Catholic Social Teaching on Labor and Capital: Some Implications for Labor Law

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CATHOLIC SOCIAL TEACHING ON LABOR AND CAPITAL: SOME IMPLICATIONS FOR LABOR LAW

KEN MATHENY*

I. THE CRISIS OF AMERICAN LABOR LAW

In 2007, 15.7 million Americans, 12.1 percent of employed wage and salary workers, belonged to labor unions. This reflects a sharp decline from 1983, when unionized workers comprised 20.1 percent of the workforce.¹ In the private sector, only 7.5 percent of workers belonged to a union.² The tiny percentage of unionized private sector workers is remarkable in light of empirical data indicating that approximately forty-four percent of private sector employees would like to be represented by a

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² Id.
Moreover, a majority of American workers would like to be represented by an organization that has independent authority from management. The frustrated desires of millions of American workers compel the conclusion that American labor law has failed, and failed badly. Millions of American workers are denied the right to union representation because of a legal regime that is weak and ineffective. A recent investigation of workers' freedom of association in the United States by Human Rights Watch concluded that:

[M]illions of workers are excluded from coverage by laws to protect rights of organizing, bargaining, and striking. For workers who are covered by such laws, recourse for labor rights violations is often delayed to a point where it ceases to provide redress. When they are applied, remedies are weak and often ineffective. In a system replete with all the appearance of legality and due process, workers' exercise of rights to organize, to bargain, and to strike in the United States have been frustrated by many employers who realize that they have little to fear from labor law enforcement through a ponderous, delay-ridden legal system with meager remedial powers.

The failure of labor law to protect the rights of American workers is disturbing not only because "[f]ew human rights are more important than the right of freedom of association," but also because the exercise of that right is essential to democracy. The policies of the National Labor Relations Act (NLRA or the Act) the heart of American labor law, embody the fundamental democratic ideals of our society. As Professor Ellen Dannin has written:

NLRA policies . . . say that work and the way workers are treated are central to the sort of country this is. The NLRA's values are

3 RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 89 (1999). Freeman and Rogers further note that the workers who want, but do not have, a union receive lower wages, are disproportionately black, and report particularly poor labor-management relations at their workplace; they are, in other words, "just the sort of folks who could truly benefit from union representation." Id. A more recent poll reveals that fifty percent of nonunion workers in America would vote for a union if they had the opportunity. See CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 8 (2005). The author cites to a poll conducted in 2002 by Peter Hart Associates for the AFL-CIO.

4 FREEMAN & ROGERS, supra note 3, at 59.

5 LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 16 (2000).

6 JAMES A. GROSS, WORKERS' RIGHTS AS HUMAN RIGHTS 1 (James A. Gross ed., 2003). See id. (observing that Senator Robert Wagner, the chief advocate of the National Labor Relations Act, believed that independent labor unions and collective bargaining are essential to a democratic form of government).

emphatically pro-democracy. Its policies set out steps to give us workplaces consistent with a democracy and to empower workers by giving them the skills needed to be citizens of a democracy.\(^9\)

Consequently, as Professor Thomas Kohler has observed, “there is more involved and more at stake in labor law reform than we may think.”\(^{10}\) Kohler writes:

> Anyone with serious concerns about the kind of people we are making ourselves to be over the long run, and whether we can sustain the sorts of habits necessary to the well-being of a democracy, must pay close and critical attention to employment and the way that relationship is ordered. Briefly stated, the employment order involves far more than simply wage rates, power relationships, productivity, quality, or workplace voice. It quite literally involves the constitution of human beings.\(^{11}\)

Because of the fundamental importance of work to the development of human personality and the goal of a just society, labor law is about much more than economic efficiency or industrial peace: it is about human dignity. The United States’ Catholic Bishops observed in their pastoral letter on the United States’ economy,

> All economic institutions must support the bonds of community and solidarity that are essential to the dignity of persons. Wherever our economic arrangements fail to conform to the demands of human dignity lived in community, they must be questioned and transformed.\(^{12}\)

The economic and legal issues raised by labor law are also moral and spiritual issues; labor unions are more than mere agents for their members. They are “first of all instruments of solidarity and justice” whose mission is to promote the common good:

> Beyond their function of defending and vindicating, unions have the duty of acting as representatives for “the proper arrangement of economic life” and of educating the social consciences of workers so that they will feel that they have an


\(^{10}\) Thomas C. Kohler, The Overlooked Middle, in The Legal Future of Employee Representation 224, 226 (Matthew W. Finkin ed., 1994).

\(^{11}\) Id. at 228.

active role, according to their proper capacities and aptitudes, in the whole task of economic and social development and in the attainment of the universal common good.¹³

Because the ultimate ends of labor union activity are moral and spiritual, the remaking of labor law in the twenty-first century must not ignore the profound teachings of the Catholic Church on the meaning of work and the dignity of workers. Although in a pluralistic society legislation must ultimately be justified in terms of secular objectives, when the law deals with fundamental questions of values, lawmakers can rely on religious teachings to help them address these issues.¹⁴ In this paper I will consider one of the central tenets on Catholic Social Thought (hereinafter abbreviated as CST)—the priority of labor over capital—and some possible implications for the future of American labor law. Before doing so, however, it is necessary to consider the reasons for the declining influence of labor unions in the United States.

II. CAUSES OF UNION DECLINE IN THE UNITED STATES.

Scholars have identified numerous reasons for the precipitous drop in union membership since its zenith in the 1950s.¹⁵ Technological changes resulting in a sharp decline of blue-collar workers and the growth of white-collar and service sector jobs eroded the traditional base of union support.¹⁶ The difficulty unions have faced in adjusting to the global economy and the increased mobility of capital has contributed to the decline.¹⁷ Employer opposition to concerted employee activity in general, and unions in

¹³ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, Compendium of the Social Doctrine of the Church 307 (2005) [hereinafter Social Doctrine].

¹⁴ KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 12 (1988). Greenawalt argues that when legislators address fundamental questions of values they may appropriately rely on their religious convictions and on the convictions of their constituents. Id. Where labor law is concerned, consideration of religious and moral beliefs is inescapable because “[t]he moral significance of an employee’s life on the job cannot be avoided, because it is primarily work that defines a man or a woman.” Theodore J. St. Antoine, Federal Regulation of the Workplace in the Next Half Century, 61 CHI.-KENT L. REV. 631, 646 (1985). Professor St. Antoine further observes that “[t]he goal of just, sound labor law has to be the fullest feasible autonomy of the individual working person[,] which is an unabashedly moral concept . . . .” Id.


¹⁶ Id. at 40–41 (discussing the effect of technological changes on the labor movement).

particular, has always been intense in the United States and has resulted in routine employer violations of the Wagner Act, chilling attempts at employee organization.\textsuperscript{18} The growth of the contingent workforce of independent contractors and temporary employees and the consequent decline of long-term employment relationships have also contributed to union decline.\textsuperscript{19} Deficiencies in the Act’s regulatory structure are another important cause of union decline.\textsuperscript{20} For example, the Act’s reliance on elections to determine union representation facilitates employer opposition. Professor Befort explains:

Under the NLRA . . . an employer is not obliged to bargain until after a union first establishes its majority status in a representation election. . . . The NLRA permits an employer to express its opposition to union representation so long as it does not threaten reprisal for union support or promises benefits to entice union opposition. Misstatements of fact and even intentional lies are not forbidden. Many employers hire professional consultants for the purpose of orchestrating sophisticated anti-union campaigns that not infrequently consist of unlawful as well as lawful conduct.\textsuperscript{21}

During the election campaign, it is common for an employer to discharge the leading employee organizers. While the tactic is illegal, the Act does little to deter the unlawful discharge of employee organizers.\textsuperscript{22} When unions do win representational status, attempts to bargain with the

\textsuperscript{18} See CRAVER, supra note 15, at 47–51 (discussing the history of virulent employer opposition to unions in the United States and the willingness of many employers to violate the Wagner Act to stop union organization); see also FREEMAN & ROGERS, supra note 3, at 86 (reporting that management hostility to unions is the most important reason that employees are unwilling to vote for union representation).

\textsuperscript{19} Labor and Employment Law, supra note 17, at 366–71 (noting that many contingent workers are not protected by the Act and are difficult to organize even when they are covered by the Act because of their weak affiliation with the enterprises where they are employed); see PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE 110 (1999) (discussing the incentive employers have to outsource jobs and to lease workers to avoid labor law obligations).

\textsuperscript{20} Labor and Employment Law, supra note 17, at 371–72 (observing that scholars often point to the "weaknesses in the NLRA regulatory scheme, in that it treats many anti-union tactics as lawful and fails adequately to deter others that are not").

\textsuperscript{21} Id. at 372. Professor Befort notes that in many industrialized countries "an employer automatically must bargain with a union concerning the rights of its members. Under such a system, employers play no overt role in an employee's decision to join a union, and any opposition to union demands typically does not occur until the parties meet at the bargaining table." Id.

\textsuperscript{22} Id. at 373. Professor Befort explains that the usual remedy for the unlawful discharge of an employee during a union organization drive is a cease and desist order coupled with reinstatement and back pay. Id. Befort further notes that the Act "does not provide for fines, punitive damages, or any other 'penalty,' and the discharged employee is subject to a duty to mitigate losses by finding alternative work. This 'make whole' approach provides little deterrence against employers who realize that they can chill union organization efforts by immediately firing the employee organizers." Id.
employer are often futile because of the Act’s weak remedial scheme, which does little to punish an employer who refuses to bargain in good faith. 23 The NLRB lacks the power to impose substantive contract terms when an employer fails to bargain in good faith, thereby allowing employers to engage in “surface bargaining” with impunity. 24 Furthermore, when the bargaining process has been delayed by employer unfair labor practices, such as the refusal to bargain in good faith, the NLRB has “refused to fashion ‘make whole’ damage relief [a refusal] that deprives workers of wages and benefits that would otherwise be negotiated in a collective bargaining agreement." 25 Because the Act provides little deterrence for bad-faith bargaining, “approximately one-third of all newly certified union representatives fail to conclude a first contract,” a failure which often leads to the de-certification of the union. 26 In addition to facilitating employer opposition to unions during a representational campaign and at the bargaining table, the Act also gives the employer a powerful weapon to use in the event of a strike: the permanent replacement of economic strikers. 27 Shortly after the passage of the Wagner Act, the Supreme Court held that employers have the right to permanently replace economic strikers. 28 The prospect of permanent replacement means that “resort to the statutory ‘right’ to strike would be, for many employees, an exercise in permanent job loss, and, for the union, an act of potential self-immolation.” 29 Indeed, the employer’s right to permanently replace strikers

23 Id. (explaining that the only remedy available under the NLRA for a party who refuses to engage in good faith bargaining is an order that requires the party to return to the bargaining table).

24 Id. at 373-74 (citing H.K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970) (holding that a bad-faith failure to bargain by an employer may not be remedied by the imposition of a substantive clause in the collective bargaining agreement)).

25 WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF THE EMPLOYMENT RELATIONSHIPS AND THE LAW 221 (1993) (discussing Ex-Cell-o Corp., 185 N.L.R.B. 107 (1970), enforced, 449 F.2d 1058 (D.C. Cir. 1971), in which the Board determined that imposing a make whole remedy for a failure to bargain in good faith "would indirectly necessitate the same kind of contract imposition that the Court had found to be inconsistent with the statutory policy in H.K. Porter").

26 Labor and Employment Law, supra note 17, at 374.

27 Id. Professor Befort notes further that these permanent replacements also have the right to vote in representational elections, allowing “an employer to rid itself of a union by pushing the employees into a strike and then hiring permanent replacements who vote to decertify the union in an election held a little more than twelve months after being hired.” Id. at 374-75. See George Schatzki, Some Observations and Suggestions Concerning a Misnomer—‘Protected’ Concerted Activities, 47 TEX. L. REV. 378, 383 (1969). Professor George Schatzki has written that the employer’s right to permanently replace strikers is “an invitation” to the employer "to rid himself of union adherents and the union." Id.

28 NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938) (holding that "an employer, guilty of no act denounced by the statute, has ... the right to protect and continue his business" by hiring permanent replacements for striking employees).

means that the difference between protected and unprotected concerted activity by workers is largely a matter of semantics.\textsuperscript{30} To make matters worse, workers face a formidable array of other possible penalties if they strike:

At the moment, the right to strike is so constrained by legal and practical barriers that strikes are rarely used and even more rarely used effectively. Strikers and unions employing the strike face panoply of official sanctions that, taken together, make the right to strike a costly and risky endeavor. In addition to their legal right to hire permanent replacements, employers can often bring lawsuits against unions that, one way or another, run afoul of the many legal proscriptions on the strike. . . . Major strikes have been responded to by martial law, criminal indictments, fines, and military action. . . . Union leaders have been arrested, jailed, and convicted of crimes for encouraging violence, sometimes with very little evidence of personal misconduct. The combination of RICO, a newly expanded view of the Hobbs Act, and a greater willingness to find that union officials encouraged or participated in violence, all combine to increase the vulnerability of unions and union leaders . . . [for] strike misconduct. Without an effective right to strike, collective bargaining becomes ineffectual, and the desire of employees to join unions is inevitably reduced.\textsuperscript{31}

\textbf{III. WORKERS' RIGHTS AS HUMAN RIGHTS}

All of the reasons discussed above for the decline of the American labor movement are familiar to scholars and practitioners of labor law and have been much discussed. In recent years, however, scholars have focused their attention on a less obvious weakness of American labor law: the Act's failure to recognize the right to organize and to collective bargaining as basic human rights.\textsuperscript{32}

\textsuperscript{30} See James B. Atleson, Values and Assumptions in American Labor Law 28 (1983) (observing that Mackay "shows that the functional difference between 'protected' and 'unprotected' conduct is the difference between permanent replacement, on the one hand, and discharge prior to replacement on the other" (emphasis omitted)).


\textsuperscript{32} See Gross, supra note 6, at 2; see also Jim Pope, Next Wave Organizing and the Shift to a New Paradigm of Labor Law, 50 N.Y.L. Sch. L. REV. 515, 558 (2005–2006) [hereinafter Next Wave]. Pope argues that "[n]ot until labor rights are recognized as fundamental freedoms, and not as mere means to the end of facilitating commerce, can they command the respect necessary to hold their own against corporate property rights." Pope, supra, at 558. In addition, increased interest in workers' rights as human rights can be found in many scholarly works. Janice R. Bellace argues that "there are fundamental human rights that must be permitted to exist at the workplace or else our [America's]
Professor James Pope has noted that from the Wagner Act’s inception, courts have interpreted the Act in a way that gives much more weight to employers’ property rights than to workers’ statutory rights. As Professor Pope observes, one reason for the subordination of workers’ rights is a crucial flaw in the Act itself. When Senator Wagner was drafting the Act, labor leaders urged him to ground the Act on Congress’ power to protect fundamental human rights. Instead, Senator Wagner chose to ground the Act on Congress’ power to regulate interstate commerce. Professor Pope writes that Senator Wagner chose to base his Act on the commerce clause apparently because he believed that doing so would make the Act more acceptable to the judiciary. Hence, during the early, formative years of NLRA jurisprudence, “each exercise of the NLRB’s authority had to be justified not in terms of labor freedom, but as an effort to prevent disruptions to commerce.” Interpreted in this manner, the Act “reduced the workers’ rights to the status of mere means to the end of preventing disruptions to commerce.” Professor Pope argues that casting workers’ rights as mere means to the end of industrial peace rather than fundamental human rights had devastating results, including workers’ loss of the right of self-defense against employers that commit unfair labor practices, employers’ right to permanently replace economic strikers, employers’ right to exclude union organizers from their property, and employers’ right to close operations out of spite against workers who choose to organize.

claim of freedom and democracy rings hollow.” Janice R. Bellace, The Future of Employee Representation in America: Enabling Freedom of Association in the Workplace in Changing Times Through Statutory Reform, 5 U. PA. J. LAB. & EMP. L. 1, 28 (2002). Larry W. Hunter posits that “there is at present a reasonably clear consensus that freedom of association in the workplace, and the rights of workers to organize and bargain collectively, should be regarded as fundamental human rights.” Larry W. Hunter, Considering What Workers Want, 3 U. PA. J. LAB. & EMP. L. 421, 421 (2001). Similarly, James Gray Pope, notes the increased interest in establishing the right to organize as a meaningful civil right. James Gray Pope, The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century, 51 Rutgers L. Rev. 941, 941 (1999) [hereinafter The First Amendment]. Further, it has been asserted that “[t]he right to form...a union is a fundamental human and civil right.” KATE BRONFENBRENNER ET AL., ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 5 (Kate Bronfenbrenner et al. eds., 1998).

33 James Gray Pope, How American Workers Lost the Right to Strike, and Other Tales, 103 Mich. L. Rev. 518, 521–22 (2004) [hereinafter How American Workers Lost the Right to Strike] (arguing that the Supreme Court has used the Constitution to elevate employers’ property rights far above workers’ statutory rights).
34 Id. at 524.
35 Id.
36 Id.
37 Id.
38 Id. at 518–19 (stating that although the United States Constitution can trump federal statutes, these statements “elevate[] the state common-law rights of employers over the federal statutory rights of workers”).
grounded on the First and Thirteenth Amendments. The growing consensus among labor law scholars that workers’ rights are fundamental human rights suggests that labor law in the twenty-first century will envision workers’ rights not as means to the end of eliminating obstacles to interstate commerce, but as ends in themselves. The labor law that might, and should, emerge in this century is one that will be based on the inherent dignity of work and the transcendent importance of every human being who contributes through work to the common good. Such a labor law will inescapably be based on moral, not just economic, principles. This new labor law will draw on many sources for its basic principles, and one of these sources should be the profound teachings of CST on the dignity of work.

Professor David Gregory is a pioneer in the application of CST to American labor law. Professor Gregory has observed that the Catholic Church has long regarded the right to unionize as a basic human right. Professor Gregory has observed that most labor lawyers in the United States are unfamiliar with the profound insights of CST and are largely unaware of the Church’s “strong theoretical support of the rights of workers” which has “been most unequivocally set forth in two major labor encyclicals in 1891 and in 1981.” Furthermore, the spirit of CST “permeated the policy provisions of the NLRA in 1935.” As Professor Gregory has noted, CST stresses that workers’ rights are never to be considered as mere means to an end; rather it is capital which “remains only a means subordinated to the service of people. Capital can never be the end.” CST offers a powerful critique of American labor law, which, as Professor Pope observed, treats workers’ rights as little more than means to the end of facilitating interstate commerce. CST holds that such a view “has exactly reversed the means and the ends, improperly reifying people

39 The First Amendment, supra note 32, at 943 (noting the possibility of forging a constitutional right to organize out of the First and Thirteenth Amendments).
41 David L. Gregory, The Right to Unionize as a Fundamental Human and Civil Right, 9 MISS. C. L. REV. 135, 152-53 (1988) (acknowledging that Catholic social teaching “is a remarkable and outstanding theoretical resource for supporting and revitalizing the fundamental human and civil right of workers to unionize”).
42 Id. at 151 (discussing LEO XIII, ENCYCICAL LETTER RERUM NOVARUM (1891) and JOHN PAUL II, ENCYCICAL LETTER LABOREM EXCERCENS (1981) [hereinafter LABOREM EXCERCENS]).
43 Id. (noting that in 1891, Pope Leo XIII declared that “[l]abor and ownership need one another to achieve and to maintain respect, harmony, and peace” in society).
44 Id. at 152 (stating that “Pope John Paul II has repeatedly reiterated unequivocal support of the rights of workers”).
as expendable objects in the false pursuit of materialism." Grounded in a correct understanding of the relationship of capital to labor, the teachings of the Catholic Church "can revitalize labor theory and, if their messages are heeded, can further assist in the practical protection and enhancement of the fundamental human and civil right of all workers to unionize."

In the following chapters, I will focus on one of CST's fundamental principles that have important implications for labor law: the principle of the priority of labor over capital. I will argue that the principle of the priority of labor can and should be one of the bases for the new labor law which will emerge in our century: a labor law that recognizes the moral and spiritual importance of human labor.

IV. THE PRINCIPLE OF THE PRIORITY OF LABOR

A. The Principle.

The Church's teachings emphasize the dignity and profound meaning of work. Pontifical Council for Justice and Peace has written:

Work is a fundamental right and a good for mankind, a useful good, worthy of man because it is an appropriate way for him to give expression to and enhance his human dignity. The Church teaches the value of work not only because it is always something that belongs to the person but also because of its nature as something necessary. Work is needed to form and maintain a family, to have a right to property, to contribute to the common good of the human family.

The relationship between work and the very purpose of existence is deep and powerful. The Church teaches:

*Human work* proceeds directly from persons created in the image of God and called to prolong the work of creation by

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45 Id. (citing the teachings of Pope John Paul II in *LABOREM EXERCENS*).
46 Id. at 154.
47 In the following discussion, I do not maintain that my interpretation of the Church's teachings is in any way the correct interpretation or that the practical implications I find in the Church's teachings are the only implications one can find or the most important implications one can find. While the Church's broad social principles have been clearly stated, the application of these principles to specific situations is a difficult undertaking which requires a humble acknowledgment that many other valid interpretations are possible. However, as the US Catholic Bishops have stated, it is important that the Church's social teachings are not "left at the level of appealing generalities." *ECONOMIC JUSTICE FOR ALL*, supra note 12, ¶ 20. It is important that Christians can take CST and use it "[to] undertake concrete analysis and make specific judgments on economic issues." Id.
48 *Social Doctrine*, supra note 13, at 287.
subduing the earth, both with and for one another. Work honors the Creator’s gifts and the talents received from him. It can also be redemptive. By enduring the hardship of work in union with Jesus, the carpenter of Nazareth and the one crucified on Calvary, man collaborates in a certain fashion with the Son of God in his redemptive work. He shows himself to be a disciple of Christ by carrying the cross, daily, in the work he is called to accomplish. Work can be a means of sanctification and a way of animating earthly realities with the Spirit of Christ.49

Given the profound importance of work, it is clear that each working person is of transcendent importance. No one has written more powerfully about the dignity of the working person than Pope John Paul II. In Laborem Exercens John Paul II observed that

[T]here is no doubt that human work has an ethical value of its own, which clearly and directly remain linked to the fact that the one who carries it out is a person, a conscious and free subject, that is to say a subject who decides about himself.50

Hence, according to John Paul II, “the primary basis of the value of work is man himself, who is its subject.”51 Hence, while it is true “that man is destined for work and called to it . . . work is ‘for man’ and not man ‘for work.’” 52 Therefore,

[I]n the final analysis it is always man who is the purpose of work, whatever work it is that is done by man—even if the common scale of values rates it as the merest “service”, as the most monotonous even the most alienating work.53

Unfortunately, modern economic systems are based on materialistic principles which tend to treat work “as a special kind of ‘merchandise’, or

50 LABOREM EXERCENS, supra note 42, ¶ 6 (1981). John Paul II’s profound appreciation for the meaning of work was rooted in his youthful experience performing physical labor in a stone quarry and a water purification plant. See POPE JOHN PAUL II, GIFT AND MYSTERY: ON THE FIFTIETH ANNIVERSARY OF MY PRIESTLY ORDINATION 20-22 (1999). Of this experience, John Paul II wrote, “[T]he stone quarry and water purification . . . plant at Borek Falecki became my seminary . . . Having worked with my hands, I knew quite well the meaning of physical labor. Every day I had been with people who did heavy work. I came to know their living situations, their families, their interests, their human worth, and their dignity.” Id.
51 LABOREM EXERCENS, supra note 42, ¶ 6 (emphasis omitted).
52 Id.
53 Id. (emphasis omitted).
as an impersonal ‘force’ needed for production.”  

Consequently, our economic systems are plagued by 

[A] confusion or even a reversal of the order laid down from the beginning by the words of the Book of Genesis: man is treated as an instrument of production, whereas he—he alone, independently of the work he does—ought to be treated as the effective subject of work and its true maker and creator. 

It is this reversal of order, the confusion of ends and means that plagues capitalism and that is present whenever man is not treated as the subject and purpose of work. Consequently, “the analysis of human work . . . goes to the very heart of the ethical and social question.”  

When work is correctly understood, one perceives that labor is prior to and superior to capital. Pope John Paul II writes that to understand the true meaning of work: 

[W]e must first of all recall a principle that has always been taught by the Church: the principle of labour over capital. The principle directly concerns the process of production: in this process labour is always a primary efficient cause, while capital, the whole collection of means of production, remains a mere instrument or instrumental cause. This principle is an evident truth that emerges from the whole of man’s historical experience. 

The principle of the priority of labor over capital is crucial not only to a proper understanding of work but also to the creation of a just society. As Pope John Paul II observed, the principle of the priority of labor requires us to: 

[E]mphasize and give prominence to the primacy of man in the production process, the primacy of man over things. Everything contained in the concept of capital in the strict sense is only a collection of things. Man, as the subject of work and independently of the work that he does—man alone is a person. This truth has important and decisive consequences. 

One of the decisive consequences of the principle of the priority of labor is 

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54 Id. ¶ 7.  
55 Id. (emphasis omitted).  
56 Id.  
57 Id. ¶ 12 (emphasis omitted).  
58 Id. (emphasis omitted).
that economic issues are fundamentally moral issues. This truth lies at the heart of the American Catholic Bishops’ landmark pastoral letter on the American economy:

Every economic decision and institution must be judged in light of whether it protects or undermines the dignity of the human person.... We believe the person is sacred—the clearest reflection of God among us. Human dignity comes from God, not from nationality, race, sex, economic status, or any human accomplishment. We judge any economic system by what it does for and to people and by how it permits all to participate in it. The economy should serve the people, not the other way around.59

B. Implications for Labor Law.

1. Participation.

In his commentary on Laborem Exercens, Gregory Baum observed that because capital is meant to serve labor, and not the other way around, justice must include “the right of the people who do the work to participate in the decisions regarding production, distribution and the use of capital.”60 Pope John Paul II stressed that worker participation is vital to a just society:

The technological workbench at which [workers] labor must in some sense be their own. They must be responsible for it. Whether industries are owned by private companies or by the government, what is necessary is that workers become in some sense co-owners, achieve co-responsibility for production and the use of capital, and co-determine the policy of the industry.61

Pope John Paul II stressed that CST:

[R]ecognizes the legitimacy of workers’ efforts to obtain full respect for their dignity and to gain broader areas of participation in the life of industrial enterprises so that, while cooperating with others and under the direction of others, they can in a certain sense “work for themselves”—through the

59 ECONOMIC JUSTICE FOR ALL, supra note 12, ¶ 13.
61 Id. at 42.
exercise of their intelligence and freedom.\textsuperscript{62}

Although Pope John Paul II's words do not necessarily endorse a European-style co-determination of enterprises, they certainly imply a much wider scope of employee participation in the control of the workplace than is permitted under American labor law. As interpreted by the Supreme Court, the NLRA strictly limits the topics about which management must bargain with labor. The Court has held that employers have an obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment," but has no duty to bargain over other matters.\textsuperscript{63} The court interpreted the Act's duty to bargain in good faith as creating a dichotomy of mandatory subjects of bargaining and permissive subjects of bargaining. The mandatory/permissive distinction is very important because a party may insist that the other party bargain in good faith only over a mandatory subject, and it is an unfair labor practice not to do so.\textsuperscript{64}

While the union prevailed in the first Supreme Court case to address which topics are mandatory subjects of bargaining,\textsuperscript{65} the mandatory/permissive dichotomy has become an impediment to effective employee participation in the workplace.\textsuperscript{66} The problems that would result from the Court's willingness to decide the subjects of mandatory bargaining, rather than allowing the parties themselves to decide, were foreshadowed in a concurring opinion by Justice Stewart in \textit{Fibreboard Paper Products Corp. v. NLRB}.\textsuperscript{67} \textit{Fibreboard} involved a decision by the employer to contract out maintenance work that had formerly been done by bargaining unit employees. The Court held that contracting out work previously performed by an existing bargaining unit is a mandatory subject

\textsuperscript{62} \textit{JOHN PAUL II, ENCYCICAL LETTER CENTESIMUS ANNUSS} ¶ 43 (1991) [hereinafter \textit{CENTESIMUS ANNUSS}].

\textsuperscript{63} \textit{NLRB v. Wooster Div. of Borg-Warner Corp.}, 356 U.S. 342, 349 (1958) (holding that an employer's insistence that a collective bargaining agreement contain a clause requiring a vote by employees on the employer's last offer and a clause which would exclude the workers' chosen union as a party to the collective bargaining agreement are not mandatory subjects of bargaining).

\textsuperscript{64} \textit{See}, e.g., \textit{Fibreboard Paper Prods. Corp. v. NLRB}, 379 U.S. 203, 209-10 (1964) (holding that an employer's refusal to bargain over the mandatory subject of contracting out work previously performed by bargaining unit members violated § 8(a)(5) of the Act).

\textsuperscript{65} \textit{See Borg-Warner}, 356 U.S. at 343-44 (enforcing NLRB's order directing the employer to cease insisting on the inclusion of non-mandatory subjects in the collective bargaining agreement).

\textsuperscript{66} \textit{See GOULD, supra note 25, at 170-73} (discussing how the mandatory/permissive dichotomy has allowed the NLRB and the courts to indirectly control the substance of bargaining and arguing that it would be better to require bargaining on all subjects of importance to the parties); \textit{see also ATLESON, supra note 30, at 124} (stating how the mandatory/permissive dichotomy has limited unions' ability to bargain on matters of vital importance to their members).

\textsuperscript{67} 379 U.S. at 221-26 (Stewart, J., concurring) (Justice Stewart agreed with the Court's decision "[\textit{w}ithin the narrow limitations implicit in the specific facts of this case} ").
of bargaining. However, in what would become an influential concurring opinion, Justice Stewart emphasized that the holding in *Fibreboard* was limited to the facts of the case:

The question posed [in *Fibreboard*] is whether the particular decision sought to be made unilaterally by the employer in this case is a subject of mandatory collective bargaining within the statutory phrase “terms and conditions of employment.” That is all the Court decides. The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual’s employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. . . . Within the narrow limitations implicit in the specific facts of this case, I agree with the Court’s decision.

Justice Stewart goes on to emphasize that the Act “defines a limited category of issues subject to compulsory bargaining.” Justice Stewart acknowledges that many decisions which affect employment security are rightly considered mandatory subjects of bargaining, but hastens to add that “it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining.” He explains:

Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers’ jobs. Yet it is hardly conceivable that such decisions so involve “conditions of employment” that they must be negotiated with the employees’ bargaining representative.

Justice Stewart further emphasized that there are decisions that “may quite clearly imperil job security, or indeed terminate employment entirely” which are not mandatory subjects of bargaining. For example,

An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such

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68 *Id.* at 209.  
69 *Id.* at 218 (Stewart, J., concurring).  
70 *Id.* at 220.  
71 *Id.* at 223.  
72 *Id.*  
73 *Id.*
managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. . . . [M]anagement decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded [from the duty to bargain collectively].

Justice Stewart's opinion has been justly criticized as imposing an unwarranted limitation on the scope of collective bargaining. Professor Atleson, for example, writes:

Although his attempt is unique, Stewart fails to explain other than in ipse dixit fashion why capital or "direction" decisions are not within the scope of bargaining. . . . Indeed, a review of the legislative history of the 1947 Taft-Hartley Act supports a broad reading of the scope of bargaining. The House bill had attempted to limit mandatory terms to specified items relating very closely to wages and benefits, thus implicitly excluding other matters. This attempt to specify the scope of bargaining was rejected in favor of the broader language now found in the Act.

Furthermore, as Professor Atleson has noted, “[b]argaining over important decisions hardly means management is barred from acting. . . . Rather it is textbook law that management can act after bargaining, usually after an impasse has been reached.” Moreover, as Professor Atleson observed, the vagueness of the concept of the “core of entrepreneurial control” undermines the Act’s goal of encouraging collective bargaining:

The practical effect of vague rules or even case-by-case adjudication in this area lies in the area of remedies. If employers are motivated to act and not bargain, little can be done when a year or two later the employer has been found remiss in failing to bargain. Equipment may have been sold or moved, and the enterprise, or a part of it, may have been closed. The result is a lack of effective remedies which, given

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74 Id.
75 ATLESON, supra note 30, at 127 (observing that Congress concluded that the scope of bargaining depends initially upon the power of the parties and, more broadly, upon "social and political" factors).
76 Id. at 129 (noting that truly necessary exceptions to bargaining could be made if management must act with "unusual dispatch").
the vagueness of the "core" concept, does not encourage respect for the law or aid in prediction.\textsuperscript{77}

The dangers of collective bargaining inherent in Justice Stewart's concept of entrepreneurial control became unmistakably clear in 1981 when the Supreme Court essentially adopted Justice Stewart's concurring opinion in \textit{First National Maintenance Corp. v. NLRB}.\textsuperscript{78} The question presented in \textit{First National Maintenance} was succinctly stated by Justice Blackmun:

Must an employer, under its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment," §§ 8(d) and 8(a)(5) of the National Labor Relations Act . . . negotiate with the certified representative of its employees over its decision to close part of a business?\textsuperscript{79}

This case involved an employer, First National Maintenance (FNM), which provided housekeeping, cleaning, maintenance, and related services for its customers in New York City.\textsuperscript{80} One of FNM's customers was "Greenpark Care Center, a nursing home in Brooklyn."\textsuperscript{81} Approximately thirty-five of FNM's employees were employed at the nursing home.\textsuperscript{82} FNM's relationship with the nursing home was neither smooth nor profitable, and eventually FNM terminated its contract with Greenpark.\textsuperscript{83} FNM's employees were represented by the National Union of Hospital and Health Care Employees. When FNM notified the employees who worked at the nursing home that they were going to be discharged, the union asked FNM to delay its decision for the purpose of bargaining.\textsuperscript{84} FNM refused, informing the union that its decision to discharge the employees was purely economic and final.\textsuperscript{85}

The union filed an unfair labor practice charge with the NLRB, which found in favor of the union and ordered FNM to bargain over the decision

\textsuperscript{77} \textit{Id.} at 132.
\textsuperscript{78} \textit{Compare} \textit{First Nat'l Maint. Corp. v. NLRB}, 452 U.S. 666, 686 (1981) (concluding that the necessity of an employer's ability to operate freely in determining whether to close down part of its enterprise for purely economic reasons prevails over any benefit a union would derive from being a part of that decision, and that the decision itself is not one of the statutory "terms and conditions" subject to bargaining), \textit{with Fibreboard}, 379 U.S. at 223 (Stewart, J., concurring) (asserting that "[n]othing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control").
\textsuperscript{79} \textit{First Nat'l}, 452 U.S. at 667.
\textsuperscript{80} \textit{Id.} at 668.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.} at 668–69.
\textsuperscript{84} \textit{Id.} at 669.
\textsuperscript{85} \textit{Id.} at 669–70.
to discharge the employees. The United States Court of Appeals for the Second Circuit enforced the NLRB order, holding that section 8(d) of the Act creates a presumption in favor of mandatory bargaining over an employer’s decision to close part of its business. Because the court of appeals' decision was at odds with the decisions of other courts of appeal, the Supreme Court granted certiorari.

Writing for the majority, Justice Blackmun observed that “in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.” Justice Blackmun wrote that there are three types of management decisions. There are decisions “such as [the] choice of advertising and promotion, product type and design, and financing arrangements, [which] have only an indirect . . . impact on the employment relationship” and are not mandatory subjects of bargaining. A second type of management decision involves matters “such as the order of succession of layoffs and recalls, production quotas, and work rules, [which] are almost” always mandatory subjects of bargaining.

Justice Blackmun observed that the type of decision at issue in First National Maintenance concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, “not in [itself] primarily about conditions of employment, though the effect of the decision
may be necessarily to terminate employment."92

Observing that an employer "must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business," the Court held that bargaining over this third type of management decisions, which "have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process outweighs the burden placed on the conduct of the business."93 Turning to the issue before it—an economically motivated decision to shut down part of a business—the Court maintained that the Act is not intended to serve the individual interests of either management of labor "but to foster in a neutral manner a system in which the conflict between these interests may be resolved."94 The Court stated that, therefore, it must "consider whether requiring bargaining over this sort of decision will advance the neutral purposes of the Act."95 The Court held that requiring bargaining would not advance the purposes of the Act:

We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of § 8(d)'s "terms and conditions" over which Congress has mandated bargaining.96

Analyzing this decision in light of the doctrine of the priority of labor, I believe that First National Maintenance is inconsistent with CST's teaching that workers have a right to participate in decisions that affect their lives. Indeed American labor law's distinction between mandatory

92 Id. (citing Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring)).
93 Id. at 678–79.
94 Id. at 680–81. As Professor Atleson has written, while the Court stressed the neutrality of the Act, the Court’s balancing test to determine whether to require bargaining over the type of decision at issue in First National Maintenance in effect considers only the interests of management. ATLESON, supra note 30, at 134. Professor Atleson observes that the Court stressed management's "need for speed, flexibility, and secrecy; the need for confidentiality, and the need to avoid 'futile' bargaining because the union would otherwise have a weapon for delay that could 'thwart management's intentions in a manner unrelated to any feasible solution the union might propose.'" Id. (quoting First Nat'l, 452 U.S. at 683). Professor Atleson further observes, "[i]t is depressing to note that none of these interests was implicated in this case . . . . If the result is based upon a balancing of interests, it is surely an odd approach. Only one side of the balance is considered, and the managerial interests conceivably involved do not even have to actually be present." Id.
95 First Nat'l, 452 U.S. at 681.
96 Id. at 686 (citation omitted).
and permissive subjects of bargaining is itself inconsistent with CST. The Church teaches that a business enterprise “must be a community of solidarity.” 97 Hence, as the American Catholic bishops observed:

When companies are considering plant closures or the movement of capital, it is patently unjust to deny workers any role in shaping the outcome of these difficult choices. . . . The capital at the disposal of management is in part the product of the labor of those who have toiled in the company over the years, including currently employed workers. As a minimum, workers have the right to be informed in advance when such decisions are under consideration, a right to negotiate with management about possible alternatives, and a right to fair compensation and assistance with retraining and relocation expenses should these be necessary. Since even these minimal rights are jeopardized without collective negotiation, industrial cooperation requires a strong role for unions in our changing economy. 98

The Bishops’ teaching finds support in secular labor law scholarship. Former chairperson of the NLRB, William Gould IV, has argued that decisions such as First National Maintenance have allowed the NLRB and the Supreme Court “to indirectly control the substance of bargaining by determining which issues are more directly important to conditions of employment.” 99 Gould argues that the problems with the Court’s decision in First National Maintenance are significant:

That decision declaims against the proposition that labor is to be “an equal partner” with management in the United States, setting federal labor policy at odds with the codetermination philosophy that has taken root in northern Europe, particularly Germany. Perhaps it is inappropriate to require an equal partnership under a statute that promotes collective bargaining. But surely the idea of a partnership, as a general proposition, is consistent with attempts to promote cooperation, the policy that should be promoted in the section 8(a)(2) cases . . . . Equally troubling, in my view, is the Court’s statement . . . that such matters as advertising and product design are peculiarly . . . the province of management prerogatives and

97 Social Doctrine, supra note 13, at 340.
98 ECONOMIC JUSTICE FOR ALL, supra note 12, ¶ 303.
99 Gould, supra note 25, at 171.
therefore always nonmandatory subjects of bargaining . . . .\(^{100}\)

Professor Gould points out that not only employees, but employers also, can benefit from worker participation in making decisions on “nonmandatory” subjects.\(^{101}\) Employers at times appear to realize the importance of worker participation also, as illustrated by recent research which indicates that a majority of managers agree that many workplace problems could be solved more easily if employees had more of a collective voice.\(^{102}\) Professor Gould concludes that it would be better to require management to bargain on all subjects of importance to workers.\(^{103}\) Requiring bargaining on all subjects of importance to workers is consistent with the Church’s principle of the priority of labor and the consequent right of workers to participate in the direction of their enterprises.\(^{104}\)

The Church’s vision of an economic order in which workers are partners in the management of enterprises is based on a deep appreciation of the vital importance of work to each person:

When man works, using all the means of production, he also wishes the fruit of this work to be used by himself and others, and he wishes to be able to take part in the very work process as a sharer in responsibility . . . at the workbench to which he applies himself. . . . [I]t must be emphasized in general terms that the person who works desires not only due remuneration [sic] for his work; he also wishes that . . . the production process provision [is] made for him to be able to know that in his work . . . he is working “for himself.”\(^{105}\)

Hence, each person who works must never be reduced to “a mere production instrument;” he must become “a true subject of work with an

\(^{100}\) Id. at 172–73.

\(^{101}\) Id. at 173. Professor Gould offers the automobile industry as one example of the harm that can result by declaring certain decisions to be exclusively managerial. In the 1950s Walter Reuther, president of the United Automobile Workers, criticized American automobile manufacturers’ failure to produce fuel-efficient cars because of the likelihood of future oil scarcity and “for the consequent need for the consuming public to purchase something different from what the Big Three was providing.” Id. The automobile manufacturers ignored Reuther with the result of declining profits and loss of jobs. Id. As Professor Gould observes, the automobile example shows that “decision making in the managerial prerogative arena” can have devastating effects on workers. Id.

\(^{102}\) FREEMAN & ROGERS, supra note 3, at 42–43 (reporting that fifty-eight percent of managers surveyed believed that it would be easier to resolve many workplace problems if workers had a collective voice).

\(^{103}\) GOULD, supra note 25, at 172.

\(^{104}\) BAUM, supra note 60, at 42 (citing LABOREM EXERCENS, supra note 42, ¶ 14 where Pope John Paul II envisions an economic system in which “on the basis of his work each person is fully entitled to consider himself a part owner of the great workbench where he is working with everyone else”).

\(^{105}\) LABOREM EXERCENS, supra note 42, ¶¶ 70–71.
initiative of his own." Accordingly, Pope John Paul II writes:

The Church’s teaching has always expressed the strong and deep conviction that man’s work concerns not only the economy but also, and especially, personal values. The economic system itself and the production process benefit precisely when these personal values are fully respected.

Hence, a just economic system must preserve the worker’s awareness of working for himself. If this teaching is ignored, “incalculable damage is inevitably done throughout the economic process, not only economic damage but first and foremost damage to man.”

Thus, American labor law’s denial of the right to participate in most decisions that involve the direction of the enterprise, which is the consequence of the Court’s holding in First National Maintenance is inconsistent with CST. CST not only envisions an economic order in which workers are, in fact, “equal partner[s] in the running of the business enterprise” at which they are employed, it goes beyond the limitations of collective bargaining and envisions an economic system in which workers have an equal voice in the decisions that affect their lives. One implication of the Church’s teaching regarding the priority of labor over capital is that our economic system should provide an effective means for all workers, whether unionized or not, to participate in the management of the enterprise. Hence, the Church’s teachings, while fully supporting the right to unionize, go well beyond the limits of American labor law by

106 Id. ¶ 71.
107 Id.
108 Id.
110 See DONAL DORR, OPTION FOR THE POOR: A HUNDRED YEARS OF VATICAN SOCIAL TEACHING 365 (rev. ed. 1992). Dorr identifies the source of the Church’s support for labor unions in the fundamental values that unify the Church’s social teaching, including the importance of human dignity, the value of the person as a worker, the right of everybody to the conditions required to be free and responsible, and the importance of human community and solidarity. Id. Unions “are promoters of the struggle for social justice, for the rights of workers in their particular professions.” Social Doctrine, supra note 13, at 306 (emphasis omitted); see CENTESIMUS ANNUS, supra note 62, ¶ 7. Leo XIII emphasized the natural right to form associations such as unions in his 1891 encyclical. LEO XIII, ENCYCLICAL LETTER RERUM NOVARUM ¶ 51 (1891) [hereinafter RERUM NOVARUM]. John XXIII affirmed the natural right of workers to form associations. JOHN XXIII, ENCYCLICAL LETTER MATER ET MAGISTRA ¶ 22 (1961) [hereinafter MATER ET MAGISTRA]. Pope Paul VI discussed the important role of labor unions. PAUL VI, APOSTOLIC LETTER OCTOGESIMA ADVENIENS ¶ 14 (1971) [hereinafter OCTOGESIMA ADVENIENS]. He described the right to form unions as one of the basic rights of the human person. PAUL VI, PASTORAL CONSTITUTION GAUDIUM ET SPES ¶ 68 (1965) [hereinafter GAUDIUM ET SPES]. Further, Pope Pius XI encouraged Christian workers to form unions in his 1931 encyclical. PIUS XI, ENCYCLICAL LETTER QUADRAGESIMO ANNO ¶ 31 (1931) [hereinafter QUADRAGESIMO ANNO].
emphasizing the right of all workers to participate in the management of the enterprise where they labor.\textsuperscript{111} One way to promote the right to participate by all workers, whether unionized or not, is the establishment of works councils. In Germany, for example, mandatory works councils have for decades proven to be successful vehicles to give workers a voice in a broad range of issues.\textsuperscript{112} Professor Weiler and many other scholars\textsuperscript{113} have imagined a system of mandated works councils in which employees would deal with their employers on issues that involve not only traditional union concerns such as wages, benefits, and layoffs, but also issues that lie at the heart of entrepreneurial control, including “plant closings, relocations, technological and organizational innovation, and other such changes in the firm’s economic environment.”\textsuperscript{114} More recently, Professor Befort writes that one of the functions of his proposed American Works Councils Act would be to consult with employers on topics that go beyond mandatory subjects of bargaining under the NLRA, including entrepreneurial decisions that may impact the performance and organization of work.\textsuperscript{115} Under Befort’s proposal, employees would have the automatic right to call for the creation of a works council in enterprises above a certain minimum size and to receive information periodically on personnel policies, financial conditions, and “plans for future undertakings that may impact the performance and organization of work.”\textsuperscript{116}

\textsuperscript{111} See \textit{Mater et Magistra}, supra note 110, \S\ 91 (stating that “employees are justified in wishing to participate in the activity of the industrial concern for which they work”); see also \textit{Gaudium et Spes}, supra note 110, \S\ 68 (finding that the active sharing of everyone in the running of the enterprise should be promoted).

\textsuperscript{112} See \textit{Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law} 284 (1990) (noting that works councils have proven to be quite successful vehicles for employee participation).

\textsuperscript{113} See \textit{Craver}, supra note 15, at 96–97 (finding a positive evaluation of German works councils); see also Stephen F. Befort, \textit{A New Voice for the Workplace: A Proposal for an American Works Councils Act}, 69 Mo. L. Rev. 607, 641–42 (2004) [hereinafter \textit{A New Voice}] (setting forth the elements of a proposed American Works Councils Act); Bellace, supra note 32, at 23–25 (discussing favorably the strengths of European works councils, including the non-adversarial model of labor relations which appeals to service and knowledge based workers); Karl E. Klare, \textit{Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform}, 38 Cath. U. L. Rev. 1, 54–55 (1988) (arguing for the right to participation in governing the firm, perhaps even mandating statutorily employee representation on corporate models of directors); Clyde W. Summers, \textit{Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)}, 69 Chi.-Kent L. Rev. 129, 131 (1993) (stating his belief that works councils “modeled on the German system could be structurally superimposed on our collective bargaining system. It could be done in a way which would provide a form of representation to those not now represented by unions without ... weakening our present collective bargaining system, and perhaps substantially strengthening it”).

\textsuperscript{114} \textit{Weiler}, supra note 112, at 285 (stating that the topics that would regularly be addressed would be “broader than that which is now required by the NLRA for employers engaged in full-fledged bargaining”).

\textsuperscript{115} \textit{A New Voice, supra} note 112, at 641–42.

\textsuperscript{116} \textit{Id.} at 642.
American Works Councils Act is consistent with CST’s emphasis on the right of workers to participate in economic decision-making. Pope John XXIII stressed the importance of worker participation in his encyclical Mater et Magistra. Pope John XXIII observed that “employees are justified in wishing to participate in the activity of the industrial concern for which they work.” While it is not possible, the Pope stated, to determine explicitly the degree of participation that is proper to each individual enterprise, employees nonetheless should have an active part in the enterprises where they work and that it is of utmost importance that productive enterprises assume the character of a true human fellowship whose spirit suffuses the dealings, activities, and standing of all its members. The importance of participation was later affirmed by the Second Vatican Council, which observed that “[i]n economic enterprises it is persons who are joined together, that is, free and independent human beings created [in] the image of God.” Consequently, the active participation of everyone in the running of the enterprise should be promoted. In more recent years, John Paul II stressed that CST

[R]ecognizes the legitimacy of workers’ efforts to obtain full respect for their dignity and to gain broader areas of participation in the life of the industrial enterprises so that, while cooperating with others and under the direction of others, they can in a certain sense “work for themselves” through the exercise of their intelligence and freedom.

In the American context, the U.S. Bishops have written of the importance of “contributive justice,” which provides that all persons “have an obligation to be active and productive participants in the life of the society and that society has a duty to enable them to participate . . . .” CST’s strong affirmation of the right and duty to participate in economic decision-making supports calls for a greater partnership between capital and labor such as legislation providing for works councils that enable workers to participate in key entrepreneurial decisions.

117 Mater et Magistra, supra note 110, ¶ 91.
118 Id.
119 Gaudium et Spes, supra note 110, ¶ 68.
120 Id. The Council noted that such participation should take into account each person’s function in the enterprise and should provide for the necessary unity of operations. Id.
121 Centesimus Annus, supra note 62, ¶ 43.
122 Economic Justice for All, supra note 12, ¶ 71 (emphasis omitted).
2. Property Rights and Union Organizing.

Under the Act, the primary means for establishing employee representation is the representation election. Congress provided for the representation election as a means of protecting employees' freedom to choose.\textsuperscript{123} However, the union representation election is not at all conducted on a level playing field. It often takes place in an atmosphere of intimidation, which frustrates rather than promotes employees' freedom to choose. As Professor James Pope has written:

To most Americans, the word "election" connotes a political contest between two parties of equal legal status. The party currently in office is prohibited from using the power of government against the opposition party. But union representation campaigns are conducted on turf controlled by one of the competing parties, namely the employer. Current law allows employers to use this control to gain advantages unheard of in political elections. The employer may command voters to attend anti-union rallies on pain of discharge. It may require voters to meet one-on-one with their supervisors to hear anti-union messages. And it may adopt and enforce a rule prohibiting everyone but itself from campaigning during work time.\textsuperscript{124}

In addition to these advantages, the employer also enjoys one other advantage, which greatly limits employees' freedom to choose under the Act: the employer has the right to exclude union organizers from its property.\textsuperscript{125} The Supreme Court created this right for employers by its decision in \textit{Lechmere, Inc. v. NLRB}.\textsuperscript{126} In this case, the petitioner Lechmere owned a retail store in a shopping plaza. The United Food and Commercial Workers Union attempted to organize Lechmere's employees, and as part of its organization drive, the union entered Lechmere's parking lot and began to place handbills on the windshields of cars, most of which

\textsuperscript{123} See WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 47 (4th ed. 2004) (observing that the "central theme" of NLRA election procedures is "the employees' freedom of choice").

\textsuperscript{124} How American Workers Lost the Right to Strike, supra note 33, at 539-40 (discussing the deficiencies of American labor law which undermine the Act's goal of promoting employee choice through free elections).

\textsuperscript{125} Id. at 540. Professor Pope observes that the unfair advantages that employers have in representation campaigns could "be at least partly offset if union organizers could enter the workplace to respond. But except in exceedingly rare circumstances, employers also enjoy the right to exclude organizers from their property." Id.

\textsuperscript{126} 502 U.S. 527 (1992).
belonged to Lechmere’s employees.\(^\text{127}\) Lechmere’s manager confronted the union organizers and ordered them to leave. They did so, while Lechmere’s personnel removed the handbills.\(^\text{128}\)

The organizers made several subsequent attempts to put handbills on employee cars in Lechmere’s parking lot, and each time were told to leave.\(^\text{129}\) Eventually, the union organizers abandoned the tactic of entering Lechmere’s parking lot to distribute handbills, and after trying other organizing tactics with little success, filed an unfair labor practice charge alleging that Lechmere violated the Act by barring the non-employee organizers from its property.\(^\text{130}\) The NLRB ruled in favor of the union, finding that Lechmere had violated section 8(a)(1) of the Act which prohibits employers from interfering with employees’ right under section 7 of the Act to engage in concerted activity for the purpose of collective bargaining (or other mutual aid or protections).\(^\text{131}\) The First Circuit Court of Appeals denied Lechmere’s petition for review and enforced the NLRB’s order.\(^\text{132}\) The Supreme Court reversed. The Court observed that so long as non-employee organizers “have reasonable access to employees outside an employers’ property,” an employer might bar non-employee organizers from entering its property.\(^\text{133}\) The Court made it clear that the exception allowing non-employee organizers to enter an employer’s property is a very narrow one, which will apply in only unusual circumstances.\(^\text{134}\) The exception will arise only when “the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.”\(^\text{135}\) The Court’s opinion makes it clear that under its interpretation of the Act, a union must meet an almost impossible burden to demonstrate the need to enter an employer’s property for the purpose of union organizing. The Court stated that such access to employer property is protected by the Act only when employees, by virtue of their employment, “are isolated from the . . . flow of information that characterizes our society.”\(^\text{136}\) Turning to the facts in *Lechmere*, the Court observed that because the employees did

\(\text{127} \quad \text{Id. at 529.}\)
\(\text{128} \quad \text{Id. at 530.}\)
\(\text{129} \quad \text{Id.}\)
\(\text{130} \quad \text{Id. at 530–31.}\)
\(\text{131} \quad \text{Id. at 531–32 (citing 29 U.S.C. §§ 157, 158(a)(1) (2000)).}\)
\(\text{132} \quad \text{Id. at 531.}\)
\(\text{133} \quad \text{Id. at 538.}\)
\(\text{134} \quad \text{Id.}\)
\(\text{135} \quad \text{Id. at 539 (citing NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)) (emphasis omitted).}\)
\(\text{136} \quad \text{Id. at 540.}\)
not reside on the employer's property, they were presumptively not beyond
the reach of the union's message.137 The Court stated that the union could
have tried to organize the employees using phone calls, home visits, mass
mailings, advertisements in local papers, or displaying signs on the strip of
public land adjoining Lechmere's parking lot.138 Hence, "[b]ecause the
union . . . failed to establish the existence of any 'unique obstacles' that
frustrated access to Lechmere's employees, the [NLRB] erred [by finding]
that Lechmere had committed an unfair labor practice . . . ."139

Many eminent labor law scholars have criticized the Lechmere decision.
Professor Pope, for example, observes that under Chevron, U.S.A., Inc. v.
NRDC, Inc.,140 the NLRB's interpretation of the Act's language was
entitled to broad deference unless the Court could find contrary "clear
meaning" in the statute.141 Professor Pope observes that Justice Thomas,
the author of Lechmere, found it significant that the Act guarantees the
right of organization to employees, not to non-employees; therefore, Justice
Thomas concluded that the Act gives much stronger protection to the
organizing activities of employees than it gives to non-employees.142
However, Professor Pope notes that the Act includes as employees any
employee except those who are not employed by employers as defined by
the Act.143 As Professor Pope observes, union organizers are employees
protected by the Act because labor unions are not excluded from the Act's
definition of employer.144 Indeed the Act explicitly states that the term
"employee' shall not be limited to the employees of a particular employer .
. . ."145 Hence, under Chevron, the Court should have deferred to the
NLRB's interpretation of the Act which permitted union organizers to enter

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138 Id. at 540 (illustrating possible alternatives).
139 Id. at 541 (quoting Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,
436 U.S. 180, 205-06 n. 41 (1979)).
141 How American Workers Lost the Right to Strike, supra note 33, at 541.
142 Id.
143 Id. Section 2(3) of the Act states that "[t]he term 'employee' . . . shall not include any
individual employed . . . by any other person who is not an employer as herein defined." 29 U.S.C. §
152(3) (2000).
144 How American Workers Lost the Right to Strike, supra note 33, at 542. However, the National
Labor Relations Act § 152(2) excludes unions from the definition of employer except when they are
acting as an employer. 29 U.S.C. § 152(2) (2000). Professor Pope explains that unions were partially
excluded from the definition of employer so that they could not be charged with an unfair labor practice
when they engaged in organizing activities. How American Workers Lost the Right to Strike, supra note
33, at 542. If unions were not partially excluded from the Act's definition of employer, they could be
charged with violating section 8(a)(3) of the Act by participating in the organizational activities of
workers. Id.
Lechmere's property.\textsuperscript{146} As Professor Pope has shown, not only is there no contrary clear meaning in the Act to foreclose deference under \textit{Chevron}, the plain language of the Act is consistent with the NLRB's finding that the Act protected the activities of union organizers in \textit{Lechmere}.\textsuperscript{147}

Prominent labor law scholars have argued that \textit{Lechmere} should be overruled. Noting the crucial importance of union access to the electoral model that Congress provided in the Act, Professor Samuel Estreicher writes:

\[\text{[W]e need to improve the access rights of unions in order to ensure that the NLRB-supervised election truly provides an accurate poll of employee wishes. That is, after all, the rationale for preferring the electoral model over "automatic" certification procedures. The Supreme Court's recent \textit{Lechmere} decision should be overruled; parking lots in shopping malls are generally open to the public and should be available to union organizers for nondisruptive informational picketing and handbilling. . . . Also, since employers presently have the right to hold "captive audience" addresses on their property, unions should have the right to come on the premises to address the workers at a scheduled time shortly before an NLRB election.}\textsuperscript{148}

Professor Ellen Dannin has rightly criticized the Court's imprecision about the rights at stake in \textit{Lechmere} and suggested an alternative interpretation of what was at stake:

\begin{quote}
Vagueness and failing to communicate which NLRA and employer rights are relevant to a case only invite judges to draw conclusions based on their preconception about rights. Recall that in \textit{Lechmere, Inc. v. NLRB}, the Court said that the conflict was between the employer's right to control access to its property and the employees' right to hear the union organizers' message. Notice that this set up a situation in which the employee right was far weaker than the employer's right. Contrast this with a case in which the employee rights were core NLRA rights of employees to make common cause with one another to engage in mutual aid or protection, to
\end{quote}

\textsuperscript{146} See \textit{How American Workers Lost the Right to Strike}, supra note 33, at 541 (stating that the Court, under its holding in \textit{Chevron}, should have deferred to the NLRB's interpretation of the Act unless there was contrary "clear meaning" in the Act, which there was not).

\textsuperscript{147} Id.

select representatives of their own choosing, to improve their purchasing power, and to stabilize wages and working conditions within and between industries. These are strong rights. . . . It is fair to say that these were the rights involved in Lechmere.149

Former chairperson of the NLRB, William Gould, has argued that Congress should reverse the Lechmere decision:

While it may be fair to assume that some kind of balance between statutory rights and private property are presumed under the Act, it seems reasonable that the balance ought to be weighted on the side of the freedom of association rights protected by the statute itself and not private property, because of the statute’s explicit protection of the former and not the latter. . . . Lechmere is completely out of step . . . and Congress should reverse the decision as part of labor law reform—and provide for periodic nonemployee union-organizer access to company . . . property closed off to the public once a representation petition has been filed.150

The Church’s teachings regarding the right to own property support the position of those scholars who urge that Lechmere should be overruled. CST, of course, has always strongly affirmed the right to private property.151 However, the Church has also emphasized the fundamental Christian principle that “the goods of this world are originally meant for all.”152 As Pope John Paul II explained, private property “is under a ‘social mortgage,’ which means that it has an intrinsically social function.”153 In powerful terms, John Paul set forth the importance of this social mortgage for the relationship of capital and labor:

[I]n the Church’s teaching, ownership has never been understood in a way that could constitute grounds for social conflict in labour. . . . [P]roperty is acquired first of all through

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149 DANNIN, supra note 9, at 105–06.
150 GOULD, supra note 25, at 157–58.
151 See RERUM NOVARUM, supra note 110, ¶ 7 (stating that the right to private property is in accordance with natural law); see also JOHN PAUL II, ENCYCLICAL LETTER SOLICITUDO REI SOCIALIS ¶ 42 (1987) (stating that the right to private property is valid and necessary).
152 SOLICITUDO REI SOCIALIS, supra note 151, ¶ 42 (referring to the Church’s doctrine of the universal destination of goods, which holds that the goods of the earth are meant for everyone). Cf. Social Doctrine, supra note 13, at 177 (asserting that “[t]he principle of the universal destination of goods is an affirmation both of God’s full and perennial lordship over every reality and of the requirement that the goods of creation remain ever destined to the development of the whole person and all of humanity”).
153 SOLICITUDO REI SOCIALIS, supra note 152, ¶ 42.
work in order that it may serve work. This concerns in a special way ownership of the means of production. Isolating these means as a separate property in order to set it up in the form of "capital" in opposition to "labour"—and even to practise the exploitation of labour—is contrary to the very nature of these means and their possession. . . . Whether in the form of private ownership or in the form of public or collective ownership—[which] is that they should serve labor, and thus, by serving labor, that they should make possible the achievement of the first principle of this order, namely, the universal destination of goods and the right to common use of them.154

Hence, the Church very clearly teaches that private property is not an end in itself, but a means to an end—to enhance the dignity of work and the full development of the worker as a child of God.155 Along with this profound teaching on the purpose of private property and the economic order, the Church offers an understanding of labor unions that stresses their ultimate purpose, which is:

[N]ot simply to defend the existing wages and prerogatives of the fraction of workers who belong to them, but also to enable workers to make positive and creative contributions to the firm, the community, and the larger society in an organized and cooperative way.156

CST's understanding of labor unions as a means for workers to make valuable contributions to the common good, rather than the impoverished view of unions as merely another special interest group, argues for a labor law that facilitates, rather than hinders, union organizing. From a CST perspective, Lechmere is inconsistent with the Church's teachings on unions and the purpose of private property and should be overturned.

154 Laborem Exercens, supra note 50, ¶ 14.
155 See Mark A. Sargent, Competing Visions of the Corporation in Catholic Social Thought, 1 J. Cath. Soc. Thought 561, 565 (2004) (explaining that in CST, private property is not an end in itself but a means to human flourishing); see also Laborem Exercens, supra note 50, ¶ 14 (stating that the Church's understanding of private property as a means to serve people results in a vision of the corporation as an institution that "must produce not just wealth, but the conditions under which human persons may flourish spiritually") (citing J. Michael Stebbins, Business, Faith, and the Common Good, St. John's U. Rev. Bus., Fall 1997, at 5 (suggesting that the purpose of the economic order is to facilitate the "pursuit of higher values, including the highest value of all, the ultimate goal of union with God").
156 Economic Justice for All, supra note 12, ¶ 304.

CST unmistakably teaches that labor-management relations should be cooperative and peaceful, not adversarial. However, the Church also teaches that “[r]ecourse to a strike is morally legitimate when it cannot be avoided, or at least when it is necessary to obtain a proportionate benefit.” While the Church’s teachings on the moral legitimacy of the strike weapon are somewhat vague, it is clear that the Church regards the strike as “an extreme means,” which “must not be abused.” However, I believe that the Church’s teaching that the strike is morally legitimate when unavoidable must be read in light of its teaching that ownership of the means of production is legitimate only when such ownership serves labor and promotes “the universal destination of goods and the right to common use of them.” American labor law is deeply inconsistent with these teachings in that it embodies a strong preference for employers’ property rights at the expense of workers’ rights. This privileging of employers’ property rights over employees’ right to organize and engage in collective bargaining is most evident in labor law’s much-criticized doctrine of the permanent replacement of strikers. Not only does labor law privilege...

157 See RERUM NOVARUM, supra note 110, ¶ 19 (observing that capital and labor need each other and that “[m]utual agreement results in the beauty of good order”); see also Mark Barenberg, The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation, 106 HARV. L. REV. 1381, 1427–28 (1993) (observing that Senator Robert Wagner, the architect of American labor law, strongly preferred a cooperative model of labor relations and understood collective bargaining to be “profundely integrationist and cooperationist, not conflictual and adversarial, as is conventionally supposed”); FREEMAN & ROGERS, supra note 3, at 141–42 (finding that the Church’s emphasis on cooperative labor relations is in accordance with the desire of a large majority of American workers); Social Doctrine, supra note 3, at 306 (noting that “[t]he Church’s social doctrine teaches that relations within the world of work must be marked by cooperation”); GAUDIUM ET SPES, supra note 110, ¶ 68 (stating that when socioeconomic disputes occur, the parties must make efforts to arrive at a peaceful settlement and that “[r]ecourse must always be had first to a sincere dialogue between the parties”); QUADRAGESIMO ANNO, supra note 110, ¶ 81 (proclaiming that it is the duty of the state and all good citizens to get rid of class conflict and to promote harmony among the various groupings of society).

158 CATECHISM OF THE CATHOLIC CHURCH, supra note 49, ¶ 2435; see LABOREM EXERCENS, supra note 50, ¶ 20 (explaining that CST regards the strike “as legitimate in the proper conditions and within just limits”).

159 LABOREM EXERCENS, supra note 50, ¶ 20 (emphasis omitted).

160 Id. ¶ 14; see Social Doctrine, supra note 13, at 177 (teaching that private property is “in its essence only an instrument for respecting the principle of the universal destination of goods; in the final analysis, therefore, it is not an end but a means”).

161 See Bellace, supra note 32, at 11 (observing that the American judiciary presumes that property rights prevail over employees’ right to organize); see also Next Wave, supra note 33, at 519 (noting that American labor law elevates the property rights of employers over the statutory rights of employees).

162 For a discussion of NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) see supra notes 28–30. For excellent critiques of the Mackay Doctrine, see ATLESON, supra note 30, at 19–34, see CRAVER, supra note 15, at 143–45, and see WEILER, supra note 112, at 264–69. For a discussion of how the permanent replacement of strikers can damage entire communities, see BARRY BLUESTONE & IRVING BLUESTONE, NEGOTIATING THE FUTURE: A LABOR PERSPECTIVE ON AMERICAN BUSINESS 259–
employers’ property rights over employees’ right to strike, it also privileges property rights over employees’ right to self-defense in the face of egregious unfair labor practices.163

Privileging of property rights over workers’ rights is evident not only in the Mackay decision but also in other decisions where the Court subordinates workers’ rights to employers’ property rights. A striking example of the Court’s tendency to privilege property rights over workers’ rights is NLRB v. Fansteel Metallurgical Corp.,164 in which the Court held that the sit-down strike is not protected by the Act, and then proceeded to set aside the NLRB’s order that the employer, which had committed egregious unfair labor practices, should reinstate employees who had been discharged for engaging in the sit-down strike.165

In this case, members of the Steel Workers Organizing Committee occupied two buildings at the Fansteel factory and commenced a sit-down strike. Prior to the strike, Fansteel had committed a number of unfair labor practices, including planting a spy in the local union, transferring the local union’s president to an isolated location, establishing a company union, and announcing that it would never bargain with the union under any circumstances.166 As Professor James Pope relates, union members felt that their leaders were not protecting workers’ rights, and the membership was demanding action.167 At the same time, Fansteel’s spy within the union was urging the employees to go out on a traditional strike so Fansteel could bring in replacement workers and break the union.168 Hence, as Professor

60 (1992) which comments on the 1987-88 strike against International Paper in Jay, Maine, where International Paper’s decision to permanently replace the striking workers shredded the social fabric of the community. Because the permanent replacement doctrine has been much discussed by so many able scholars, and because I think there is little doubt that the permanent replacement doctrine conflicts with CST, I will focus instead on the use of means other than the traditional strike to enforce workers’ right to self-defense and to engage in collective bargaining. I will consider collective action that probably is not protected by the Act and which is, in effect, peaceful civil disobedience, and I will address the difficult question of whether such tactics might, under certain circumstances, be in accordance with the principles of CST. Although I will focus on one tactic—the sit-down strike—my purpose is not to argue for or against the sit-down per se. My purpose is to consider the broader issue of civil disobedience and labor organizing by focusing on the sit-down strike and to speculate on what CST can teach us regarding labor organizers’ using tactics that are not protected by the Act.

163 See How American Workers Lost the Right to Strike, supra note 33, at 520–26 (discussing NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939)).
165 Id. at 498–99 (holding that Fansteel “stood absolved by the conduct of those engaged in the ‘sit-down’ from any duty to reemploy them”).
166 See id. at 251–52 (describing the unfair labor practices); see also In re Fansteel Metallurgical Corp., 5 N.L.R.B. 930, 935 (1938) (announcing the “unqualified opposition to outside unions”).
167 How American Workers Lost the Right to Strike, supra note 33, at 520 (citing Henry M. Hart, Jr. & Edward F. Prichard, Jr., The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board, 52 HARV. L. REV. 1275, 1280–81 (1939)).
168 Id. (citing Fansteel, 5 N.L.R.B. at 939).
Pope observes, the union leadership was "[c]aught between the necessity for action and the perils of a traditional strike" and chose to defend themselves from the employer's clear violations of the Wagner Act by resorting to a sit-down strike.\footnote{169}

Professor Atleson points out that after Congress passed the Wagner Act in 1935, vigorous attacks on the Act's constitutionality hampered the NLRB's power to enforce the Act and resulted in the need for concerted action by workers to force employers to recognize and bargain with industrial unions.\footnote{170} Professor Atleson notes that in 1936 the sit-down strike was crucial to establishing union recognition in both the rubber industry and the automobile industry.\footnote{171} With the constitutionality of the Act in doubt, the sit-down strike became the most important weapon industrial unions had in 1936 and 1937. Professor Atleson notes that "[f]rom September 1936 through May 1937, sit-down strikes directly involved 484,711 workers and closed plants employing 600,000 others."\footnote{172} Professor Atleson writes that the sit-down strikes "occurred primarily in unorganized industries, and recognition was the critical goal. The basic grievance was generally the refusal of employers to observe the NLRA and engage in collective bargaining."\footnote{173} The sit-down strike succeeded in bringing the right of collective bargaining to thousands of industrial workers.\footnote{174}

In \textit{Fansteel}, however, the Court stripped the workers of the right to

\footnote{169} \textit{Id.} at 520–21.

\footnote{170} In his book, Atleson emphasizes the crucial importance of the sit-down strike as a means to enforce the promises of the Wagner Act in the mid 1930s. \textit{ATLESON, supra} note 30, at 45–46. At the time of the famous General Motors sit-down strikes, which began on December 30, 1936, "[f]or every one of the twenty-four federal judges who had ruled [on the constitutionality of the Wagner Act] agreed that the Act could not be applied to manufacturing companies."

Jim Pope, \textit{Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958, 24 LAW & HIST. REV. 45, 82} (2006) [hereinafter \textit{Worker Lawmaking}]. As Professor Pope observes, as long as the constitutionality of the Wagner Act remained doubtful, "it was clear to unionists that the only way to enforce worker rights was through strike action." \textit{Id.} The Supreme Court upheld the constitutionality of the Act on April 12, 1937, by a 5 to 4 vote in \textit{NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1} (1937).

\footnote{171} \textit{See ATLESON, supra} note 30, at 46 (explaining that the rubber workers' sit-down in 1936, followed by the more well-known sit-downs at General Motors, led to the establishment of union status in the two industries); \textit{see also}, \textit{MICHAEL J. PIORÉ & CHARLES F. SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY 97} (1984) (observing that the sit-down strikes of the 1930's transformed American labor relations from a model based on craft unionism to a model based on industrial unionism).

\footnote{172} \textit{ATLESON, supra} note 30, at 46.

\footnote{173} \textit{Id.}

\footnote{174} Sit-down strikes were especially important in bringing collective bargaining to the automobile, steel, rubber, and other major industries. \textit{See PIORÉ & SABEL, supra} note 171, at 97. As Jeremy Brecher notes, however, resort to the sit-down strike was by no means limited to factory workers. \textit{JEREMY BRECHER, STRIKE! 208-09} (1972). Waitresses, candy makers, cab drivers, stenographers, retail store workers, trash collectors, and thousands of others in workplaces of all types engaged in sit-down strikes; "[t]he range of industries and locations hit by sitdowns was virtually unlimited." \textit{Id.}
defend themselves against blatant violations of the law. The Court noted that there was no doubt that a majority of Fansteel’s workers supported the union. Indeed, 155 of Fansteel’s 229 employees had designated the union as their collective bargaining representative. Prior to the strike, union representatives met twice with Fansteel’s superintendent who refused to bargain with the union about pay, hours, and working conditions on the grounds that it would never “deal” with an outside union. On February 17, 1937, after the second meeting, 95 employees seized two of Fansteel’s buildings. That evening, the superintendent, accompanied by police officers and Fansteel’s counsel, went to the buildings and demanded that the employees leave. They refused, and Fansteel’s counsel announced that all of the strikers were discharged. On February 18, Fansteel obtained an injunction requiring the strikers to surrender the buildings. The strikers again refused to leave, and on February 19 police officers unsuccessfully attempted to evict the strikers. The men continued to occupy Fansteel’s buildings until February 26, when sheriff’s deputies finally ousted the strikers and arrested them.

Fansteel gradually resumed operations. The Court noted that “[a] large number of the strikers, including many who had participated in the occupation of the buildings, were individually solicited to return to work with back pay but without recognition of the Union.” Some of the strikers accepted the offer and returned to work, but others refused to return to work unless Fansteel would recognize the union. Fansteel hired new workers to replace the men who remained on strike.

The union twice requested that management meet with them to discuss recognition of the union, but Fansteel refused. Instead Fansteel created a company union, the Rare Metal Workers of American, which the NLRB determined was a part of Fansteel’s anti-union strategy.

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175 See How American Workers Lost the Right to Strike, supra note 33, at 522 (observing that in Fansteel, the workers’ statutory rights “all but disappeared from consideration”).
177 Id.
178 Id.
179 Id. at 249.
180 Id.
181 Id.
182 Id.
183 Id.
184 Id.
185 Id.
186 Id. at 249–50.
187 Id. at 250.
found that Fansteel had committed unfair labor practices by interfering with the employees’ right to self-organization and collective bargaining, by establishing a company union through its domination of the Rare Metal Workers of America, and by refusing to bargain collectively with the exclusive representative of the workers.\footnote{Id. at 250–51.} The NLRB ordered Fansteel to bargain collectively with the union and to offer reinstatement with back pay to all of the workers who went on strike.\footnote{Id. at 252.} The Circuit Court of Appeals for the Seventh Circuit set aside the NLRB’s order,\footnote{Fansteel Metallurgical Corp. v. NLRB, 98 F.2d 375, 382 (7th Cir. 1938).} and the Supreme Court granted certiorari on November 21, 1938.\footnote{NLRB v. Fansteel Metallurgical Corp., 305 U.S. 590 (1938) (granting petition for certiorari).}

The Court agreed with the NLRB that Fansteel had committed unfair labor practices by isolating the union president from contact with other workers, by using a labor spy, and by failing to bargain collectively with the representative of its employees.\footnote{Id. at 252. The Court called the seizures “a high-handed proceeding without shadow of legal right” and observed that this conduct gave Fansteel good cause to dismiss them.\footnote{ATLESON, supra note 30, at 45. Hence, the Court’s opinion in Fansteel does not accurately reflect community values because it supports the values of only part of the community, those of the owners of the means of production. Id.} However, the Court held that the strikers’ seizure of Fansteel’s buildings gave Fansteel good cause to dismiss them.\footnote{Id. at 253.} The Court then proceeded to consider the NLRB’s rationale for ordering reinstatement of the discharged strikers. The NLRB found that Fansteel’s actions had caused the strike, that the employees who were on strike because of an unfair labor practice retain their status as employees under the Act, and that ordering reinstatement would serve to effectuate the policies of the Act.\footnote{Fansteel, 306 U.S. at 252–53.} The Court rejected the NLRB’s reasoning, observing that the Act provided a remedy for the employers’ unfair labor practices, namely filing a complaint with the NLRB. The Court further stated that although Fansteel’s conduct was “reprehensible,” its conduct did not deprive it of its legal right to possession of its property.\footnote{Id. at 253.} The Court observed that:

\begin{quote}
[T]he fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the
\end{quote}
free flow of commerce as defined in the Act. There is not a line in the statute to warrant a conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasions of the employees' rights. Accordingly, the Court held that:

[T]o provide for reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure.

The one-sidedness of the Fansteel decision is striking as the Court focuses almost exclusively on the wrong done to the employer by the strikers who interfered with its property rights and gives little or no weight to the wrong done to the employees by the employer's trampling on their statutory rights protected by the Act. Moreover, as Professor Pope observes, the Court substituted its "own judgment for that of Congress as to how commerce would best be protected" by the Act. Congress had stated in Section 1 of the Wagner Act that it was "'the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . .'." Professor Pope goes on to observe that the causes of obstruction to the free flow of commerce that Congress wanted to eliminate were "the 'denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining.'" Hence, Professor Pope concludes that "whatever else they were doing—the Fansteel strikers were serving the primary purpose of the Act by enforcing its guarantee of the right to organize and thereby helping to 'eliminate the causes' of strikes." The Court's observation that the Act provided a remedy for the Fansteel strikers ignores the crucial fact that the NLRB had failed to take action on the employees' unfair labor practice

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196 Id. at 257–58.
197 Id. at 258.
198 How American Workers Lost the Right to Strike, supra note 33, at 523.
199 Id. (quoting 29 U.S.C. § 151 (2000)).
201 Id.
charges, which had been filed five months prior to the sit-down strike.\textsuperscript{202} Furthermore, as Professor Pope observes, the Court failed to take into account that the employer’s illegal actions were threatening the union’s very existence.\textsuperscript{203} However, as Professor Pope also points out, the Court’s lack of concern for the employees’ statutory rights cannot be blamed entirely on the \textit{Fansteel} majority, for the Act itself reduces “workers’ rights to the status of mere means to the end of preventing disruptions to commerce.”\textsuperscript{204} While labor leaders had urged Senator Wagner to base the Act on human rights principles, the senator believed that basing the Act on Congress’ commerce power would strengthen its chances of being held constitutional.\textsuperscript{205} Nonetheless, framing the Act’s main purpose as preventing disruptions to commerce allowed the courts to strip labor of some of its most effective weapons, including not only the sit-down strike, but also slow-downs and other partial strike activities.\textsuperscript{206}

If the sit-down strike was analyzed in light of CST principles, what would be the result? First, it is quite clear that CST does not countenance violence or destruction of property as means to enforce workers’ rights.\textsuperscript{207} However, as Professor Pope and Jeremy Brecher have demonstrated, the sit-down strike was not usually characterized by violence or sabotage. On the contrary, sabotage was condemned, the employer’s property protected, and the strike conducted according to rules democratically enacted by the strikers.\textsuperscript{208} Professor Pope observes that:

On the whole, the strikers’ legal order appears to have been effective. “The most astonishing feeling you get in the sit-down plants is that of ORDER,” enthused one striker. “The plant has been re-administrated.” Even hostile observers confirmed that the strikers maintained orderly, smoothly

\textsuperscript{202} \textit{Id.}

\textsuperscript{203} \textit{Id.} Professor Pope points out that a traditional strike was what Fansteel was urging through its labor spy so that Fansteel could replace the striking workers and break their union. \textit{Id.} He concludes that “[o]nly by sitting down could the workers prevent the employer from reaping the benefits of its violations.” \textit{Id.}

\textsuperscript{204} \textit{How American Workers Lost the Right to Strike, supra} note 33, at 524.

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} \textit{Id.} at 524–25.

\textsuperscript{207} \textit{See RERUM NOVARUM, supra} note 110, ¶ 20 (teaching that labor must never injure capital or resort to violence).

\textsuperscript{208} \textit{See BRECHER, supra} note 174, at 182, 194–97 (noting that sit-down strikers opposed sabotage, protected machinery, and established rules regulating the behavior of the strikers, even creating courts to punish those who violated the rules); \textit{see also Worker Lawmaking, supra} note 170, at 81 (observing that sit-down strikers protected employer property, enacted rules prohibiting sabotage, and “generally stood ready to evacuate occupied plants on a credible promise by the employer to refrain from restarting production until collective bargaining was concluded”).
functioning communities in the plant.\footnote{209}

It is also interesting to note that the strikers defended the sit-down strike tactic using notions of human rights that are quite comparable to the Church's teachings on the rights of workers. Professor Pope writes that many members of the labor movement emphasized that the right to strike derives from the worker's property right in his or her job.\footnote{210} The workers' belief that they had a property interest in their jobs is consistent with CST's teaching that property rights can be acquired through labor and that the Church has never held that capitalists' right to private property is "absolute and untouchable."\footnote{211} Hence, the Church does not teach that capitalists have an absolute property right which would preclude workers from asserting property rights in their jobs. Pope John Paul II stressed that a capitalist's property right to the means of production is limited by other Church teachings:

[The Church] has always understood this right [of ownership of the means of production] within the broader context of the right common to all to use the goods of the whole of creation: \textit{the right to private property is subordinated to the right to common use}, to the fact that goods are meant for everyone.\footnote{212}

Pope John Paul II also went on to explain that "ownership has never been understood in a way that could constitute grounds for social conflict in labour."\footnote{213} The late Pope explained,

\textit{[P]roperty is acquired first of all through work in order that it may serve work. This concerns in a special way ownership of the means of production. Isolating these means as a separate property in order to set it up in the form of "capital" in opposition to "labour"—and even to practise exploitation of labour—is contrary to the very nature of these means and their possession. They cannot be possessed against labour, they cannot even be possessed for possession's sake, because the only legitimate title to their possession . . . is that they should serve labour and thus, by serving labour, that they should make possible . . . the universal destination of goods and the right to}

\footnote{209 Worker Lawmaking, supra note 170, at 59.}\footnote{210 Id. at 71 (quoting former UAW president Homer Martin, who wrote that the "right to strike involves the property right of the worker's job, which is, in our opinion, the most vital property right in America").}\footnote{211 LABOREM EXERCENS, supra note 50, ¶ 14.}\footnote{212 Id.}\footnote{213 Id.}
In these passages, Pope John Paul II went beyond the sit-down strikers’ assertion of a property right in their jobs to assert a property right in the means of production. The late Pope stated that “it must immediately be noted that all [the means of production] are the result of the historical heritage of human labor.” Pope John Paul II’s teachings on the priority of labor, which asserts that the means of production are produced by labor and for labor supports the sit-down strikers’ impassioned assertion of a property right to their jobs, a position that is consistent with Pope John Paul II’s teaching that one goal of a just economic system is to enable each worker to be “fully entitled to consider himself a part-owner of the great workbench at which he is working with everyone else.” Hence, CST not only supports the idea that workers have a property interest in their jobs, it also supports the idea that workers have a property interest in the means of production, which labor created and which exist to serve labor.

Defenders of the sit-down strike also argued passionately that the right to strike is a fundamental human right that trumps employers’ property rights. Homer Martin, president of the United Auto Workers, proclaimed:

Clearly, the issue involved in this whole controversy is whether or not pure property and profit rights shall supersede and preclude the consideration of human rights [including] the inalienable rights of all workers to life, liberty, and the pursuit of happiness.

As Professor Pope has demonstrated, labor leaders considered the right to strike as a fundamental human right, grounded in the Thirteenth Amendment of the Constitution, which prohibits slavery and involuntary servitude. These trade unionists’ arguments are remarkably consistent with the Church’s teachings that the rights to form unions and to participate in union activities without fear of reprisal are fundamental human rights:

Among the basic rights of the human person [must be counted] the right of freely founding [labor unions]. These [unions] should be truly able to represent [the workers] and to contribute to the [proper arrangement] of economic life . . . . [Another such right] is the right of freely taking part in the
activity of these unions without risk of reprisal.\textsuperscript{219}

Because the Church recognizes as a fundamental human right the right to form unions that are truly able to represent the workers, the Church has also taught that workers have the right to strike.\textsuperscript{220}

However, does the fundamental human right to strike which CST recognizes include recourse, in extreme circumstances, to civil disobedience, such as the sit-down strike? The Church's answer appears to be "yes" in some cases because a strike is an effective tool for promoting the fundamental human right to organize only when a strike can succeed in stopping production. Labor unionists in the 1930s argued that for low-skilled industrial workers to wage an effective strike, only a sit-down strike could be effective. Professor Pope explains:

Why was the sit-down necessary to make the right to strike effective? Because a strike could succeed only by stopping production, and the only [legal] way for unskilled workers—who could easily be replaced—to halt production was the mass picket line, which was too vulnerable to suppression. "Should a worker leave his job behind and depart from a plant and his skill is not such that his absence stops production," explained one union journal, "then the corporation brings in guards, strike-breakers, poison gas and machine guns." With the picket line broken, the "strikers are just men out of jobs" and the "strike staggers on awhile, collapses and the union dies . . . "\textsuperscript{221}

Hence, union leaders argued, the sit-down became necessary as a result of the weakness of the traditional strike. Therefore, the sit-down strike was not a "novel and radical tactic," but an incremental response to changed conditions; it was the transfer of the picket line into the plant.\textsuperscript{222}

These arguments for the sit-down strike are not inconsistent with the Church's teachings on labor unions and strikes. The Church does not affirm merely the abstract right to form worker associations; it affirms the right to form associations that are able "to secure their rights to fair wages

\textsuperscript{219} \textit{Gaudium et Spes}, supra note 110, ¶ 68.
\textsuperscript{220} See \textit{Laborem Exercens}, supra note 50, ¶ 100 (stating that the Church recognizes the right to strike "as legitimate in the proper conditions and within just limits"); see also \textit{Social Doctrine}, supra note 13, at 304 (noting that the Church recognizes the legitimacy of the strike "when it cannot be avoided, or at least when it is necessary to obtain a proportionate benefit" (quoting \textit{Catechism of the Catholic Church}, supra note 49, ¶ 2435 (1994))).
\textsuperscript{221} \textit{Worker Lawmaking}, supra note 170, at 70.
\textsuperscript{222} Id.
and working conditions.”223 It is the right to form effective labor unions that the Church acknowledges. Just as the union leaders of the 1930s rejected the “absurd and futile proposition that a working man’s right to strike means nothing more than his right to give up his job to a scab,”224 the Church teaches that the right to strike is justified only when it is effective, that is, when it is a means that can secure the justice owed to workers.225 It is not an abstract right to organize that the Church proclaims to be a fundamental human right, but the right to organize workers’ associations that can affect justice for workers. The arguments that union leaders made to justify the sit-down strike are, in general, consistent with CST. If the facts of Fansteel were analyzed using the principles of CST, I believe the sit-down strike would have been found a legitimate means for workers to effect their human right to organize labor unions with the power to adequately “secure their rights to fair wages and working conditions.”226

The Fansteel decision and its implications for workers’ right to defend themselves have a continuing relevance in our time. As Professor Pope points out, Fansteel is one of the key Supreme Court decisions that help to explain the decline of the American labor movement.227 Moreover, there are similarities between the challenges workers faced in the 1930s and the challenges they face today. We know from the work of Freeman and Rogers that employees today want power and influence at the workplace as much as their counterparts in the 1930s.228 However, American workers continue to face fierce employer opposition to unionization. The renowned labor law scholar Derek Bok observed long ago that while employers in most economically advanced countries eventually came to accept the idea of bargaining collectively with their workers, American employers have not only refused to accept collective bargaining but have been fierce...

223 ECONOMIC JUSTICE FOR ALL, supra note 12, ¶ 104.
224 Worker Lawmaking, supra note 170, at 69 (quoting A.F. Whitney of the Railroad Trainmen union).
225 See ECONOMIC JUSTICE FOR ALL, supra note 12, ¶ 104.
226 Id.
227 See Worker Lawmaking, supra note 33, at 551-53 (arguing that Fansteel is one of a small number of important decisions that were barely noticed at the time they were decided but which had a significance that has been magnified by social and economic changes such that they have led to the ossification of American labor law).
228 See FREEMAN & ROGERS, supra note 3, at 41. Freeman and Rogers reported that 63% of American workers would like to have more influence at work. Id. They found that 44% of private sector workers in the United States would like to be represented by a union. Id. at 89. Furthermore, a majority of workers want to be represented at the workplace by an organization with some authority that is independent of management and want workplace decisions to be jointly decided by labor and management, with disputes referred to an outside arbitrator. Id. at 59.
As unions grow weaker and easier to attack, employer opposition to unions and to collective bargaining grows even stronger. Professor Lance Compa has observed that “[f]iring or otherwise discriminating against a worker for trying to form a union is illegal but commonplace in the United States.” Freeman and Rogers found in their survey of managers that most would oppose any unionization effort, and most managers said it would hurt their careers a great deal if their employees successfully unionized. Anti-union employers have available to them the anti-union consultant industry, which often recommends that employers resort to illegal tactics to thwart unionization drives. Consequently, Professor Dannin writes, “[t]he use of illegal campaign tactics is now so widespread that every twenty-three minutes, a worker is fired or discriminated against for attempting to exercise his or her freedom of association.”

The weakness and growing irrelevance of American labor law is making such employer lawlessness possible. Professor Compa, writing about widespread illegal discrimination against union supporters, notes that an employer who fires a union organizer has little to fear:

An employer determined to get rid of a union activist knows that all that awaits, after years of litigation if the employer persists in appeals, is a reinstatement order the worker is likely to decline and a modest back-pay award. For many employers, it is a small price to pay to destroy a workers’ organizing drive by firing its leaders.

As Professor Estlund has observed, the paltry remedies for employees whose rights have been violated and the long delays in the enforcement of employees’ rights have led many employers to “realize they have little to fear from labor law enforcement through a ponderous, delay-ridden legal

229 Derek C. Bok, Reflections on the Distinctive Character of American Labor Laws, 84 Harv. L. Rev. 1394, 1409–11 (1971). Professor Bok, writing at a time when unions still had a great deal of strength, noted that American employers continued defiantly to oppose collective bargaining and noted that “[t]housands of cases are brought each year alleging the firing of employees for engaging in union activities . . . .” Id. at 1410.

230 Lance Compa, Workers’ Freedom of Association in the United States: The Gap Between Ideals and Practice, in Workers’ Rights as Human Rights, supra note 6, at 23, 33 (observing that in “the 1990s more than 20,000 workers each year were victims of discrimination” for participating in union activities).

231 Freeman & Rogers, supra note 3, at 62 (noting that three-fourths of managers would rather discuss workplace problems individually rather than in groups).

232 Dannin, supra note 9, at ix (commenting that the push to suppress unionization by employers is met “without fear of reprisal!”).

233 Id.

234 Compa, supra note 230, at 33–34.
system with meager remedial powers."

In summary, the Wagner Act's weakness, particularly its inability to address illegal employer activities that violate workers' statutory rights, has resulted in the Wagner Act's becoming "distorted and dysfunctional, if not irrelevant, for most employees." Hence, in the early twenty-first century, workers find themselves in a situation similar to workers in the early to middle-1930s with declining union membership, hostile employers, and weak laws that do little to protect them. Nonetheless, a majority of workers still want an effective voice in the workplace. With labor law ossified and with virtually no hope of meaningful labor law reform in the near future, today's workers, like their sisters and brothers in the 1930s, will have to resort to self-help. Furthermore, it is likely that the traditional strike will not be a major component in a self-help approach. Professor Estlund has written that the Mackay decision "has rendered the strike useless and virtually suicidal for many employees." Indeed, Professor Pope has written that the Mackay permanent replacement doctrine has led to a bizarre reversal of the strike's traditional function. Although the strike is legally protected so that it can provide workers with a source of bargaining power, it now serves as a source of employer bargaining power. According to a recent study of collective bargaining negotiations, employers are now more likely to threaten permanent replacement than unions are to threaten a strike.


236 Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 COLUM. L. REV. 319, 402 (2005). Professor Estlund contrasts the growing irrelevance of labor law and the rapid expansion of what is commonly known as employment law. Id. Professor Estlund argues that the individual rights that characterize employment law are "a poor substitute for the system of self-governance envisioned by the labor laws." Id.

237 See FREEMAN & ROGERS, supra note 3, at 41 (illustrating that 63 percent of workers surveyed report that they want more influence at the workplace); see also MORRIS, supra note 3, at 8 (observing that recent polling reports indicate that 50 percent of nonunion workers would vote for a union if they had the opportunity).

238 Ossification, supra note 235, at 1538.

With the traditional strike perversely transformed into a weapon for employers to break worker organizations, workers will be forced to win recognition of their organizations and promote the basic human right of collective bargaining by resorting to tactics that are either illegal or, at best, of questionable legality, much like the workers who waged sit-down strikes in the 1930s. Workers, in short, will have to engage in civil disobedience, as African Americans did in the 1960s to destroy the evil of segregation. A recent example of a union using civil rights tactics with encouraging results is the Service Employees International Union’s (SEIU) Justice for Janitors campaign. Vanessa Tait has called the Justice for Janitors campaign one of the largest and most confrontational organizing efforts of recent times. By bypassing the NLRA’s ineffective procedures, the SEIU “turned to time-tested social movement strategies—including sit-ins, militant demonstrations, and civil disobedience—that physically interfered with employers’ ability to conduct business.”

Allying themselves with civil rights and community activists, Justice for Janitors organized highly effective demonstrations of civil disobedience. For example:

In Washington, DC, janitors blocked a major bridge and held class in the streets to protest educational cuts. In November 1990 they chained themselves to the headquarters of the city’s wealthiest developer and in March 1995 occupied city council offices to protest a real estate tax break. The tax reduction would have devastated social programs for the poor while benefiting big developers, including one who had resisted the union’s attempts to organize its buildings. “This isn’t just about 5,000 janitors; it’s about issues that concern all D.C. residents—what’s happening to their schools, their streets, their neighborhoods,” a union leader told the Washington Post.

SEIU’s willingness to break out of the constraints of the NLRA proved highly effective. Tait writes:
By 1995, Justice for Janitors had won contract battles in Los Angeles, Washington, DC, and Denver, and had become the most successful organizing campaign among private sector service workers in decades, bringing 35,000 new members into SEIU.\textsuperscript{243}

Professor Pope has observed that SEIU’s success reflected the lessons of history in two prior occasions when the labor movement had enjoyed great success by going outside of the boundaries of the law: once in the 1930s with sympathy strikes, city-wide boycotts, mass picketing, and sit-down strikes, and again in the 1960s when public employees engaged in successful strikes despite laws prohibiting them from striking.\textsuperscript{244} Like private sector workers in the 1930s and public employees in the 1960s, Justice for Janitors achieved sensational results by “seeking to resolve issues outside the legal system to the extent possible.”\textsuperscript{245} Although workers’ willingness to go outside the law to promote basic human rights might be disturbing, it is nonetheless true that:

It is in disorder that workers experience and exercise their power in the production process. The entire history of the labor movement is a history of workers creating “disorder”—strikes, disruptions of production, picketing—in order to achieve unionization and to better their working conditions.\textsuperscript{246}

The rebirth of the labor movement will depend in large part on labor’s ability to create disorder and to act outside the constraints of current law.\textsuperscript{247}
Professor Pope has noted that twice before the labor movement faced “conditions at least as daunting as today’s: once around the turn of the century and once in the 1930s.”\textsuperscript{248} In both instances the labor movement succeeded by “going outside the boundaries of the law.”\textsuperscript{249} Among the tactics employed were sympathy strikes, city-wide boycotts, mass picketing, and sit-down strikes.\textsuperscript{250} Although tactics like mass picketing and sit-down strikes might seem like relics from the industrial age with little relevance for post-industrial America, one must realize that the majority of employees in the United States continue to be “working class.” Professor Michael Zweig writes:

The great majority of Americans form the working class. They are skilled and unskilled, in manufacturing and in services, men and women of all races, nationalities, religions. They drive trucks, write routine computer code, operate machinery... sort and deliver the mail, work on assembly lines, stand all day as bank tellers, perform thousands of jobs in every sector of the economy. For all their differences, working class people share a common place in production, where they have relatively little control over the pace and content of their work, and aren’t anybody’s boss... When we add them all up, they account for over 60 percent of the labor force.\textsuperscript{251}

Furthermore, although the sit-down strike was a key tactic for industrial workers, many non-industrial workers resorted to this tactic, including clerical workers, laundry workers, hotel employees, waitresses, candy makers, cab drivers, stenographers, tailors, department store workers, garbage collectors, hospital maintenance workers, grave diggers, draftsmen, and engineers.\textsuperscript{252} The wide range of workers who successfully employed the sit-down strike in the 1930s suggests that today’s workers in the post-industrial economy could also successfully employ this tactic to enforce the basic human right of freedom of association and collective bargaining.

\textsuperscript{248} Id. at 547.
\textsuperscript{249} Id.
\textsuperscript{250} Id. (noting that in the 1960s public worker unions won spectacular victories by “systematically conducting strikes in the face of public employee strike bans”).
\textsuperscript{251} MICHAEL ZWEIG, THE WORKING CLASS MAJORITY: AMERICA’S BEST KEPT SECRET 3 (2000).
\textsuperscript{252} BRECHER, supra note 174, at 208–11 (noting the breadth of non-industrial workers who used the sit-down strike, a tactic traditionally employed by industrial workers, to achieve their labor demands).
Whether or not the sit-down strike would be a useful weapon in the twenty-first century, it is likely, given the ineffectiveness of the traditional strike, that workers will have to resort to more effective strategies to enforce their rights. Some of these strategies will include tactics that are not currently protected by the Act, such as reviving the secondary boycott weapon, and resorting to tactics like slowdowns, partial strikes, and “quickie” or intermittent strikes. The necessity of employing pressure tactics other than the traditional strike reflects the fact that “the world for which the Wagner Act was designed has ceased to exist.” As Professor Bellace has written:

The Wagner Act was designed to regulate labor relations in an industrial economy, one that produced almost exclusively for a domestic market. . . . The examples used by members of Congress and the newspaper accounts of the day also indicate that the picture Congress had in mind [when it passed the Wagner Act] was that of a male, blue-collar worker most often working in a factory. Professor Bellace notes that, following the deindustrialization of the 1970s and 1980s, “fewer workers were employed in jobs where striking [was] useful.” Furthermore, technological changes have made it possible for

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253 See 29 U.S.C. § 158(b)(4) (2000) (including a broad prohibition on appeals to the employees of so-called neutral employers to support workers who are involved in a labor dispute under § 8(b)(4) and limiting appeals to customers of neutral employers); see also CRAVER, supra note 15, at 145–46 (arguing that Congress should amend the Act to permit some forms of secondary activity); see also Getman, supra note 31, at 140 (asserting that the secondary boycott prohibitions in the Act should be found unconstitutional as violations of employees’ First Amendment right to free speech); see also Ken Matheny & Marion Crain, Making Labor’s Rhetoric Reality, 5 GREEN BAG 2d 17, 24–25 (2001) (stating that the secondary boycott prohibitions should be eliminated because of their questionable constitutionality and because they “deprive workers of essential leverage in balancing power between employers and workers”); see also How American Workers Lost the Right to Strike, supra note 33, at 555 (discussing the International Labor Organization’s holding that the Act’s ban on secondary boycotts violates workers’ freedom of association); see also St. Antoine, supra note 14, at 653 (asserting that prohibitions on secondary activity should be lifted in particular situations such as organizing, “where union need is greatest”); see also Katherine V.W. Stone, The Kenneth M. Piper Lecture: Employee Representation in the Boundaryless Workplace, 77 CHI.-KENT L. REV. 773, 818 (2002) (recommending that section 8(b)(4) of the Act should be repealed and that unions should be allowed to engage in peaceful secondary activity).


255 Bellace, supra note 32, at 13.

256 Id. at 13.

257 Id. at 19.
many companies to operate during a strike. Also, in the growing service sector of the economy, workers are often aware that if they go on strike, there will be minimal impact on their employers. If it is true, as Professor Stone has argued, that it is through disorder that workers win and exercise their basic right to bargain collectively with their employers, then it is likely that workers will have to choose tactics that lie outside of the protections of the NLRA.

If the rebirth of the labor movement does indeed require workers to employ tactics that are not protected by the law, what should the Church's position be regarding these tactics? Clearly, the Church cannot and should not support violence or damage to property. The Church has always opposed class warfare and has rightly taught that labor and capital can cooperate peacefully. Nonetheless, American business's fierce opposition to organized labor reveals that class warfare unfortunately exists and is usually waged from the top. Determined employer resistance to the Wagner Act began well before it was signed into law. Professor Melvyn Dubofsky describes the unanimous employer opposition to the Wagner Act in the 1930s:

> Employers without exception [fought] the Wagner Act before and after its passage. If there was a single ‘corporate liberal’ anywhere in the American business universe willing to embrace either the new law or accommodative labor leaders, that person never testified before the Senate and House committees . . . in 1934 and 1935. Between March 1934, when Wagner first introduced his legislation, and July 1935, when it became law, corporate America united against it. When Roosevelt signed the Wagner Act, the employers did not withdraw from the field of battle.

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258 Id. at 19–20.
259 Id. at 20.
260 See RERUM NOVARUM, supra note 110, ¶ 15 (articulating the view that employers and employees can cooperate peacefully by observing that labor cannot do without capital and capital cannot do without labor, and rejecting class conflict); see also Social Doctrine, supra note 13, at 306 (stating that the social doctrine states that cooperation is an essential element of work relationships).
261 MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA 130 (University of North Carolina Press 1994) (explaining that over the decades the fierce business opposition to labor unions remained strong); see Bok, supra note 229, at 1410 (describing how, 36 years after the passage of the Wagner Act, employers continued to put up a determined resistance to workers' right to unionize, and thousands of cases were brought each year before the NLRB alleging that employers had dismissed workers for their support of unions); see also CRAVER, supra note 15, at 49 (observing, among other things, that by the late 1980s, unlawful terminations occurred in one out of every three Labor Board elections); see also DANNIN, supra note 9, at 14 (pointing out that the use of illegal campaign tactics has become so common that a worker is either fired or discriminated against every twenty-three minutes for attempting to exercise his or her freedom of association).
Indeed, employers have continued to wage a bitter war against workers' rights that continues to this day. While the Church should continue to insist on the necessity of class cooperation, her position on workers' employing tactics not protected by the Wagner Act to promote their fundamental rights at work must acknowledge that class conflict has existed for decades in America whenever employees attempt to unionize. Failing to recognize the reality of class conflict over American workers' right to organize would weaken the force of the Church's teachings by removing them from reality. Nor should the Church fail to acknowledge that at times conflict is necessary and just. Indeed, as Donal Dorr has argued, "confrontation may at times be compatible with Christian faith, and even demanded by it." 

Furthermore, the Church's powerful statements regarding workers' rights to form unions and to bargain with their employers support the view that CST should endorse the use of peaceful tactics to make these rights available to all workers who desire them even if the tactics are not protected by current American labor law. The forcefulness of the Church's teachings on workers' rights can hardly be exaggerated. For example, the U.S. Catholic Bishops have proclaimed that "[n]o one may deny the right to organize without attacking human dignity itself." Furthermore, the Second Vatican Council clearly stated, "[a]mong the basic rights of the human person must be counted the right of freely founding labor unions." Moreover, the Church has long taught that love for the poor and the powerless is at the heart of CST. Support for a stronger labor

\[\text{262} \text{ Cf. supra note 259 (explaining that workers' unions continue to struggle against employers for the well-being of workers).}
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\[\text{263} \text{ Professor Bok noted that America is unique in the Western world in that employers in this country have never come to acknowledge the legitimacy of unions and the right to collective bargaining. Bok, supra note 229, at 1409–11. Professor Bok observed that in Europe, an overwhelming majority of employers eventually came to accept collective bargaining, while in the United States, resistance to unions and collective bargaining has remained strong. Id. Indeed the tactics used by many employers to resist unionization reveal that it is no exaggeration to characterize employer resistance as class warfare. See Roy J. Adams, Voice for All: Why the Right to Refrain from Collective Bargaining Is No Right At All, in WORKERS' RIGHTS AS HUMAN RIGHTS, supra note 6, at 142. Adams discussed a report by Human Rights Watch that many American workers who try to form unions are "spied on, harassed, pressured, threatened, suspended, fired, deported, or otherwise victimized in reprisal for their exercise of their right to freedom of association." Id. at 148.}
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\[\text{264} \text{ The U.S. Conference of Catholic Bishops implicitly recognized the reality of class conflict concerning the right to unionize when it called for labor law reform to address employers' efforts to break unions and to prevent workers from organizing, ECONOMIC JUSTICE FOR ALL, supra note 12, ¶ 104.}
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\[\text{265} \text{ Dorr, supra note 110, at 202 (emphasis added).}
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\[\text{266} \text{ ECONOMIC JUSTICE FOR ALL, supra note 12, ¶ 104.}
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\[\text{267} \text{ GAUDIUM ET SPES, supra note 110, ¶ 68.}
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\[\text{268} \text{ See ECONOMIC JUSTICE FOR ALL, supra note 12, ¶ 260 (teaching that "the preferential option}
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movement is one of the most effective ways of enhancing the economic and political position of the poor and disadvantaged. As Richard Freeman and James Medoff observed in their classic study *What Do Unions Do?*, unions have achieved their greatest political victories on social legislation that has benefited all workers, whether unionized or not, and in the process contributed to greater economic equality. In addition, unions have been of central importance to providing political clout for the poor. For example, unions were strong supporters of President Lyndon Johnson's Great Society reforms, which resulted in the "broadest expansion of the American welfare state since its inception during the New Deal." That unions remain deeply committed to promoting the interests of the working poor is evident in AFL-CIO president John Sweeney's statement that the labor movement must continue to represent all "working people throughout the society – union members and nonmembers alike." As Vanessa Tait has observed, for decades progressive trade unionists have advanced the vision of social justice unionism which has championed the causes of the poor and the powerless in our society. Indeed, as a practical matter, the Church's preferential option for the poor requires a strong commitment to rebuilding the American labor movement. It has long been known that there is a strong correlation between a strong labor movement and "the maintenance of low unemployment, a progressive distribution of income, and high expenditures for domestic social programs." Moreover, the transition to a services-based economy in the U.S. provides opportunities for a revitalized labor movement to help the poorest workers, most of

for the poor is the central priority for policy choice").

269 RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 18–19 (1984) (arguing that based on a wide variety of data and interviews with labor experts, there is ample evidence that unions have had very positive effects on the working class and on general economic and political freedoms).

270 Id. at 202 (noting that unions have achieved "their main political success[es] . . . as the voice of workers and the lower income segments of society").

271 DUBOFSKY, *supra* note 261, at 226.

272 JOHN J. SWEENEY & DAVID KUSNET, *AMERICA NEEDS A RAISE: FIGHTING FOR ECONOMIC SECURITY AND SOCIAL JUSTICE* 106 (1996). The labor movement's importance as a political force that promotes a broad agenda based on social justice, as opposed to being just another special interest group, is illustrated by labor's strong support for all of the civil rights acts and for important social legislation, such as Medicare. See ARTHUR B. SHOSTAK, *ROBUST UNIONISM: INNOVATIONS IN THE LABOR MOVEMENT* 177 (1991).

273 See TAIT, *supra* note 240, at 8–9 (discussing the broad commitment to justice and the redistribution of power at the heart of social justice unionism).

274 THOMAS BYRNE EDSALL, *THE NEW POLITICS OF INEQUALITY* 235 (1984) (discussing the effects of strong labor movements in Western European countries); see ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 100 (1997) (describing unions as one of society's most potent counterweights to the inequalities generated by markets and maintaining that unions are "a force for greater equality, because they promote[] a more egalitarian distribution of earnings").
whom have jobs in the local service economy, which means that their jobs will not be shipped overseas if employers had to pay higher wages. The preferential option for the poor is at the heart of CST, and this love for the poor requires strong support for the labor movement and advancing the rights of workers. Hence, I argue that the Church should strongly support all peaceful attempts by workers to form unions, even when some of the tactics employed might not be protected, or might even be proscribed, by the Act.

CONCLUSION: TEMPLES OF THE HOLY GHOST

CST has made a valuable and powerful contribution to our comprehension of the deeper dimensions that underlie the complexities of American labor law. The Church has strongly endorsed workers’ freedom of association as a basic human right, the protection of which is indispensable for a just society. CST’s keen interest in the rights of workers reflects its understanding that human work is “the key to the entire social question.” While CST has made a profound contribution to labor law theory by its strong stand that workers’ right to organize is a basic human right, at an even deeper level, the Church has made the most profound contribution possible to understanding the true meaning of workers’ rights through its teaching that workers’ rights are grounded on the most important theological and moral truths about the human person. The renowned Catholic philosopher, Jacques Maritain, who observed that the rights of the working person are ultimately of the greatest moral significance, perhaps best expressed the moral nature of work:

What is involved in all this is first of all the dignity of work, the feeling for the rights of the human person in the worker, the rights in the name of which the worker stands before his employer in a relationship of justice and as an adult person, not as a child or as a servant. There is here an essential datum which far surpasses every problem of merely economic and social technique, for it is a moral datum, affecting man in his spiritual depths.

Ultimately, labor law implicates profound theological issues, issues which were seen clearly by Dorothy Day, founder of the Catholic Worker

276 Social Doctrine, supra note 13, at 101.
movement, a woman who devoted her life to bringing CST into a daily, practical encounter with working people. For Dorothy Day, workers' struggles to assert and defend the dignity conferred on them by their status as workers expressed the “fundamental truth that men should be treated not as chattels, but as human beings, as ‘temples of the Holy Ghost.’”278 At the deepest level, I would argue, CST’s most important contribution to the future of American labor law is to remind us that when God took on human form and took up the trade of a carpenter, everything changed, and the true nobility of work was for all time revealed. In the twenty-first century, one hopes, America will create a labor law that is worthy of the true dignity of workers.