neighborhood blight, the resulting high cost of municipal services, and the detrimental effect on adjoining property values and home environment make a strong case for municipal regulation. The compelling public necessity to protect property development should place amortization plans completely within the realm of reasonable regulation.

SECTION 8(d) 4 LIMITATIONS ON THE RIGHT TO STRIKE: A CRITICISM

There can be little doubt that the right to strike is an integral part of any system of collective bargaining[1] without which employees have no effective bargaining power.[2] Strikes, of course, may be undesirable for a number of reasons: They may cause inconvenience and perhaps hardship to the general public[3] and under some circumstances may be injurious to the entire economy. Strikes often inflict serious economic loss, not only upon the employer but also upon the individual employees engaged in the activity.[4] The right to strike is, nevertheless, an indispensable element of the right to bargain collectively; it represents the power which, even if not used, constitutes the foundation of the union's

1. The Norris-LaGuardia Act and the NLRA, which were specifically created for the establishing, sanctioning, and protecting of collective bargaining, both specifically provide for the right to strike. "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment." Norris-LaGuardia Act § 4, 47 STAT. 70 (1932), 29 U.S.C. § 104 (1952). "Empioyees shall have the right . . . to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." National Labor Relations Act § 7, 49 STAT. 452 (1935), 29 U.S.C. § 157 (1952).

2. Professor Frey of the University of Pennsylvania Law School stated that the employee has no effective bargaining power "unless those who can perform the jobs in a given bargaining unit are able to act as one man, and unless that 'one man' is given the privilege which any individual has of refusing to work upon the terms or under the conditions proferred. . . ." Rose, *The Right to Strike: Is it an Inalienable Right of Free Man?*, 36 A.B.A.J. 439, 520 (1950).

3. In spite of this fact, Senator Taft himself admitted the need for the right to strike: "We recognize that right [the right to strike] in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right." 93 CONG. REC. 3951 (1947).

4. "Regardless of who initiates such action, both parties are, of course, subjected to costs. In the event of a strike, aimed at the employer's business operations, the employees too are subjected to a cost—their loss of wages—and it will be the employer's estimate of how long his employees will submit to such loss that will partly determine his estimate of the duration of the strike and consequently the cost to him of rejecting the union's terms." CHAMBERLAIN, COLLECTIVE BARGAINING 223 (1st ed. 1951).

bargaining position.[5] Any curtailment of the right involves the danger of weakening the very basis of collective bargaining.[6]

The Taft-Hartley Act has often been criticized for certain provisions limiting the right to strike.[7] One of these restrictive provisions is contained in section 8(d) which requires a sixty day notice before a collective bargaining contract can be terminated or modified. Strikes and lock-outs, within this sixty day period are prohibited as a refusal to bargain, constituting an unfair labor practice under the act.[8] The unfortunate language of this section has resulted in a considerable amount of confusion in its interpretation, the precise problem being whether the prohibition to strike applies only to a sixty day period after notice has been given or to the entire duration of the contract.

In the case of *United Packinghouse Workers*[9] the collective bargaining contract contained a reopening clause for the purpose of wage adjustments. Modifications concerning a wage raise were demanded prematurely and after a 60 day notice period a strike was called by the union. The Company filed a complaint requesting a cease and desist order. The NLRB held that section 8(d) required merely a sixty day notice period before the strike, regardless of the expiration or modification date agreed upon by the parties. The opinion stated that in view of the purpose and spirit of the act it would be illogical to extend the

5. ". . . the threat to strike, and the strike itself, are the prods which stimulate management and unions to find a peaceful solution to the problems of employment. Indeed, the strike is an integral part of the collective bargaining process. Without it, collective bargaining cannot function effectively as the vehicle of joint determination of the issues of the employment relationship." WITNEY, GOVERNMENT AND COLLECTIVE BARGAINING 3 (1951).

6. The following statement illustrates the fundamental nature of the right to strike in collective bargaining: "To those who regard collective bargaining as a marketing procedure, involving the sale of labor service, the strike and lockout, for example may be upheld as necessary to a freedom not to contract, as an alternative to a forced sale or purchase. On these grounds limitations on these rights might be opposed in principle." CHAMBERLAIN, *op. cit. supra* note 4, at 237.

7. WITNEY, *op. cit. supra* note 5, at 405-425.

8. Section 8(d) defines the duty to bargain collectively. Where there is a collective bargaining agreement in effect, a party must (1) refrain from termination or modification of the contract unless it serves a written notice of the proposed termination or modification upon the other party sixty days prior to the expiration date of the contract, (2) offer to meet for negotiations, (3) notify the Federal Mediation and Conciliation Service within thirty days after such notice, and (4) continue ". . . in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later."

The section also provides that any employee who engages in a strike within the sixty-day period shall lose his status as an employee, for the purposes of the Act. Labor Management Relations Act, 1947 (Taft-Hartley Act), § 8(d), 61 STAT. 142, 29 U.S.C. § 158(d) (1952).

9. 89 N.L.R.B. 310 (1950).

prohibition against strikes to the entire life of the contract.[10] As the union had given the required notice, the complaint of the Wilson Company was dismissed.[11]

Wilson & Co.,[12] the second case arising from the same nation-wide dispute, involved circumstances similar to those in the first case. In this instance, however, the union was seeking relief in the form of reinstatement of employees who were discharged as a result of their participation in the strike. The strike was called after the expiration of the sixty day period at a time when the terms of the contract provided for reopening. The Board ordered reinstatement,[13] pursuant to section 10(c) of the act.[14] This decision of the NLRB was reversed and the action dismissed on appeal to the Eighth Circuit.[15] The court held that the parties were required to continue the terms of the existing contract without resorting to strike until the expiration date or for a period of sixty days after notice has been given, "whichever occurs later." It was stated that the language of section 8(d)4 was not am-

10. *Id.* at 313.

11. The contract between the union and Wilson company provided for reopening for wage adjustment "once during the term of the agreement," but not within 12 months of the signing thereof. *Id.* at 326. The Union demanded wage adjustment prior to the expiration of the 12 months period. The union claimed that the contract itself was merely a skeleton of the relationship between the employees and the company, and there was a tacit understanding that every time the other three members of the "Big Four," the major packing companies, granted a raise to their employees, the employees of Wilson Company would receive a similar raise. *Id.* at 327. The union failed to prove materially this contention, however, and the trial examiner found for the company. His decision was based on Section 8(d)4 of the LMRA, which, in his interpretation, prohibited a strike before the expiration date of the contract, or before the date designated for contract modification. *Id.* at 336.

The sole issue considered by the Board was whether the strike constituted a refusal to bargain because the union failed to comply with the requirements of Section 8(d)4. The majority opinion admitted that a purely literal interpretation of the section would sustain the trial examiner's decision. However, the Board held that such interpretation would be obviously contrary to the policy and specific purposes of the Act. *Id.* at 313. It was held that the "whichever occurs later" provision was specifically directed at a situation in which notice of a desire to modify or terminate a contract was given less than sixty days before the expiration of the contract. *Id.* at 316. According to the Board opinion a strike after the expiration of the sixty-day notice period would not be a violation of Section 8(d).

Chairman Herzog and Member Murdock, in their separate concurring opinions, maintained that Section 8(d) should not apply in the present case at all, as it was only intended to regulate strikes near the expiration time of a contract, and not disturbances which occurred during the term of the agreement. *Id.* at 319, 323.

12. 105 N.L.R.B. 823 (1953).

13. The Board followed its own decision in the *United Packinghouse Workers* case, holding that since the strike occurred more than sixty days after notice had been given, the requirements of Section 8(d)4 were satisfied. Consequently, the individuals who engaged in the strike did not lose their status as employees. *Id.* at 825, 826.

14. Labor Management Relations Act, 1947 (Taft-Hartley Act), § 10(c), 61 STAT. 147, 29 U.S.C. § 160(c) (1952).

15. Wilson & Co., Inc. v. National Labor Relations Board, 210 F.2d 325 (8th Cir. 1954).

biguous, and that, by express provision, it prohibited any strike for modification before the expiration date of the contract. The court stated further that, even if the contract itself provided for reopening and secured the right to strike at the date set for such modification, a strike would still be unlawful under the act. "Contracts, however express, cannot fetter the constitutional authority of Congress."[16]

A similar situation arose in the *Lion Oil Co.* case,[17] where the contract provided for reopening after sixty day notice; an additional sixty days after a second notice was required for termination. Only one notice was served and, after the passage of a substantial period (more than sixty days), a strike was called. Here the contract had not expired, but the union had, under its terms, a right to reopen. The NLRB took the position that, while the LMRA outlawed all strikes for modification before the expiration of the contract, strikes were permitted if a time was designated for modification. Although reversing its position in the first *Wilson* case, the NLRB did not go along entirely with the second *Wilson* decision.[18] It remains to be seen whether or not the Eighth Circuit will affirm the Board's position on this point.[19]

In the cases, section 8(d)4 has been subjected to three different interpretations, all three claiming to be substantiated by legislative history. The NLRB, its dissenting members, and the circuit court all attempt to support their positions by quotations from committee reports

16. The court cited the following parts of a District Court opinion, involving the same contract, the same union, and the same strike, as the correct statement of the laws: ". . . the complaint shows on its face that plaintiffs, by 'resorting to strike' . . . 'before the expiration date of such contract,' have violated the express mandate of Section 8(d) of the Labor Management Relations Act of 1947. Plaintiffs contend that their contract gave them the right to strike during its term. After the passage of the Labor Management Relations Act of 1947, such a contention would be contrary to the express policy of the Act and Section 8 thereof. Contracts, however, express, cannot fetter the constitutional authority of Congress." United Packinghouse Workers v. Wilson & Co., Inc., 80 F. Supp. 563, 569 (N.D. Ill. 1948). When the case was appealed to the Supreme Court, the NLRB asked the court not to consider it on the ground that the issues were not clearly drawn. The court denied review. Local No. 3. United Packinghouse Workers v. Wilson & Co., Inc., 348 U.S. 822 (1954).

17. Lion Oil Co., 23 U.S.L. WEEK 2090 (NLRB August 5, 1954).

18. The Board followed the Eighth Circuit's decision in the *Wilson* case in declaring that there could be no strikes for modification before the expiration date of the contract, even after the expiration of the sixty-day notice period. However, it held that the "expiration date" of a contract as used by Congress also means the date in the course of a labor agreement when the contract, by its own terms, is subject to either modification or termination. This is clearly in conflict with the Eighth Circuit's view. 23 U.S.L. WEEK 2090 (NLRB Aug. 5, 1954).

19. Petition for review of *Lion Oil* was filed with the Eighth Circuit on August 23, 1954. See Note, 64 YALE L.J. 248, 258 (1954).

or congressional debates used in more than one instance out of context.[20] These conflicting results indicate that legislative history offers a somewhat vague and indefinite picture of the applicability of section 8(d)4. While a careful study of the debates and proceedings which preceded the enactment of the section reveals no express conclusions as to the true meaning of the section, it seems fairly clear that the interpretation by the Eighth Circuit receives no support from the legislative history.[21]

After the Taft-Hartley Act had been in operation for a year, there were admissions from its proponents that a number of the act's provisions had had unforeseen consequences detrimental to the promotion and strengthening of collective bargaining. Section 8(d)4, because of the lack of clarity of its proper application, was listed among these provisions.[22] Senator Taft, during debates concerning an amendment to the LMRA, admitted the presence of such a defect, and proposed an amendment to make it clear that a strike after sixty days, but before the expiration date of the contract, in the presence of a reopening clause, would not constitute an unfair labor practice.[23] This amendment would have stricken out the fatal words "whichever occurs later."[24] The purpose of section 8(d), according to Senator Taft, was to give the Conciliation Service advance notice of disputes so that it could be alert to prevent stoppages.[25] During the debates preceding the passage of the act, Senator Taft pointed out that, "we have done nothing to outlaw strikes for basic wages, hours, and working conditions after a proper opportunity for mediation."[26]

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20. The Eighth Circuit and the NLRB both emphasize the fact that Congress considered the prohibition of breaches of contracts as essential to industrial stability. To support this prosition the Eighth Circuit quotes the Senate Committee on Labor and Public Welfare: "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. . . . Without some effective method of assuring freedom from economic warfare for the term of the agreement there is little reason why an employer would desire to sign such a contract." Wilson & Co., Inc. v. National Labor Relations Board, 210 F.2d 325, 332 (8th Cir. 1954). The above discussions on industrial stability were actually not directed to Section 8(d), but to Section 301, allowing suits to be brought in federal courts against labor organizations for damages. S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947).

21. For detailed discussion see Note, 64 YALE L.J. 248, 252 (1954).

22. See S. REP. No. 99, 81st Cong., 1st Sess. 4 (1949).

23. Senator Taft made the following statement presenting the views of the Senate minority at the discussion of possible amendment of the LMRA: "The Taft-Hartley Act's definition also contains a possible defect in that it is not clear that a strike after sixty days' notice under an annual reopening clause of a contract running for more than 1 year does not constitute a violation. . . . The amendment proposed below makes it clear that such a strike would not constitute an unfair labor practice." *Id.* at pt. 2, 27.

24. *Id.* at 72.

25. *Id.* at 27.

26. 93 CONG. REC. 3835 (1947).

The draftsmen of the act were obviously concerned only with the usual problem of renegotiation of a contract at its expiration date, or with contracts with automatic renewal clauses, and had attempted to avoid occurence of strikes and violence at the critical expiration time.[27] The possibility that this section might be construed to be applicable to strikes during the life of the contract was pointed out in the Senate Minority Report.[28] Some of the legislators may have actually considered this a desirable result; others perhaps did not believe that such meaning could be read into the act. It is very likely that most of the legislators did not really appreciate the danger of such an interpretation.

The present interpretation of section 8(d)4 cannot be justified on the theory that Congress intended to make labor contracts enforceable through this section. Senator Taft was certainly in favor of making collective bargaining agreements binding upon the parties and of invoking government power to enforce such agreements. He agreed with Senator Morse that there should be some provision to prevent the parties from violating their agreements "with impunity."[29] Senator Morse would have recommended making breaches of collective bargaining contracts unfair labor practices, and, as an alternatitve, would have provided damage suits for such breaches.[30] Even he stated that the duty to bargain collectively does not cease with the signing of the contract, for when the terms of the contract become unfair as a result of circumstances which were not foreseen, the parties should not be permitted to refuse discussion of modifications of its terms.[31] Even if breaches of

27. According to Senator Ball the purpose Section 8(d) sought to accomplish was to protect the public from so called "quickie-strikes" by "giving at least 60 days notice of the termination of the contract, or of the desire for any change in it." S. REP. No. 105, 80th Cong., 1st Sess. 25 (1947). Mr. Hartley's presentation of the Senate Bill in the House (the original House Bill did not contain the 60 day notice provision) also confirms the conclusion that the notice period was to apply only at the termination date of the contract, for the purpose of affording time to settle disputes with the aid of the Mediation Service, before resorting to work stoppages. H. R. REP. 245, 80th Cong., 1st Sess. 35 (1947).

28. The Senate Minority Report pointed out that Section 8(d) in effect incorporates no-strike clauses in collective bargaining contracts "by legislative fiat." S. REP. No. 105, pt. 2, 80th Cong., 1st Sess. 21 (1947).

29. When discussing the amendment of the LMRA, Senator Taft said: "Since our whole national labor policy is based upon achieving peaceful labor relations through collective bargaining between employers and unions, the success of the policy depends upon the extent to which both parties faithfully observe the contract arrived at in the bargaining conferences. The knowledge that the other party is legally bound to carry out its commitments under the contract will do more to promote true collective bargaining than any mandatory provision that we may write." S. REP. No. 99, pt. 2, 81st Cong., 1st Sess. 27 (1949).

30. 93 CONG. REC. 1558 (1947).

31. During the debates preceding the enactment of the LMRA Senator Morse made the following statement: "It is not going to help peaceful relations between management and labor in this country if, once a contract is made, the employer and

contracts were treated as unfair labor practices, Senator Morse would not have approved a provision like 8(d)4 under the Eighth Circuit interpretation, which would bar all attempts to modify contract terms during the life of the agreement. The right to strike is manifestly essential in any attempt at modification.

The Senate amendment to the NLRA contained a provision making the violation of the terms of a collective bargaining contract an unfair labor practice. The conference agreement omitted this provision for the reason that, "once the parties have made a collective contract the enforcement of the contract should be left to the usual processes of the law and not to the NLRB."[32] To lend force to collective bargaining agreements Congress opened the federal courts to suits for breaches of labor contracts. Section 301 was enacted for the purpose of requiring the parties to abide by their agreements.[33] It is evident that this section, not section 8(d), was intended to serve this purpose. Nowhere do Senator Taft, or any of the immediate authors of the act, talk about alternative methods for the enforcement of labor contracts.

The court in the *Wilson* case insisted that the language of the Act was unambiguous and that nothing was left for them but to follow the clearly expressed legislative policy.[34] In view of the admissions of the section's confusing nature by its creators, the finding of clarity by the court seems unjustifiable.[35] Section 8(d) imposes the following sanction upon violators; employees who engage in strikes during the sixty day period lose their employee status and become ineligible for reinstatement under the act.[36] No sanction is imposed upon employees who strike after expiration of the notice period but before the end of the contract.[37] The court, nevertheless, when imposing this punishment upon such employees, claims to be supported by the "unambiguous" language of the act.

The express policy of Congress, as found by the court, evidently

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the union may thereafter refuse even to discuss modification of its terms, no matter how unfair or erroneous they may have become, because of circumstances that were not foreseen when the contract was signed." *Id.* at 1557.

32. H. R. No. 510, 80th Cong., 1st Sess. 42 (1947).

33. Section 301 of the LMRA permits suits for violations of labor contracts in the federal district courts, in the absence of the ordinary requirements of federal jurisdiction. Labor Management Relations Act, 1947 (Taft-Hartley Act), § 301, 61 STAT. 156, 29 U.S.C. § 185 (1952).

34. The court declared: "It [the language of Section 8(d)4] is not ambiguous and cannot be amended by interpretation." 210 F.2d at 332.

35. See note 30 *supra.*

36. Labor Management Relations Act, 1947 (Taft-Hartley Act), § 8(d), 61 STAT. 142, 29 U.S.C. § 158(d) (1952).

37. This obvious inconsistency in the language of Section 8(d) is pointed out in the majority opinion in United Packinghouse Workers, 89 N.L.R.B. 310, 314 (1950).

prohibits all strikes supporting modification demands once a collective bargaining agreement is signed. This requirement does not honor the actual terms of the agreement; the contract in the *Wilson* case expressly provided for reopening and modification during its term. This results in the compulsory inclusion of terms in the contract regardless of the actual intention of the parties. A promise not to strike, the so-called "no-strike clause," is embodied in the agreement although neither the union nor the employer bargained for such provision.

The desirability of no-strike clauses is widely recognized in the field of industrial relations. More than eighty percent of all collective bargaining agreements contain some form of a no-strtike provision,[38] illustrating the fact that employers and employees realize that they are benefited by the limitation or prevention of strikes. At first glance one may find it reasonable for Congress to include no-strike clauses in all contracts, but this disregards the basic principles of collective bargaining which call for agreements arrived at by the parties themselves on a voluntary basis.[39] Collective bargaining is the product of the recognition that the complex problems of labor relations can be regulated best by the parties involved.[40] These contracts must operate in many entirely different situations. Each industry, each individual plant, each geographic area has its own peculiar problems. Certain contract provisions may be advantageous to both labor and management in a certain industry, while the same terms would not be desirable in others. Any attempt to embody no-strike clauses into labor contracts by legislative fiat amounts to compulsory prescription of the contents of labor agreements, and, in effect, this procedure would replace part of the collective bargaining process.[41]

A study of existing no-strike clauses shows a variety of situations and methods under which the device has been put to use. A no-strike clause is not simply a union agreement to refrain from any strikes during the term of the contract, for usually there are important qualifica-

38. See Wolk and Nix, *Work Stoppage Provisions in Union Agreements,* 74 MONTHLY LABOR REV. 272, 273 (1952); WITNEY, GOVERNMENT AND COLLECTIVE BARGAINING 398 (1951).

39. The Senate Minority Report objected to this result, stating: "Although we believe that such provisions [no-strike clauses] are eminently desirable, it is our further belief that such agreements should be reached voluntarily on friendly, collective bargaining." S. REP. No. 105, pt. 2, 80th Cong., 1st Sess. 22 (1947).

40. The institution of collective bargaining, as part of a political democracy, is based on the ideals of self rule and government according to law. Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 HARV. L. REV. 1 (1947).

41. Professor Frey stated: ". . . legislation which curtails the right to strike, thus in effect eliminating collective bargaining, is not an expedient way to protect the public interest, for the consequences of the cure may too readily be worse than the disease." Rose, *supra* note 2, at 520.

tions made.[42] Many no-strike provisions limit the union's liability for breach of contract to strikes which are called or supported by the officials of the union. This means that damage suits under section 301 are unavailable in disputes resulting in unpredictable wildcat strikes engineered by irresponsible members of the union.[43] Even more important are the provisions which preserve the right to strike in connection with disputes on certain specified subjects. Some problems are considered too important to be submitted to arbitration or permanently fixed for a long period at the time of signing the contract.[44] All these provisions which the union and management have readily accepted as reasonable measures will lose their effect under the new interpretation of section 8(d)4; a new and unqualified no-strike clause will take their place.

A legislative prohibition of strikes lacks the beneficial effects of a voluntary no-strike clause since the real purpose of a no-strike clause is to secure the promise of union leadership, not only to refrain from calling strikes, but also to cooperate with the company in preventing and controlling unauthorized wildcat strikes.[45] The former is the less important purpose, since responsible union leaders do not call strikes in violation of a contract which was negotiated by them; this is especially true in view of the liability imposed upon the unions by section 301. Wildcat strikes constitute one of the most serious problems in labor relations.[46] Congressional prohibition would be completely ineffective against such strikes;[47] the only effective method of suppressing them is through responsible and powerful union leadership. The acceptance of union security clauses by management representatives indicates an awareness of the union's importance in resolving these conflicts. Only

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44. For a detailed study of limitations of union liability under no-strike provisions the Bureau of Labor Statistics nearly 90 percent includes some form of a limitation on work stoppages. In 56 percent of these contracts the limitation was not absolute, and the agreements contained exceptions or specific conditions under which strikes were permissible. Wolk and Nix, *supra* note 38, at 274.

43. Under this "nonsuability" arrangement the union usually is obligated to take positive action to terminate the unauthorized strike. WITNEY, GOVERNMENT AND COLLECTIVE BARGAINING 399 (1951).

44. For a detailed study of limitations of union liability under no-strike provisions see Fulda, *The No-Strike Clause* in READINGS ON LABOR LAW 133-136 (Temporary ed. September, 1953).

45. *Id.* at 134. See also note 43 *supra.*

46. The great majority of strikes in violation of no-strike clauses are unauthorized. The International Longshoremen & Warehousemen's Union, for example, during a five year period engaged in more than one thousand "quickie" strikes in violation of their contract. *Hearings Before the Committee on Labor and Public Welfare* of the Senate, 80th Cong., 1st Sess. on S. 55 and S. J. RES. 22, pt. 2, at 635 (1947).

47. Any form of injunction against individual workers would not only be impractical, but also unconstitutional, as imposing involuntary servitude. U. S. CONST. amend. XIII, § 1. Section 301 of the LMRA, in the presence of a union "nonsuability clause" will also be ineffective against wild-cat strikes.

under such an arrangement can union leaders maintain the discipline which is so essential to the avoidance of unauthorized strikes.[48] The *Wilson* case, by embodying a no-strike clause in every collective bargaining agreement, largely eliminates this important function of union leadership.[49]

Perhaps the most objectionable feature of the *Wilson* decision is the fact it renders ineffective the insertion of reopening dates as a provision of the contract; a right to reopen and modify is meaningless without the right to strike. The flexible, practical system of collective bargaining, which facilitates the solution of labor problems, will suffer a serious setback if this theory prevails. While the purpose of the NLRA admittedly is to encourage collective bargaining,[50] the *Wilson* interpretation will hardly serve to induce parties to negotiate long term labor contracts.[51] The NLRB in the *Lion Oil* case seems to have recognized this weakness in the *Wilson* decision. The Board rejected the theory that contract reopening clauses are contrary to congressional policy, and declared that a strike called after the expiration of the sixty days is illegal only in the absence of a provision for reopening.[52] This decision still embodies a no-strike clause in every labor contract which does not provide for modification.

The Board presents a number of arguments to justify its position. It is contended that strikes must be outlawed during the term of a labor agreement in order to insure stability in industrial relations. If unions agree to a fixed contract and are then permitted to seek a modification of its terms, the Board argues that labor contracts will become meaningless. If strikes to support modifications are outlawed, the parties will be forced to honor their contractual obligations. This will result in a mutual feeling of security on both sides and will insure more stability in labor-management relations, at least for the period of the contract. Once the contract is signed, it is the Board's position that its

48. Senator Murray made the following observation: "It is only under a union shop or maintenance of membership that union leaders can most effectively maintain union discipline, which is so essential to avoidance of unauthorized strikes. Union security is not opposed but, on the contrary, strengthens company security." 93 CONG. REC. A 895 (1947).

49. If an unconditional no-strike clause will be read into every collective bargaining contract, provisions limiting union liability will lose their effect, and union leaders will have little reason to make an express promise to cooperate actively in the suppression of wildcat strikes.

50. "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining. . . ." National Labor Relations Act § 1, 49 STAT. 449 (1935), 29 U.S.C. 151 (1952).

51. Note, 64 YALE L.J. 248, 258 (1954).

52. See note 18 *supra*.

fixed terms should be strictly adhered to.[53]

On the surface this reasoning seems to have some merit. Bargaining in good faith is one of the primary requirements imposed upon the parties by the act,[54] and a party who merely goes through the motions of bargaining without intending to come to an agreement is, at least in theory, violating the law.[55] Analogously, a party who goes through the bargaining process and agrees to a fixed contract without any intention of honoring the terms of such agreement seems equally guilty of an unfair labor practice. An intention to abide by the terms of the contract is an integral part of bargaining in good faith. Developing this further, the conclusion might be reached that any party who refuses to be bound by the terms of such contract was not bargaining in good faith.[56]

The above position assumes that a collective bargaining agreement which does not expressly provide for reopening includes a tacit promise that no modification will be demanded; consequently, a strike for this purpose could not occur.[57] This theory seems to be directly contrary to the actual practice observed in collective bargaining. Instead of embodying express provisions permitting strikes, the practice is, if the parties desire to avoid strikes, to include an express promise not to strike. This procedure seems to imply that the right exists in the ab-

53. The Board in the opinion made the following statement: "We say only that strikes to alter the provisions of a firm contract of fixed duration, and containing no provision for modification, must await the termination date." 23 U.S.L. WEEK, 2090, 2091 (NLRB Aug. 5, 1954).

54. Labor Management Relations Act, 1947 (Taft-Hartley Act), § 8(a)5, (b)3; § 8(d), 61 STAT. 140, 142, 29 U.S.C. § 158(a), (b), (d) (1952).

55. Section 8(d), defining collective bargaining, makes good faith a necessary requirement.

56. "There seem to be strong grounds for arguing that while the union can insist upon reasonable conditioning and definition of its liability for strikes during the contract period, it cannot arbitrarily demand a total release from responsibility without committing an unfair labor practice. To do so is to refuse the employer the only substantial consideration he receives, and it is difficult to see how the union can make such refusal and still fulfill its duty to bargain collectively in good faith." Livengood, *Labor Contracts and the Taft-Hartley Act,* 26 N.C.L. REV. 1, 14 (1947).

57. There is some authority indicating that even in the absence of no-strike provisions there is an implied obligation not to resort to methods of economic pressure, like a slowdown or strike, in order to enforce a modification demand. The cases, however, which uphold this principle, involve contracts providing for settlement of disputes by arbitration or through the grievance procedure. Courts and labor arbitrators held that the parties were obliged to exhaust these methods provided for by the contract before a strike would be permissible. NLRB v. Dorsey Trailers, Inc., 179 F.2d 589 (5th Cir. 1950); Universal Dishwashing Machinery Co., 17 L.A. 737, 738 (Th. J. Reynolds 1952); Fabet Corporation, 12 L.A. 1126, 1129 (S. Wallen 1949); Waterfront Employers' Association of Pacific Coast, 9 L.A. 5, 11 (A. C. Miller 1947). This rule falls far short of an absolute implication of a promise not to strike, read into the contract by *Wilson* and *Lion Oil.*

sence of a no-strike clause.[58] This argument was developed by the union's counsel in the first *Wilson* case, when he pointed out that if the employer does not bargain for a no-strike clause, he is not entitled to freedom from strikes.[59]

Even if the proposition that a no-strike provision should be implied in every contract were to be conceded, the *Lion Oil* decision would still be unjustified. There is clear evidence that Congress did not intend to make violations of a labor agreement an unfair labor practice.[60] Cases construing the LMRA support this proposition. Earlier cases show that where the contract contained a no-strike clause, and the union struck because of the employer's unfair labor practices, such employees were not protected by the act.[61] Even though the employees were violating their contract, these cases did not hold that such strikes constituted unfair labor practices.[62] The *Mastro Plastic Corporation* case, which reversed the courts' position in regard to protection under the act, held that employees who struck under such circumstances retained their right to reinstatement.[63] While there was a breach of the no-strike clause in the *Mastro* case, it was held not to affect the operation of the act in favor of the employees. This demonstrates that there is no logical relationship between breaches of contract and unfair labor practices. Strikes, even though carried out in violation of a collective bargaining agreement, involve a "labor dispute." They should be protected, not prohibited by the act and cannot be considered unfair labor practices, subject to injunction, unless the Norris-LaGuardia Act is to be rendered ineffective.[64] An unfair labor practice is a public wrong, subject to injunction.[65] To declare that breaches of contracts constitute public

58. See Note, 54 COL. L. REV. 1006 (1954).

59. Union's Exception to Intermediate Report, p. 12, United Packinghouse Workers 89 N.L.R.B. 310 (1950).

60. See page 544 *supra*.

61. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939); United Elastic Corporation, 84 N.L.R.B. 768 (1949); J. Dyson & Sons, Inc., 72 N.L.R.B. 445 (1947); Scullin Steel Company, 65 N.L.R.B. 1294 (1946).

62. The NLRB in these cases did not hold breaches of contract unfair labor practices. The NLRB refused to intervene for the protection of employees who by such activities exposed themselves to countermeasures by the employer. Breach of contract was described as "wrongful", but not "unlawful" conduct. Levinson, *Breach of Contract Under the Taft-Hartley Act*, 2 LAB. L.J. 279, 282 (1951).

63. NLRB v. Mastro Plastic Corp., 214 F.2d 462 (2d Cir. 1954); *cert. granted*, 348 U.S. 910 (1955).

64. The Act adopts the view that collective agreements are in some respects mutually enforceable by employer and union, through orthodox contract remedies. Such actions, however, are subject to the limitations of anti-injunction statutes, such as the Clayton and Norris-LaGuardia Acts. Livengood, *supra* note 56, at 7.

65. The NLRB is empowered to prevent any person from engaging in any unfair labor practice and may petition federal circuit and district courts to enforce its restraining orders. Labor Management Relations Act, 1947 (Taft-Hartley Act), § 10(a)

wrongs would mark the initiation of a new theory in the law, of indeterminable consequences. Congress realized the absurdity of such a proposition and refused to make breaches of labor agreements unfair labor practices.[66] On this basis, the Board's reasoning in support of the *Lion Oil* decision seems untenable.

The *Wilson* and *Lion Oil* decisions represent efforts to establish a legal theory for union contracts which would lend binding force to the terms of such agreements. They show an awareness of the fact that the authors of the LMRA strongly believed that collective bargaining could create stability only if the agreements were made binding through the utilization of government power.[67] While even the soundness of this belief may be seriously questioned, the interpretations of 8(d)4 in *Wilson* and *Lion Oil* seem to conflict with the general provisions of the LMRA itself. Section 13 declares in express language that: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."[68] It seems that in interpreting the ambiguous and confusing language of section 8(d)4, the policy established in section 13 should receive serious consideration.

Even the soundness of the 60 day notice provision and the damage suit provision of section 301 may be questioned. Supposedly these sections were enacted with the purpose of strengthening economic stability and thereby protecting the general public. Actually they govern strikes which do not endanger the national economy. Title II of the LMRA provides adequate safeguards against large scale strikes.[69] It is difficult to see why the Government should interfere with strikes of limited scope. The provisions of the LMRA which attempt to regulate strikes not having national significance are directly conflicting with the purpose of the act—the furtherance and encouragement of collective bargaining.[70] Unnecessary government regulation of bargaining agreements involves the

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and (e), 61 STAT. 146, 147, 29 U.S.C. § 160(a), (e) (1952).

66. See page 544 *supra*.

67. See note 30 *supra*.

68. Labor Management Relations Act, 1947 (Taft-Hartley Act, § 13, 61 STAT. 151, 29 U.S.C. § 163 (1952).

69. *Id.* §§ 206, 207, 208, 209.

70. Professor W. W. Wirtz of Northwestern University says: "It is hard to understand why we have in fact gone out of our way to discourage, in Section 8(d) of the 1947 version of the NLRA, the orthodox procedure of amending these agreements if the need for amendment arises during the contract term." Wirtz, *Collective Bargaining: Lawyers' Role in Negotiations and Arbitrations,* 34 A.B.A.J. 547, 549 (1948).

very real danger of destroying the collective bargaining process.[71]

Section 301, by providing for damage suits in federal courts for breaches of labor contracts, also represents an undesirable form of governmental interference with labor agreements. This section is of rather questionable value even when limited to the purpose for which it was enacted. While in isolated cases the prospect of a damage suit may serve as a deterrent to would-be violators of collective bargaining contracts, generally it does not provide the relief actually desired by the injured party. Employers are interested in continuous production and security not in the uncertain prospect of collecting damages from their employees.[72] The employment relationship is a continuing one in which good will and good faith of the two parties are essential. Damage suits are hardly the device to promote the desired harmony.[73] The possible harmful effects of such suits have been recognized by management, and there is evidence that Section 301 has not been extensively used.[74] The obvious inadequacy of this section may have prompted the judges and NLRB members in *Wilson* and *Lion Oil* to seek "solution" through their interpretation of 8(d)4.[75]

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71. Experience with the War Labor Board shows that the immediate availability of an agency for settling disputes discourages the parties from settling such disputes themselves by voluntary adjustment. S. REP. No. 105, pt. 2, 80th Cong., 1st Sess. 12 (1947).

72. "A firm remains prosperous, not by collecting money damages from labor unions, but by selling goods and services to customers. Regular production, free from unauthorized work stoppages, is a prime requisite for the healthful financial conditions of a business enterprise." WITNEY, GOVERNMENT AND COLLECTIVE BARGAINING 395 (1951).

73. See Cox, *supra* note 40, at 313.

74. As far as court decisions are concerned, the deluge of damage suits against unions has not materialized up to this time. On the contrary, the number of reported cases involving damage suits by employers against unions for breach of the no-strike clause is very small. Fulda, *op. cit. supra* note 44, at 124.

75. Unfortunately the method employed in these cases is not only an irrational one but also entirely unsuited to the smooth operation of the collective bargaining system. These decisions are founded upon the theory that collective bargaining contracts, to be effective, must be subject to strict interpretation and enforcement. This position shows a fatal misunderstanding of the basic nature of collective bargaining.

The collective bargaining contract is very different from an ordinary contract, therefore ordinary contract principles cannot be applied to it. Collective bargaining is a flexible system which cannot be squeezed within narrow limitations. Such agreements are in effect legislative enactments which contemplate, for their administration, the exercise of administrative and judicial functions. They represent a system of rules which should govern in settling labor disputes. They do not cover every detail of industrial life. Subjects labeled as management prerogatives do not constitute parts of the contract, yet they are an integral part and influence upon the production process and, as such, will affect employee interests indirectly. There are many direct issues left which must be decided at a later date when the actual necessity arises. Unlike ordinary contracts, collective agreements must leave ample room for future determination of issues. Thus when the Board in the *Lion Oil* case talks about "fixed terms" of a labor contract, it falls victim to error. Labor contracts, by their very nature and usefulness cannot have fixed terms, and if they had such unchangeable provisions requir-

While it is true that healthy industrial relations cannot be achieved if collective bargaining agreements are not honored by the parties, the solution to the problem does not lie in the approach resorted to in the *Wilson* and *Lion Oil* cases. Legislation which limits the respective rights of the parties under the contract is not only a curtailment of the freedom to contract and of the right to settle disputes on the basis of mutual understanding, but it is also an extremely impractical device. Congress may pass laws, or the courts may read certain interpretations into such acts but, if the unions and management do not acquiesce, these enactments will have little effect. Parties negotiating future labor contracts have a variety of devices at their disposal for avoiding the effect of the *Wilson* and *Lion Oil* decisions.[76] If the *Wilson* decision is to prevail, short term labor contracts with automatic renewal clauses are the answer; this will enable the unions to modify their agreements at frequent intervals. The effect of *Lion Oil* will be nullified if union contracts include reopening provisions. Neither of these developments is particularly desirable for the promotion of economic stability, but the two decisions virtually compel their use.[77]

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ing strict adherence, excluding reasonable argument and determination according to sound plant policies, they would be obstacles to not promoters of industrial harmony. Literal enforcement of labor contracts endangers their very purpose.

76. See Note, 64 YALE L.J. 249, 258 (1954).

77. The fact that statutory or judicial regulations may be rendered ineffective with such ease points to the conclusion that the shaping of labor policies can be done effectively only by the parties involved. Senator Murray pointed this out, stating: "Compliance with contract terms must ultimately depend upon the parties themselves, supplemented by expert and impartial arbitration. Collective bargaining, somewhat like marriage, is a social relationship which depends upon continuity. It is a living together which cannot be safely interrupted while the bones of contention are being rattled in the courts." 93 CONG. REC. A 895 (1947). If labor agreements shall be honored let the union and management realize that adherence in good faith to their agreements serves not only their mutual benefit, but in fact it is essential to their most vital interests. Effective and continuous production and secure and fair wages are the primary objectives of the parties.

The view that collective bargaining should be closely regulated by the government is based on the quite unjustifiable belief that union and management, in the absence of outside regulation, will reject sound reason and destroy themselves. It is absurd to assume that labor leaders are not aware of the fact that the union's vital interests are closely interrelated with the interests of the plant it works for. There can be little doubt that where both parties realize the beneficial values of the inclusion of a no-strike provision in the contract they will provide for it, without any governmental interference. The fact that the vast majority of labor contracts contain no-strike clauses is proof that there is no need for creating such provisions by legislative power, as advocated by the *Wilson* case.