. In addition, the seniority system is likely to generate union disinterest in avoiding the double-monopoly effect, because the vested interests of the most senior workers—those likely to be most influential in union decision-making—would be undermined by any agreement which traded off compensation for employment. This analysis suggests that most American industrial unions lack interest in advancing the overall interests of the working class by seeking a wage/employment tradeoff which maximizes the overall return to labor. Rather, industrial unions in the United States lack any underlying ideology. They, like other interest groups, aggressively assert the short-run interests of their most powerful class of members.

Since the 1970s basic industry in the United States has been increasingly subject to international competition. Wage rates which were set in a context in which employers were domestic oligopolists have handicapped these companies in competing with foreign rivals. Taking the U.S. automobile industry as an example, Japanese Professor Junichi Goto has shown how the results of collective bargaining agreements in that industry have imposed a substantial disadvantage on the U.S. producers vis-à-vis their Japanese rivals. Goto points out that it is not just that U.S. auto workers earn high wages that is the source of the difficulty, because the effects (for purposes of international trade) of generally high U.S. wage rates would be washed out in the currency markets. Rather, as Goto states, it is the fact that U.S. auto workers are paid significantly more than U.S. workers in manufacturing generally. This, of course, is the direct result of industrial unions seeking industry-specific goals, pressuring up wages in the most profitable industries. By contrast, Japanese auto workers do not enjoy a comparable wage differential over Japanese workers in manufacturing generally. Thus, the differentially higher labor costs borne by U.S. auto manufacturers vis-à-vis their Japanese rivals means that the U.S. manufacturers are

238. See supra text accompanying notes 234-35.
239. See Gifford, supra note 14, at 1403.
240. See Goto, supra note 27, at 59-61, 135-36 (identifying the impact of the differentials between auto-worker wages and general manufacturing worker wages in the United States and Japan).
241. See id. at 61.
242. See id. at 64.
burdened with a handicap which will not be washed out in the currency markets.

This kind of a labor-cost handicap is not easily overcome. Wages, as noted above, are not adjustable downwards, except in extreme circumstances. The industry-specific wage differential is, to a significant extent, the consequence of collective bargaining by industry. When the practice of conducting wage bargaining by industry-specific unions originated in the 1930s and 1940s, international competition was not important. The effects of that practice have continued, however, into an era when international competition has increased in importance.

Finally, the tradition of labor relations in the United States has been an adversarial one. Unions have traditionally sought their own goals of increased wages and benefits with little concern about the employer's day-to-day efficiency. Work rules have been a source of inefficiency, especially when technology changes. The employer's profitability was relevant only as an occasion for seeking increased compensation. The adversarial climate has discouraged workers from offering ideas or suggestions for improving product quality or production efficiency. Today, this long-standing adversarial climate impedes the abilities of U.S. employers to adjust to international competition and impedes employers and unions from restructuring their relations along more cooperative lines. Indeed, the NLRA itself assumes an adversarial format for labor relations and contains a number of provisions reinforcing those assumptions.243

Because the U.S. model is premised upon unions exerting power in the labor market to pressure wages upwards and employers passing on their higher labor costs in higher prices, unions would be expected to oppose international agreements, such as NAFTA and the WTO, which would interfere with this scenario by exposing employers to heightened competition from abroad.244 Yet, as pointed out below, the German/Scandinavian model and the Japanese model of labor relations are more compatible with international trade.245 In short, the U.S. model of labor relations is a creature of an earlier era. It bears characteristics which are ill-adapted to a period of intense international competition. Moreover, the organizational structure of industrial unions and the

245. See infra notes 260-64 and accompanying text.
universal custom of seniority make reform difficult.

B. The German/Scandinavian Model

The industrial-relations practices of Germany and Scandinavia suggest a model of labor relations in which a large union representing blue-collar workers in all, or most, manufacturing industries bargains with an association whose membership includes most manufacturers. As noted previously, in such a bargaining context, both sides are necessarily concerned with economic effects extending beyond those affecting a particular industry. In such a model, bargaining would tend to focus upon a range for economy-wide wage increases, exerting less of a disparate impact upon wages (and hence upon labor costs) among the various industries than does the U.S. model. This model drawn from the salient features of German and Scandinavian practice would also incorporate the German practice of widespread worker participation in governance, including works councils, matters which will be discussed after consideration of the Japanese model.

The LO in Sweden has reinforced the compressing effect that economy-wide bargaining would be likely to exert on wage increases across industries with its solidaristic wage policy, a policy explicitly designed to narrow wage differences among blue-collar workers. Despite countervailing tendencies expressed in so-called wage drift, the LO appears to have been partially successful in containing pressures towards wage disparity. In Germany, where IG Metall bargains for most workers in the manufacturing sector, wage spread among industries has been unusually low. Thus, to a significant extent, actual results follow those indicated by the model.

The crisis in Swedish labor relations which emerged in the 1980s was apparently due to the abandonment of the Aukrust format for negotiation when inter-union rivalries effectively forced the LO to assert excessive wage demands. The labor-relations model suggested by the German/Scandinavian practice, however, is one in which a single union bargains on behalf of most workers. The breakdown of the Swedish practice can thus be attributed to the divergence of the actual practice in

246. See supra text accompanying notes 194-98.
247. See Flanagan, supra note 90, at 132-33 (noting that most of the reductions in wage dispersion for blue-collar workers is due to Sweden's solidaristic wage policy).
248. See Streeck, supra note 184, at 125.
249. See Flanagan, supra note 90, at 161-63, 165.
Sweden from the logic of the model. In the model, a comprehensive union representing all workers would have foreclosed the possibility of inter-union rivalries.

C. The Japanese Model

Japanese industrial relations suggests a model which is significantly more paternalistic than the German/Scandinavian model. While in the German/Scandinavian model a single union representing all workers possesses sufficient power to countervail the employers’ associations, the model drawn from Japanese experience is one in which an array of nonexclusive enterprise (or company) unions deal separately with each employer.\(^{250}\) This is a situation in which the power relationship is heavily weighted in favor of the employers.

In the Japanese model, twenty percent of the work force has permanent employment, in the sense that these workers are relatively secure against layoffs.\(^{251}\) The result is that workers are willing to cooperate with management in accepting new technology and in contributing insights from the plant floor on product quality and production efficiency.

Wage increases in this model are determined, within a narrow range and for all industries, in a process of public dialogue involving government, academics, members of the public and workers.\(^{252}\) This method of determining wage increases helps to narrow differentials among industries and incorporates into the process economy-wide considerations. Thus, the Japanese model uses a different method to replicate the results of the German/Scandinavian model in broadening the focus of wage determinations to include economy-wide factors.

Finally, in the Japanese model, wages represent only a part of workers’ overall compensation. The remainder—amounting to thirty-five percent of the total—takes the form of bonuses, the amount of which depends upon the company’s profits.\(^{253}\) Prescinding from any downward stickiness affecting actual bonus payments in Japan, the model assumes that bonuses are freely adjusted up or down depending upon the company’s success in the market.\(^{254}\) Under the Japanese model, workers

\(^{250}\) See GOTO, supra note 27, at 65.
\(^{251}\) See GOULD, supra note 208, at 9-10.
\(^{252}\) See supra notes 217-20 and accompanying text.
\(^{253}\) See GOULD, supra note 208, at 7.
\(^{254}\) See id.
truly share in the company's profits and thus the company's fortunes. In conjunction with the security offered by permanent employment, this economic participation in their employer's success helps to reinforce workers' identification with their employer and encourages active attempts to increase efficiency.

Under the Japanese model profitable industries are not burdened with excessive labor costs; in this model unions do not pressure wage rates upwards in successful industries to transform profits into hourly wage rates. Rather wage rates are set on an economy-wide basis as they are under the German/Scandinavian model. But workers nonetheless share in the particular profitability of their employer as they do in the U.S. model. Thus, the Japanese model, in this respect, appears to possess the advantages of both the German/Scandinavian model and the U.S. model while avoiding their respective disadvantages.

VI. COMPETITIVE CONSTRAINTS ON WAGE DETERMINATIONS

In the Aukrust bargaining format originally followed by the LO, industries are visualized as belonging either to an "exposed" sector dealing in tradable goods and services or to a "sheltered" sector dealing in so-called nontradables, i.e., goods and services which are not exposed to international competition. In Scandinavia, the "exposed" sector is composed primarily of the export industries. These industries sell in internationally competitive markets where they are "price-takers" and so are constrained in the amounts which they can pay in wages and remain competitive. As noted above, the LO tried to determine how much "room" was available in these industries for wage increases—the room for wage increases being determined by increases in productivity in Swedish factories and the internationally competitive price levels which set a ceiling on the prices which Swedish exports could command.

The LO strategy then was to seek an across-all-industries wage increase of a percentage amount which was within the capacity of the export industries to pay without losing their international competitiveness. This strategy thus sought to impose upon the sheltered industries a percentage wage increase whose amount was set without reference

255. See Summers, supra note 158, at 475.
256. See Edgren et al., supra note 49, at 70-71.
258. See id. at 113.
259. See supra text accompanying notes 109-10.
to the conditions of the sheltered industries. Indeed, the export industries were generally more efficient than the sheltered industries, and so (at constant world prices) had more "room" for wage increases. The sheltered industries, however, were presumed to price their goods and services on a mark-up basis. Under this assumption, the sheltered industries would essentially pass on labor-cost increases to the public. Insofar as the demand for the goods and services of the sheltered industries limited their ability to pass on higher costs or forced reductions in output, the LO saw this effect as conducive to the expansion of the more efficient export industries, industries which (under this format) were the pace-setters for wage increases. Similarly, in Germany, when IG Metall seeks wage increases in meta-industry bargaining, it also must consider competitive constraints upon employers. Germany is both an unusually large exporter and importer, and hence (in terms of the Aukrust model associated with Scandinavian negotiations) has a large exposed sector which is constrained by international competition. Again, the society-wide attention to across-the-board wage increases in Japan similarly ensures that competitive considerations for Japan's important export industries are taken into account in wage determinations. Indeed, as noted above, Professor Goto has identified the narrow wage differential among Japanese industries as a significant competitive advantage which the Japanese auto companies possess in their export trade vis-à-vis their U.S. competitors.

By contrast, wage negotiations in the United States have not focused upon international competition as a constraint upon wage increases. Under the U.S. model, employers pass on all or much of higher labor costs which result from bargaining. Auto, steel, and other mass production industries are oligopolies with the power to set prices. And even competitively structured industries have sold either nontradables (such as construction) or have enjoyed extensive protection (like textiles under the Multi-Fiber Agreement and its predecessors). In terms of the

261. See id. at 112.
262. See id. at 110-11.
263. See id. at 113-14.
264. See GOTO, supra note 27, at 61.
265. The United States has traditionally been the leading example of a large industrial nation in which foreign trade has not exerted a major effect. See EDGREN ET AL., supra note 49, at 70.
Aukrust format, all American employers bargained as if dealing in nontradables, a situation which, until the last two decades, was largely true.269

In the auto industry, for example, only an insignificant portion of North American production has been exported outside of North America,270 with U.S. manufacturers generally producing for foreign markets in foreign plants. Throughout the post-World War II period into the 1990s, the UAW had assumed that the automobile industry is an oligopoly in which employers are able to pass along substantial amounts of any increased labor costs in final-product prices. Even when Japanese competition became severe in the late 1970s and early 1980s, the response of the union and most of the auto companies was to call for protection.271 When the government finally negotiated a voluntary restraint agreement ("VRA") with the Japanese, the result was the preservation of the domestic oligopoly of the big three, but with the Japanese producers admitted to a cartel-like arrangement established through the VRA.272 The VRA relieved the pressure on the U.S. manufacturers to control their wage costs.273 Indeed, after the Plaza Agreement in the mid-1980s (which effectively revalued the dollar downwards against the yen and thereby increased the dollar-measured costs of the Japanese companies), the U.S. producers took advantage of the higher costs of the Japanese companies by increasing their own prices.274 Thus, they confirmed by their behavior the continuance of oligopolistic pricing in the domestic auto market and facilitated the continuance of the traditional collective bargaining assumptions. The expiration of the VRA in 1992,275 the downsizing of General Motors, and the growing practice of outsourcing in the auto industry are all signs, however, that the days of the traditional U.S. model are numbered. The successful resistance of Caterpillar, Inc., a large exporter, to the UAW's attempt to impose a wage structure based upon the John Deere pattern

270. See GOTO, supra note 27, at 37.
271. See id. at 40.
272. See id. at 155-57 (referring to VRAs as voluntary export restraints "VERs").
273. The VRA also preserved domestic auto employment against erosion, but at a strikingly high cost to U.S. consumers. Goto estimates the cost per job saved to have been $126,050 per year. See GOTO, supra note 27, at 163.
274. See Gifford, supra note 236, at 1077.
suggests that international competitive constraints are beginning to be felt in some areas of domestic bargaining.276

VII. THE REFORM OF THE U.S. MODEL

The U.S. model of labor relations is especially vulnerable to international competition. It assumes that employers are able to pass on higher labor costs in the prices of final products. When international competition impedes employers from passing on higher costs, then the model breaks down. Yet the demise of this model of labor relations does not necessarily portend the end of the labor movement nor a bleak future for workers generally. Both the German/Scandinavian model and the Japanese model provide useful points of reference for redesigning U.S. labor relations. The German/Scandinavian model incorporates Mancur Olson’s “encompassing” organization concept and so provides the most obvious vehicle through which institutional design would bring about a closer match between the perspectives and objectives of organized labor on one hand and the pursuit of aggregate societal welfare on the other.277 But that model also has critical deficiencies disqualifying it as a pattern for American reform. First, the German/Scandinavian model confers immense power on the encompassing labor organization—more power than the American public would probably tolerate in a private organization.278 Second, with union membership declining substantially in the United States and currently running at approximately ten percent of the workforce, there is no foreseeable prospect whatsoever for the emergence of an encompassing labor organization in the United States.279 Like the German/Scandinavian model, the Japanese model can be the source of valuable insights for U.S. labor law reform, but the heavily paternalistic elements incorporated in the Japanese model preclude its being carried over bodily to the American context.

277. See OLSON, RISE AND DECLINE, supra note 33, at 47-53.
278. See id. at 90-93.
279. See 1996 STATISTICAL ABSTRACT, supra note 26, at 436 tbl.681.
A. Insights for Reform Provided by the German/Scandinavian Model

Although reform in the United States is unlikely to employ the device of an encompassing labor organization along German/Scandinavian lines, some of the socially positive aspects of that model may be achievable by alternate means. Before mapping out these alternate means, let us first identify the positive aspects of the German/Scandinavian model.

1. The Positive Aspects of Meta-Industrial Organization

As noted, the meta-industry or encompassing structure of organized labor under the German/Scandinavian model fosters labor union perspectives which are broader than those of an industrial union in the United States and objectives which coincide more closely to the aggregate welfare of society. This is Mancur Olson’s point about the superiority of encompassing organizations. In the labor union context, the larger the labor organization and the greater its responsibilities, the less it will focus solely upon conditions within a specific industry to the exclusion of economy-wide concerns. Indeed, in the extreme case in which a single labor organization represented all workers, that organization would be impelled to consider fully the wage/employment tradeoff, since nationwide unemployment would be the direct result of its own bargaining. Such a comprehensive union organization would also be more likely than the present industrial unions to seek the overall welfare of the working class. Indeed, its goal in bargaining would tend towards maximizing the overall return to labor, rather than the welfare of the most senior workers.

Maximizing labor’s return within each industry sounds similar to the efforts of today’s industrial unions to pressure up wages within their respective industries. Yet such a maximizing goal would provide a critically different operational modus vivandi. It would mitigate the contemporary interest conflict between workers of greater and lesser

280. See supra note 277 and accompanying text. The U.S. labor movement—partially due to the craft-union background from which even its industrial unions have sprung—has almost invariably been characterized by a narrow vision, one which placed in the foreground the welfare of its employed members (especially the most senior of the employed members) and which has tended to avoid responsibility for the unemployed. See OLSON, LOGIC, supra note 33, at 66-67 (recounting the origin of unions in America).

281. See OLSON, RISE AND DECLINE, supra note 33, at 48-53.
seniority where benefits to the workers with the greater seniority come at the expense of those with lesser seniority. Because today’s American unions possess no standard for resolving this inherent conflict, the tradeoffs they make between higher wages and lower employment invariably appear arbitrary. The institutional dynamics of an encompassing union, however, would induce pressures upon its leadership to seek a wage level on the more objective maximization criterion. Moreover, an encompassing union would bear a responsibility to assist workers unemployed in one industry to find employment in another. A goal of maximizing labor’s return within each industry would help to engender a new more cooperative relationship between capital and labor, since the achievement of this new maximizing goal would require the maximum degree of production efficiency. Thus, labor’s goals on the plant floor would be substantially identical to those of management. Indeed, this correspondence of goals would facilitate the introduction of a new regime of worker participation in workplace governance, along the lines of the German practice, in which workers’ representatives consult with plant management at the plant level through works councils and in which a labor representative participates in the deliberations of the company board.282

A labor union with economy-wide membership seeking to maximize the return to labor would pursue goals of high compensation and full employment. Compensation would vary by industry, consistent with the maximization criterion as applied to each industry. As pointed out below, maximizing the return to labor in each industry would be facilitated by a movement towards incorporating bonus or profit-sharing plans as significant parts of workers’ compensation. The macroview which would be embraced by such a labor union would push the union’s objectives towards ensuring that, over the long run, society’s productive resources were used at their highest potential, thereby ensuring that the labor force was both fully employed and employed at the highest possible compensation, consistent with the employment of all others at the highest possible compensation.

Contrary to the present practice in which an industrial labor union’s strategic decisions implicate Phillips curve considerations, balancing higher compensation for many against layoffs for a lesser number, an economy-wide union’s efforts to maximize compensation would always be consistent with full-employment goals, since maximizing the return to

282. See supra notes 178-82 and accompanying text.
labor would require that workers displaced in one industry would be hired in the next most rewarding industry. Indeed, the union in such a setting could be conceived as playing a role analogous to the role played by the Japanese *keiretsu* members, who take on the displaced employees of a downsizing member, thus ensuring that so-called "permanent" employees are kept permanently on the payrolls. Here the union would facilitate the transfers when necessary. As a result, the level of employment security of workers generally would be enhanced.


Although a comprehensive labor organization of the type described would represent interests which were close to the interests of the general public, those interests would not always coincide perfectly. First, is the question of how much weight is to be afforded the present generation of workers as against the interests of future generations. The particular way the actual members of the work force make this balance may not correspond to the way the larger society performs this balance. A comprehensive union seeking to maximize the return to labor would be likely to weigh present compensation greater than company profits, and thus make demands upon enterprise profits which would be excessive in the light of the investment necessary to advance living standards over the long run. Second, a comprehensive union, which adopted socially suboptimal objectives, would possess immense power to impose them upon the larger society. Such a union would possess the potential to paralyze the economy, a power which it would be tempted to use, at least as a last resort, when industry resisted its demands.

Again, such a comprehensive union would possess a lesser, but no less threatening, power to impose its objectives: the power to use its control over the labor force to strategically threaten company-specific or industry-specific strikes. By coordinating actual or threatened strikes pursuant to an overall plan, such a comprehensive union could exploit employer vulnerabil-

283. See Gould, supra note 208, at 10-11.
284. This aspect of a private interest group was noted two centuries ago. See The Federalist No. 10 (James Madison).
285. This is the power that Maier identified as the basis for the involvement of European government in labor affairs during reconstruction from World War I. See Maier, supra note 3, at 582.
286. Industry-specific unions often employ "whipsaw" tactics in which one producer is pressured to settle a strike in order to avoid sales diversions to its non-striking rivals. See Gifford, supra note 14, at 1402-03. A comprehensive union would be able to fashion far more sophisticated whipsaw-like strategies, involving, for example, the threatened refashioning of customer/supplier
ties much more extensively than can presently be done by our separate industry-specific unions.

The societal dangers potentially raised by an encompassing labor union need not detain us for long, because reform of American labor relations will not follow the German or Scandinavian path. The share of the United States economy which is organized is small and diminishing. Reform cannot involve universal organization. More likely, it will take a form which can be implemented incrementally.

B. Insights for Reform Provided by the Japanese Model

The Japanese model combines an economy-wide format for adjusting hourly compensation with an enterprise focus upon productivity and bonuses. On the surface, the Japanese approach is superior to the German/Scandinavian model. First, the economy-wide format for adjusting basic hourly compensation is superior to that produced by actual Olsonian encompassing organizations like the Swedish LO and the German IG Metall, because neither the LO nor IG Metall represents all workers. Even the LO behaved antisocially when rivalry with public-sector unions compelled it to make excessive wage demands. Second, the public dialogue which forms the core of the Spring Offensive is informed by a comprehensive collection of relevant data supplied at the beginning of the year by the government. Informed public participation is more likely to push the result of bargaining towards the common good than two-way bargaining, even between encompassing organizations, and even when the government participates in the negotiations. Third, the result which is obtained in the Spring Offensive is less critical than the results obtained in the bargaining conducted by the LO and IG Metall, because the one-third of total compensation that takes the form of bonuses is determined separately.

In the Japanese model some significant part of worker compensation is transformed from an inflexible hourly wage format into bonuses. This is a characteristic meriting imitation. First, because such a bonus system
is a highly flexible method for adjusting to economic downturns, layoffs would no longer become the first response of an enterprise to a fall in demand. Rather than a situation in which a minority of the work force suffer a lot, the burden of the downturn would be shared among all of the enterprise's workforce where the burden incurred per worker would be less. Second, the bonus system is not merely a method for adjusting compensation upwards or downwards. It is a means for involving labor as a partner with employers by directly sharing in the employers' success in the market. Moreover, it is a method of compensation which probably best accords with the objective of maximizing labor's overall return. Indeed, the objection most likely to be raised about such a method of compensation is that it introduces a factor of uncertainty into worker's compensation, since workers will not know their total yearly compensation until their bonuses are calculated.

There are compelling responses to this objection. One, the increased uncertainty about the exact amount of compensation is offset with increased employment security, for reasons already mentioned. Two, in the long run, compensation is likely to be greater because the flexibility of the bonus system enables the employers to respond more flexibly to market demands, and because the increased identification which the bonus system engenders between workers and their employers is likely, in a variety of ways, to increase productivity and hence to increase enterprise profits which in turn (through the bonus or profit-sharing arrangements) produce higher compensation. The increased identification by workers with the enterprise is further reinforced by the employment security objectives which now become part of the union's goals.

Finally, the bonus system eliminates once and for all the double monopoly effect which has produced sub-optimal returns for labor and capital in some mass production industries and which has burdened the public with unduly high prices for many years. True, international competition may effectively erode the double-monopoly effect over the long run as domestic oligopolies are transformed into international competitors. But during the period of transition, the double-monopoly effect impedes the adjustment of domestic firms to the new realities of global competition. Rather than exerting a restrictive effect on output as does the double-monopoly effect, the bonus system enhances each firm's competitive response to market changes because it effectively removes

292. See supra text accompanying notes 221-25.
labor costs from the computation of variable (and hence marginal) costs. In short, a bonus system, to the extent that it was implemented, would heighten the competitiveness of business firms, enhance the return of workers, and assist in providing the public with the benefits of a more intensely competitive marketplace.

C. The Direction of U.S. Reform

Labor unions are a decreasing presence in the U.S. economy. Here, private-sector labor unions are concentrated in the traditional mass-production industries. The diminishing proportion of these industries in the U.S. gross domestic product indicates that labor law reform is not a critical need to this nation. Furthermore, despite the many socially positive characteristics of the German/Scandinavian model, the small proportion of the private-sector labor force which is unionized means that reform in the United States will not follow an Olsonian "encompassing" organization paradigm. Moreover, experience in Sweden suggests that in practice even meta-industry organization is sometimes insufficient to generate the public-regarding behavior which theory predicts.

The Japanese model seems to provide more grist for reform in the United States. The bonus system, the society-wide dialogue on wage increases, and the institution of permanent employment are ideas which carry the potential for inspiring reform in American labor relations. Were American labor relations to import the Japanese practice of paying up to one-third so of compensation in the form of a bonus, American society would acquire the potential for reaping the many benefits of that system—the increased identification between workers and their enterprises, engendering in a variety of ways, enhanced productivity and responsiveness to changes in market conditions, thus maintaining scale economies, sustaining profits, employment, and progress down learning curves. The direction indicated by the Japanese model is congruent with proposals previously urged by American scholars interested in finding

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293. Indeed, for the purposes of enhancing the competitive response of a firm to changing conditions in the marketplace, the effect of transforming compensation from an hourly wage base to a the bonus system is pro tanto similar to making labor a fixed cost, in that variable cost would then be computed without regard to labor. Labor, however, to the extent that it was compensated under a bonus format, would be neither a fixed nor variable cost in conventional terms, but more of a claim on profits.


295. See REES, supra note 57, at 20-22.

296. See id. at 187-88.

297. See supra note 289 and accompanying text.
ways to foster converging perspectives by labor unions and employers on workplace issues.298

Because conversion to a bonus system can be done on a company-by-company basis, this route to reform is compatible with the existing state of private-sector industry in the United States, where unions constitute only a modest proportion of the labor force. Yet the bonus system surprisingly produces institutional incentives similar to those of Mancur Olson’s encompassing organizations. Encompassing organizations develop institutional goals which approximate the aggregate public welfare because their extensive membership replicates the interests of the larger society. A labor union whose members receive a major part of their compensation in the form of bonuses or profit sharing develops an institutional incentive to foster behavior consistent with the profit-making goals of the employing enterprise and hence consistent with national welfare.299 Indeed, the incentive of the union and its members is to enhance the enterprise’s profits. Thus, the profit-sharing arrangement transforms the traditional American adversary relationship between employer and employee into one of cooperation, since now both sides seek the same goal.

Again, the Japanese practice of an economy-wide approach to hourly-wage changes might be desirable, especially in conjunction with an encouragement of collective bargaining over the ways that employees would share in company profits. First, annual increases for all industries equal to the average aggregate productivity increases of all industries would focus the attention of workers, employers, and society upon productivity—the engine upon which all elements of society rely for their economic well-being. Second, since productivity always increases over the long run, there is little danger of racheting up hourly wage levels to unsustainably high levels. Third, an economy-wide approach to hourly wages would facilitate the transformation of expectations to a bonus system as the source for the extraordinary compensation likely to accompany extraordinary profits.

The cooperative attitude of Japanese workers engendered by the bonus system receives additional support from the Japanese institution of permanent employment. Since workers are not fearful of losing their

298. See Freeman & Medoff, supra note 30, at 248 (suggesting that both the voice and responsibility of unions for the enterprise must be increased for unions to be more effective in the U.S.); Estreicher, supra note 54, at 40-43 (suggesting various ways labor laws should be amended in order to improve relationships between employers and unions).

299. See discussion supra Part IV.A.3.
jobs, they are not inhibited from suggesting ways to produce more with less labor input. The two institutional factors play together: permanent employment provides workers the security which they need to provide efficiency-enhancing input to their employers, while the bonus system provides them with the economic incentive to do so. Conversely, the bonus system introduces sufficient flexibility into worker compensation as to enable the enterprise to maintain its employment base in the face of a falling demand.

American employers might be reluctant to support a system of permanent employment analogous to the Japanese practice, because they have become accustomed to the ease and flexibility which the practice of layoffs provides for the control of labor costs. Yet flexible compensation, such as a bonus system, provides an alternative route to the control of labor costs and one which makes it easier for an enterprise to provide enhanced employment security. Indeed, layoffs are a less desirable method for controlling labor costs than is an alternative flexible compensation method since the latter better preserves (and fosters the growth of) the enterprise's human capital, its scale economies, and its progress on the industry's learning curve.

Americans do not always advert to the fact that the Japanese system of "permanent" employment is not radically different from American employment practices. The seniority system (which is almost universally observed in the United States) effectively provides security against layoffs to the large core of workers in any enterprise who have been employed for the longest period. It would not be a major step to formalize the "permanent" employment aspect of current U.S. practice by identifying a core of workers in each enterprise as permanently employed, while treating the remaining body of the most recently hired workers as "temporary" or "probationary" employees who are waiting for openings in the body of permanent employees. Such a step would reconceptualize the way we in the United States think about the workforce into a format resembling the Japanese model. Yet to a large extent it would merely recognize the high degree of employment security presently possessed by the core of the workforce of many enterprises, while similarly recognizing the lack of security possessed by the band of workers most recently hired.

This kind of reconceptualization of the workforce of enterprises into "permanent" and "temporary" employees has the potential advantage of reshaping workplace incentives when it is combined with other reforms. To the extent that employees whose jobs are in fact permanent recognize that fact and act accordingly, they will—like their Japanese counter-
parts—lose their inhibitions about affirmatively cooperating with their employers to enhance efficiency. Combined with a bonus or other profit-sharing system, the permanent employees would possess incentives for efficiency-enhancing cooperation, including accepting flexibility of job descriptions and the elimination of most work rules. Finally, such a change would enable the seniority system to lose its significance. When the workplace division was formalized into categories of permanent and temporary workers, with all permanent workers treated alike, interest conflicts within the class of permanent workers would vanish, and within that class identification with the overall welfare of the enterprise would be further strengthened.

With these reforms—the introduction of a bonus or other profit-sharing system and the adoption of a form of "permanent" employment from the Japanese model—American labor relations would move strongly in a cooperative direction. Since the goals of both workers and management would be directed towards greater efficiency, a broadening of worker participation in workplace governance along German lines would become practicable. At the plant level, workers' representatives might consult with plant management through works councils, while a labor representative might participate in the deliberations of the company board.

We know that the public interest is furthered when enterprises pursue profit-maximizing goals. Indeed, these private maximizing goals underlie the action of the market in allocating resources efficiently. When the goals of workers and their unions are transformed into maximizing a profit base from which both employers and workers draw their returns, labor's goals become coincident with those of society. Indeed, this profit-sharing format produces the same coincidence between the goals of labor and the public welfare which theory allocates to "encompassing" labor unions. Yet the profit-sharing route to this goal is more direct and thus less likely to be undermined by inter-union rivalries or by the internal politics of a massive encompassing union.

This profit-sharing approach to capital/labor cooperation is a form of integrating labor into the productive enterprise. It changes the focus from labor as a purchased commodity to labor as a participant. Ronald Coase has pointed out that a business firm integrates when integration is more profitable than outsourcing. And Oliver Williamson points out that an array of transaction costs exacerbated by recurring technological

changes and uncertainties heightens the benefits of integration over contracting when input suppliers deal with output producers in a bilateral monopoly situation. Their insights are properly brought to bear on the relations between employers and organized labor. A movement towards negotiating increased amounts of compensation in the form of flexible arrangements such as profit sharing and bonuses and lesser amounts in the form of rigid hourly wage rates would transform the labor/management relation pro tanto into one of integrated participants in a common venture. Such a venture would resolve bilateral monopoly negotiations to the benefit of both parties while simultaneously eliminating the double-monopoly produced under the present system in concentrated industries. It would also enhance the ability of the enterprise to respond to market challenges. Insofar as it is beneficial to both parties to follow that route, they will do so, circumstances permitting. What impedes the labor side from pursuing such a strategy in the U.S. context is the economic conflict of interest engendered by the seniority system as it works in its current context, the more secure workers resisting changes which would maximize the overall economic return to labor.

Labor relations in the United States are thus impeded by present institutional arrangements from reaching more socially optimal arrangements. Modest revision of U.S. labor laws would benefit not only society, but workers themselves. This is not the place to propose a detailed revision of those laws. But the direction of reform is clear enough. Labor unions and their employing companies should be encouraged or required to bargain for a major portion (approximately one-third) of compensation in a form which depends upon the success of the company. And the employment relation should probably be refashioned to facilitate the formal recognition of a "permanent" employment relationship for the core of workers which in most enterprises is in fact permanently employed. Finally, some form of annual hourly wage adjustment reflecting economy-wide changes in productivity should probably be encouraged or required. These are the routes taken in Japan. And they are routes which appear likely to produce the results which an encompassing organization produces in theory but often fails to produce in practice.

301. See WILLIAMSON, supra note 58, at 89-90.
CONCLUSION

In this Article the Author has presented the main outlines of a reformed labor law policy, a new policy which would be more fully compatible with today's global marketplace, and which would serve to enhance the well being of the entire workforce. The Author has not attempted here to provide an answer to every difficulty which may arise under the outline presented.

Labor law reform in the United States—especially reform which is compatible with global competition—is urgently needed. Yet the literature, with few exceptions, has not addressed the problem festering beneath the surface of existing laws and practices: how to minimize restraints in the product markets while maximizing labor’s return, and how to do both in a world of intense international competition. In this Article, the Author has responded to this need, outlining broadly the direction in which reform should proceed.

Those who disagree with this policy prescription will have their own proposals. If the Author’s presentation serves to stimulate others to offer alternative prescriptions for labor law reform, this Article will have served a need.