ended.[16] After certification, the employer expects a respite from his labor troubles only to find that the minority has started a campaign to displace the majority as the sole bargaining agency. Whatever the remedy that may be suggested[17] for the plight of the employer, it is submitted that interference by injunction on the part of the district courts is unjustifiable. The National Labor Relations Act lends its sanction to the closed shop agreement between an employer and the majority of his employees.[18] Such contracts invariably lead to the discharge of those who refuse to join the majority union.[19] No *terminus ad quem* is fixed for the duration of certified majorityship, and no provisions, statutory or otherwise, have as yet appeared requiring unions to cast open the doors of membership to everyone.[20] Hence if the means of organization, persuasion, and education, be taken away from the minority by injunction,[21] majority groups may as a practical matter become self-perpetuating. The universal desideratum of minorities is to become majorities; and it is one of the functions of a democracy to make this evolution possible.

Labor Law—Power of National Labor Relations Board To Invalidate Contracts of Independent Union—[Federal].—The Consolidated Edison Company, upon withdrawing its support from its company dominated unions, immediately recognized the International Brotherhood of Electrical Workers, an American Federation of Labor affiliate, whose membership was neglible, despite knowledge that the United, an affiliate of the Committee for Industrial Organization was the only active labor organization among its employees. The company continued to favor the American Federation of Labor by permitting its officers to utilize company facilities in the ensuing organizational drive, by exerting pressure upon the employees to join the locals or be discharged, and by permitting it to carry on activities on company time, at the same time denying similar privileges to the rival union. This favoritism was

[16] The Board has sanctioned this means of getting employees to petition for certification. Matter of Bartlett & Snow Co., 4 N.L.R.B. 113 (1937). On the subject of employer's remedies generally, see 38 Col. L. Rev. 1243, 1262 (1938).

[17] A dictum in the instant case offers a possible solution of the problem. When the Board has certified the proper unit for bargaining, and a minority decides to strike and picket for recognition, the majority employees—it is said—may petition the Board to have the circuit court of appeals issue an injunction against the rebellious group. This would constitute some sort of supplementary process to help effectuate the Wagner Act's primary purpose of creating a peaceful atmosphere for collective bargaining; but this would necessarily entail creation of an unfair labor practice among employees, since only orders to prevent unfair labor practices are enforcible by the circuit courts under Section 10(a) and (e) of the Wagner Act.

[18] 49 Stat. 449, § 8 (3) (1935), 29 U.S.C.A. § 158 (3) (Supp. 1938).

[19] See Williams v. Quill, 277 N.Y. 1, 12 N.E. (2d) 547 (1938).

[20] See Miller v. Ruehl, 166 Misc. 479, 2 N.Y.S. (2d) 394 (1938). Pennsylvania does have a provision in its Labor Relations Act refusing to recognize any organization which discriminates because of race, color, or creed, 43 Purdon's Penn. Stat. § 211.3 (Supp. 1938), but this is a minimum requirement.

[21] The Wisconsin Labor Relations Statute anticipated just such cases as have been dealt with here. To the section retaining in labor the right to strike is appended "or to deprive any party to a labor dispute as defined in this chapter and in the [anti-injunction] act of the rights, benefits, and protection of the . . . . [anti-injunction] act. Wis. Stat. 1937, § 111.17.

climaxed by the execution of a series of contracts between the American Federation of Labor locals and the Company after the hearings before the National Labor Relations Board were under way, covering terms of employment for members. The Board concluded that the contracts, even if applicable to members only—and especially so if construed as exclusive bargaining agreements—were invalid and ordered the company to cease giving effect to them and to post notices to that effect.[1] The circuit court of appeals, admitting that the appropriateness of the invalidating clause "was not so clear" enforced the order on the ground that it was not so unwarranted as to necessitate reversal.[2] On appeal, the Supreme Court concluded that the Board was without authority to require the companies to desist from giving effect to the American Federation of Labor contracts. *Consolidated Edison Co. of New York v. National Labor Relations Board.*[3]

Confronted with the determination of the propriety of the Board's order invalidating contracts between an employer and an independent American Federation of Labor union, the Court rendered an opinion sufficiently vague to entitle both parties to claim victory.[4] Although the majority held that the Board lacked authority in the instant case to set aside the contracts, it is debatable whether it predicated its decision on the Board's failure to comply with appropriate procedural forms,[5] or on the fact that the contracts, applicable only to members of the American Federation of Labor, thwarted no policy of the Labor Relations Act, or finally on the absence of power to abrogate any type of contract between an employer and an independent union. The scope of the majority opinion will probably be judicially determined in the first instance when the seventh circuit decides the *Jefferson Electric* case,[6] wherein the Board conformed to the procedural amenities specified herein and abrogated a closed shop contract between an employer and an independent union favored by the company.

To re-establish a neutral atmosphere in which employees may properly "secure the benefits of self-organization and collective bargaining through representatives of their own choosing,"[7] the Board is empowered to order the abandonment of unfair labor practices.[8] Conduct of employers clearly recognized as unfair labor practices within the meaning of Sec. 8(1)[9] includes, espionage,[10] strikebreaking,[11] discrediting

[1] 4 N.L.R.B. 71 (1937). [2] 95 F. (2d) 390 (C.C.A. 2d 1938).

[3] 59 S. Ct. 206 (1938). (Justices Butler and McReynolds denied the jurisdiction of the Board on the ground that the operations of the company did not affect interstate commerce; and Justices Black and Reed dissented from the modification of the Board's order invalidating the contracts).

[4] See statements of Messrs. Green and Pressman in New York Times, p. 22 (Dec. 6, 1938). See 147 Nation 606 (Dec. 10, 1938); 97 New Republic 157 (Dec. 14, 1938).

[5] The Court insisted that the union, being independent, was entitled to notice of the Board's proposed abrogation of the contracts. P. 218.

[6] In the matter of Jefferson Elec. & Radio Workers (July 14, 1938).

[7] N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267 (1938).

[8] 49 Stat. 454 (1935), 29 U.S.C.A. § 160 (c) (Supp. 1938).

[9] 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (Supp. 1938). "It shall be an unfair labor practice for an employer (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 7."

[10] N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 75 (1937); N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49, 54 (1937).

[11] N.L.R.B. v. Remington Rand, 94 F. (2d) 862 (C.C.A. 2d 1938), *cert. denied*, 304 U.S. 576 (1938).

the union,[12] exertion of economic pressure in the form of threats to close or move a plant,[13] and the stirring of community prejudice so that food stores discontinued extending credit to employees engaged in union activities.[14] The instant case, however, presents the novel question as to whether a contract between an employer and a favored independent union[15] constitutes an unfair labor practice within the meaning of Sec. 8 (1),[16] and may be set aside by the Board by virtue of its power under Sec. 10 (c).

The Board, proceeding on the assumption that "for the employer to dictate the choice of representatives of his employees would be to destroy self-organization and freedom of selection"[17] which the Act guarantees, has invalidated closed shop agreements between employers and independent unions. Thus *In the matter of National Electric Products Corp.*[18] the contract with the favored union climaxed a series of other unfair labor practices. The company urged its employees to become members of the American Federation of Labor local, threatened them with discharge if they did not comply or joined the Committee for Industrial Organization; supervisory employees were allowed to solicit members on company time; and finally, all employees were required to join the union or have deducted from their wages sums equivalent to dues. *In the matter of Lenox Shoe Co.*[19] the employer permitted organizers of the preferred union to address the employees at meetings on the company time, designated certain employees to solicit members for the favored organization and even requested local business men to decide what labor organization the employees should join. *In the matter of National Motor Bearing Co.*,[20] the employer closed the plant in an effort to discourage union activity and on reopening refused to reinstate workers unless they were affiliated with the favored local; and in the *Waterman Steamship* case, the carrier denied passes for entry upon the premises to representatives of the Com-

[12] In the matter of Atlas Bag Co., 1 N.L.R.B. 292 (1936); In the matter of Wheeling Steel Corp., 1 N.L.R.B. 699 (1936), aff'd 94 F. (2d) 1021 (C.C.A. 6th 1938).

[13] N.L.R.B. v. Remington Rand, 94 F. (2d) 862 (C.C.A. 2d 1938); Ansin Shoe Mfg. Co. 1 N.L.R.B. 929 (1936); Anwelt Shoe Mfg. Co. 1 N.L.R.B. 939 (1936).

[14] N.L.R.B. v. Remington Rand, 94 F. (2d) 862 (1938); Alaska Juneau Gold Mining Co., 2 N.L.R.B. 125 (1936), aff'd 91 F. (2d) 1017 (C.C.A. 4th 1937).

[15] Since the Supreme Court has held that the Board may disestablish a company dominated union in N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261, *a fortiori* their contracts with employers can be prohibited as unfair labor practices and the Board may properly set them aside, as was done in the following cases: In matter of Clinton Cotton Mills, 1 N.L.R.B. 97 (1935), aff'd 91 F. (2d) 1008 (C.C.A. 4th 1937); N.L.R.B. v. Oregon Worsted Co., 96 F. (2d) 193 (C.C.A. 9th 1938); In matter of Atlanta Woolen Mills, 1 N.L.R.B. 316 (1936); In matter of Stackpole Carbon Co., 6 N.L.R.B. 171 (1938); In matter of Hill Bus Co., 2 N.L.R.B. 781 (1937); In matter of Lion Shoe Co., 2 N.L.R.B. 819 (1937), but rev'd in 97 F. (2d) 448 (C.C.A. 1st 1938). See also Wettach, Unfair Practices under the Wagner Act, 5 Law and Contemp. Prob. 223, 235 (1938); 26 Calif. L. Rev. 661 (1938).

[16] Although frequently classified as an aspect of the company dominated union problem, dealt with in 8 (2), these contracts are technically a violation only of 8 (1). For discussion, see 26 Calif. L. Rev. 611, 614 (1938).

Section 8 (1) includes not only the more prevalent practices enumerated in the succeeding subdivisions, but other tactics used by employers to bar effective organization. See Sen. Rep. No. 573, 74 Cong. 1st Sess. (1935) and H. Rep. No. 1147 (1935).

[17] In matter of National Electric Products Corp., 3 N.L.R.B. 475, 499 (1937).

[18] 3 N.L.R.B. 475 (1937).

[19] 4 N.L.R.B. 392 (1937).

[20] 5 N.L.R.B. 409 (1938).

mittee for Industrial Organization affiliate but readily granted them to representatives of the American Federation of Labor.[21]

The Board, in abrogating the contracts, viewed them not in isolation, but, with a more realistic perspective, in their background of undisguised favoritism, threats against joining a rival union, discriminatory discharges, and a host of other condemnable unfair practices.[22] In that setting the contracts may very well be considered as giving the union a preference likely to have a marked effect upon the affiliations of the employees.

The action of the Board in the contract cases is consistent with its general policy to eliminate all subtle and imperceptible influences, which may interfere with the employees choice of representatives. Because of the frequently prevailing hostilities between employer and employees, seemingly innocuous acts by the employer have been interpreted as unfair labor practices. Thus an employer was ordered to desist from making statements that he favored employee organizations and had "information" that a "vast majority" of the employees would prefer to be represented not by an outside union.[23] Statements in a company magazine, stressing loyalty, confidence and cooperation as the basis of the company's progress and the importance of individual merit, were construed as thinly veiled threats of discharge. The distribution of a booklet enumerating among the duties of the employer that he must guard the company against destructive forces from within and without and refuse to recognize any individual or group not having the welfare of the company at heart,[24] and the posting of a message embodying a gratuitous offer of legal advice and specifying that employees might form representation plans under the Act,[25] were similarly condemned as unfair labor practices.

The decision in the instant case appears in sharp contrast to this general approach adopted by the Board. Although admitting obvious unfair labor practices,[26] by a curious selectivity of attention, the Court concluded that the mere execution of a contract with an independent union cannot be construed as giving the union such a preferable status as to influence the choice of unaffiliated employees.[27] The Court also suggested that the contracts with an independent union were consistent with the policies of the Act,[28] since the independent union by hypothesis represented the free choice of the employees. Such a position would indicate that the power of the Board to abrogate contracts was limited only to those between employers and company dominated unions, outlawed by Sec. 8(2)![29] This conclusion would in effect overrule the Board's prior decisions and, in addition, enable the employer to favor a union more amenable to his demands than its rival.

[21] 7 N.L.R.B. no. 33 (1938). For similar acts of intimidation and assertions of preference, see In the matter of Missouri-Arkansas Coach Lines, 7 N.L.R.B. no. 23 (1938) and In the matter of Zenite Metal Corp., 5 N.L.R.B. 509 (1938).

[22] See notes 17–21 *supra*. [23] In the matter of Federal Bearings Co., 4 N.L.R.B. 467 (1937).

[24] In re Cincinnati Milling Co., 6 U.S. Law Week 245 (1938).

[25] *In re* Western Felt Works, 6 U.S. Law Week 508 (1938). This conduct must be distinguished from a mere expression of opinion which the statute cannot be interpreted to forbid, without violating the First Amendment. See N.L.R.B. v. Union Pac. Stages, 99 F. (2d) 153, 178 (C.C.A. 9th 1938).

[26] 59 S. Ct. 206, 217 (1938). [27] *id.* at 220. [28] *id.* at 219.

[29] 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (2) (Supp. 1938).