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Labor Dispute Disqualification for Unemployment Compensation Benefits

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LABOR DISPUTE DISQUALIFICATION FOR UNEMPLOYMENT COMPENSATION BENEFITS

KEN MATHENY*

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* B.A., West Virginia Wesleyan (1977); M.A., West Virginia University (1980); J.D., West Virginia University College of Law (1989). I would like to thank my wife, Katherine Matheny, for the many sacrifices she made to make this Article possible.
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I. INTRODUCTION

The West Virginia Code disqualifies an employee from receiving unemployment compensation benefits (UCB) if the employee is involved in a work stoppage resulting from a labor dispute. However, no disqualification is imposed if: (1) an employee is required to accept wages, hours, or conditions of employment substantially less favorable than those prevailing for similar work in the same locality; (2) an employee is denied the right of collective bargaining by the employer; or (3) the employer shuts down the operation or dismisses the employee to force wage reductions, changes in hours, or working conditions.

The code section is vaguely worded and permits considerable judicial interpretation of the labor dispute disqualification (LDD) and its purpose and justification. In part II of my paper, I will discuss the major West Virginia cases that have addressed the LDD. This discussion will culminate with a discussion of the West Virginia Supreme Court of Appeals' recent decision in Roberts v. Gatson.

In part III, I will discuss scholarly commentary about the LDD and look at some important decisions of the Supreme Court of the United States. I hope to show in these first two parts that the LDD results in inconsistent decisions, is difficult to administer, undermines the federal labor policy in favor of collective bargaining, and cannot be reconciled with the goals of the Unemployment Compensation Act (Act).

2. Id.
In part III, I propose that West Virginia radically reform the LDD by adopting New York’s unique approach to work stoppages and the receipt of UCB. The New York Act requires strikers to wait seven weeks before becoming eligible for UCB.\textsuperscript{4} New York’s approach is more consistent with the public policy favoring collective bargaining, accomplishes state neutrality in labor disputes, and is easier to administer.

II. WEST VIRGINIA CASES

A. Early Attempts To Interpret The Act

One of the first important West Virginia cases to address the LDD was \textit{Miners in General Group v. Hix}.\textsuperscript{5} \textit{Miners} discussed the basic issues of what a labor dispute is for purposes of the Act, the purposes of UCB, and the definition of involuntary employment.\textsuperscript{6}

\textit{Miners} concerned the claims of thousands of coal miners involved in a strike from April 1 to May 13, 1939, when a new contract was signed. The prior collective bargaining agreement expired on March 31, 1939.\textsuperscript{7} The mine owners sought to have the miners accept a wage reduction.\textsuperscript{8} Two weeks before the strike the miners offered to continue to work after the contract expired until a new one could be made, such work to be performed at the wages specified by the old contract.\textsuperscript{9} The mine owners rejected this offer.\textsuperscript{10}

The miners contended that they were eligible for UCB because there was no labor dispute within the meaning of the Act. They argued that a labor dispute is a dispute that occurs involving an existing contract. Because no contract was in place at the time of the work stoppage, there was no labor dispute.\textsuperscript{11}

\begin{itemize}
  \item \textsuperscript{4} N.Y. LAB. LAW § 592(1) (McKinney 1988).
  \item \textsuperscript{5} 17 S.E.2d 810 (W. Va. 1941).
  \item \textsuperscript{6} \textit{Id.} at 815.
  \item \textsuperscript{7} \textit{Id.} at 812-13.
  \item \textsuperscript{8} \textit{Id.} at 813.
  \item \textsuperscript{9} \textit{Id.}
  \item \textsuperscript{10} \textit{Id.}
  \item \textsuperscript{11} \textit{Id.} at 816.
\end{itemize}
The court refused to accept the miners’ argument that labor disputes are disputes over existing contracts. The court concluded that a labor dispute can indeed exist without a contract being currently in place. In reaching its decision, however, the court found it necessary to inquire into the merits of the parties’ positions. The court found that there would have been no work stoppage if the miners had accepted the mine operators’ offer to renew the terms of the 1937 contract or if the operators had agreed to a closed shop. The court quoted approvingly a Kentucky Supreme Court decision that UCB are not available “to enable those who are offered continuation of employment to refrain from work.” Hence, even though the court acknowledged that either side could have prevented the work stoppage, only the miners were penalized because of the labor dispute. The court focused entirely on the miners’ “fault” while ignoring the operators’ fault: “Here the workers were voluntarily idle because they followed their organization in an attempt to better their conditions.” By “seeking additional advantages,” the miners forfeited their rights to UCB. That the operators were also seeking “advantages” had no bearing on the outcome.

12. This argument enjoyed some support at the time of this decision as evidenced by a proposed amendment to permit UCB to strikers unemployed due to the expiration of a contract. The amendment would have allowed strikers to receive benefits until a new contract was negotiated. See id. at 820.

13. Id. at 816.

14. The court indicated that it primarily wanted to know why the proposed contract was not entered into so as to avert a strike. This is the same as inquiring into which party is at fault by looking at the merits of the parties’ objectives and proposals. Hence, Miners illustrates a fundamental weakness of the LDD. It requires courts to involve themselves in assessing the merits of a dispute. Such an assessment necessarily will conflict with the doctrine of state neutrality used to justify the LDD in many decisions. For a key case that discusses the state neutrality doctrine, see NLRB v. Insurance Agents’ International Union, 361 U.S. 477 (1959).

15. Miners, 17 S.E.2d at 816.

16. Id. at 819 (quoting Barnes v. Hall, 146 S.W.2d 929 (Ky. 1940)).

17. Id. at 820. The U.S. Supreme Court rejected the voluntariness rationale in Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471 (1977). Nonetheless, courts continue to rely on the voluntariness rationale despite Hodory. See, e.g., Lee-Norse Co. v. Rutledge, 291 S.E.2d 477, 482 (W. Va. 1982) (Act is designed to protect workers who are involuntarily unemployed). For a federal case reaching the same conclusion, see United Steelworkers of Am. v. Johnson, 830 F.2d 924, 928 (8th Cir. 1987).

18. Id.
Miners is important because it clarified the meaning of "labor dispute," and, in so doing, rejected the argument that a dispute must be over an existing contract. Miners illustrates one of the shortcomings of the LDD provision: employees can be penalized for seeking their own advantages while employers are not penalized despite engaging in the same behavior. Miners also relied on a common justification of the LDD: that strikers are voluntarily unemployed. This use of the word "voluntary" ignores the possibility that a labor dispute could well be more the result of an employer's intransigence or anti-union animus than it is the result of voluntary behavior by employees. The LDD, as Miners illustrates, permits obstinacy and hard bargaining by employers while imposing a costly penalty on employees. Furthermore, attempting to decide who is at fault in a labor dispute involves time-consuming, complex factual inquiries. Determining fault will also inevitably lead to inconsistent results. Both parties in the dispute are seeking gain, but when employees seek to gain by resorting to a strike, their self-seeking is "fault" while the employers' self-seeking is not. Miners illustrates that the "voluntariness" of strikers' unemployment cannot provide a sufficient justification for the LDD. The problem of a lack of a reasonable basis to justify the LDD will reappear in all of the cases discussed in this Article.

Finally, Miners attempted to reconcile the purposes of unemployment compensation with the existence of the LDD. This has proven to be difficult, primarily because the stated goals of the Act are not consistent with the LDD. The court found that the purpose of the Act

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19. Even though the court stated that employees should not be penalized for "asserting their right to more satisfactory terms," it is clear nonetheless that the strikers are being denied UCB precisely for the behavior which the court says should not be penalized. See id. at 821.
20. Id. at 820.
22. See W. VA. CODE § 21A-1-1 (1989) (purposes of unemployment compensation are to "[p]rove a measure of security to the families of unemployed persons"; to "[g]uard against menaces to health, morals, and welfare arising from unemployment"; to "sustain the economy in times of economic depression"; to "[s]timulate stability of employment as a requisite of social and economic security"; and to "[a]llay and prevent the debilitating conse-
was to assist those who cannot find work, not to assist those who reject an offer of continuing employment to try to better their positions.\textsuperscript{23} Nonetheless, there is a clear conflict between the LDD and the Act's stated purposes. Furthermore, as Judge Lovins stated in his dissent, the Act is a remedial piece of legislation and should be construed liberally.\textsuperscript{24} If the LDD had been construed consistent with the stated purposes of the Act, the miners' interpretation of what makes a labor dispute would have been accepted.\textsuperscript{25} None of the stated purposes of the Act are furthered by a strict construction and application of the LDD.

The next major case to address the LDD was \textit{Homer Laughlin China Co. v. Hix}.\textsuperscript{26} This case addressed such key questions as: What is a "work stoppage"? What are "conditions of employment substantially less favorable than those prevailing for similar work in the locality"?\textsuperscript{27} What is "voluntarily leaving work without good cause involving fault on the part of the employer"?\textsuperscript{28}

\textit{Homer Laughlin} involved a wildcat strike that occurred between August 2 and August 17, 1943.\textsuperscript{29} Three employees, the claimants in \textit{Homer Laughlin}, were the leaders of the strike. The employer refused to let them return to work unless they agreed to return as new employees without seniority.\textsuperscript{30} The court first addressed the question of whether a work stoppage had occurred. It had no trouble deciding that a seventy-five to eighty percent curtailment of production in one of the employer's departments constituted a work stoppage.\textsuperscript{31} The Act does

\begin{footnotesize}
\begin{itemize}
\item[23.] \textit{Miners}, 17 S.E.2d at 820.
\item[24.] \textit{Id.} at 821 (Lovins, J., dissenting).
\item[25.] \textit{Id.}
\item[26.] 37 S.E.2d 649 (W. Va. 1947).
\item[27.] W. VA. CODE § 21A-6-3(4) (Supp. 1992).
\item[28.] \textit{Id.}
\item[29.] \textit{Homer Laughlin}, 37 S.E.2d at 651.
\item[30.] \textit{Id.} at 653.
\item[31.] \textit{Id.} at 650, syl. pt. 1.
\end{itemize}
\end{footnotesize}
not define work stoppage, and it is not clear how the court concluded that a seventy-five percent reduction is sufficient. One could argue that, because striking employees involved in a work stoppage suffer a one hundred percent reduction of UCB, the employer’s diminution of production should also be nearly one hundred percent. Nothing in the Act implies that a work stoppage should be anything less than a total stoppage for the LDD to apply. Also, the court found a work stoppage had occurred at one of the employer’s departments but did not consider the effect on the employer’s entire operation.

The work stoppage issue appears in other West Virginia cases. It requires complex factual determinations that must be made without any statutory guidelines. Not only can this result in prolonged legal battles, it can result in arbitrary decisions. Difficult issues must be (or ought to be) addressed, such as: How does one measure the percentage of diminution in production needed for a work stoppage? If the parties’ evidence conflict, how can conflicts be resolved? Should the level of continued delivery of goods and services be considered along with figures concerning production? How can production be measured in operations that deliver services rather than make products? Should different standards apply to conglomerates? If, at some point in the strike, the strikers offer to return to work but the employer does not permit them, is there still a work stoppage for UCB purposes? Should the Employment Security Administration make the sometimes difficult determination whether a strike or a lockout has occurred or should it await a decision by the National Labor Relations Board (NLRB) if this issue is before that body? Does the Employment Security Administration have the same expertise as the NLRB has so that it could make consistent findings whether a strike or a lockout has occurred? What is the effect of contracting out struck work? These variables can lead to inconsistent results. 32 Indeed, in some non-West Virginia cases, de-

32. Only Missouri has tried to codify a definition of work stoppage. Mo. ANN. STAT. § 288.040(6)(2) (Vernon Supp. 1992). It requires the diminution of activities, production, or services to be “substantial.” Obviously, this definition does not reduce the difficulties involved in determining how much work stoppage must occur to be substantial. “Substantial” could fairly be interpreted as anything from ten percent to ninety percent. See Marc Schoenfield, Public Benefits and The Labor Dispute Disqualification from State Unemployment Compensation and Federal Food Stamp Eligibility, 1988 ANN. SURV. AM. L. 863, 873
creases in production of only twenty to thirty percent have been held to be sufficient for a work stoppage to occur. Finding only thirty percent reductions to be work stoppages results in harsh treatment of strikers by totally disqualifying them from receiving UCB, while the employer continues to operate at seventy percent of the prior operating level. Such unequal treatment of strikers and their employers conflicts with the "state neutrality in labor disputes" justification often relied on to justify the LDD. I will discuss state neutrality in greater detail throughout this Article.

The court also addressed the question of what constitutes "conditions of employment substantially less favorable than those prevailing for similar work in the same locality." If an employer requires an employee to accept such terms to end the dispute, then the employee can receive UCB. By trying to force the claimants to give up their seniority rights, the employer in Homer Laughlin attempted to force them to accept substantially "less favorable" conditions of employment, according to the court.

The main reason that the claimants prevailed in Homer Laughlin is that the employer did not simply fire the three claimants. Because the strike was unauthorized, the employer had the right to terminate the claimants' employment. If the claimants had been fired, the employment relationship would no longer exist, and the claimants would no longer have been employees who were being forced to accept substantially less favorable conditions. Therefore, if the claimants had been fired and still wanted their old jobs back, the employer could have rehired them as new employees without seniority rights.

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34. As one commentator observed, because the employer usually has more resources to survive a labor dispute than employees do, a truly neutral state would pay UCB to employees involved in a dispute to make the conflict more equal. Penalizing the weaker party by denying benefits is not neutrality. Milton I. Shadhur, Unemployment Benefits and the "Labor Dispute" Disqualification, 17 U. Chi. L. REV. 294, 298 (1950).


36. Homer Laughlin, 37 S.E.2d at 655.

37. Id.
Hence, the court made two conclusions about the employment relationship between strikers and employers. One was that an employer may terminate without penalty its relationship to an employee who is involved in a wildcat strike. The other was that such terminations are not "self-executing." The employer must act to terminate the employment relationship. Termination cannot simply be inferred.

In reaching its decision, the court relied on what it considered to be the main purpose of the Act: "To provide reasonable and effective means for the protection of social and economic security by reducing as far as practicable the hazards of unemployment." If this is the main purpose of the Act, it is not clear how the LDD promotes it. The employer can adequately protect its interests by discharging wildcat strikers. However, subjecting the strikers and their families to an indefinite period of no or little income works against the purpose of the Act. The Act's purpose is to protect workers from the hazards of unemployment, not to be another economic weapon in the employer's arsenal. Furthermore, one should note that UCB will not be denied to an unemployed person who refuses to accept a position which is available because of a labor dispute. It is an odd policy that makes such drastic distinctions between strikers and those who support the strike by refusing to accept a position made available by the strike. Many such inconsistencies are created by the LDD because the LDD is inconsistent with the Act itself. I will return to this point later.

_Copen v. Hix_ addresses a provision in the Act that disqualifies a person who is "participating, financing, or directly interested" in a labor dispute. _Copen_ concerned employees who did not belong to the "grade" or "class" of workers who were participating in, financing,

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38. _Id._
39. _Id._
40. _Id._ at 655-56.
42. W. VA. CODE § 21A-1-1(1) (1989) specifically states that concern for the welfare of the families of unemployed persons is one purpose of the Act. It is difficult to see how the purpose is in any way advanced by singling out the families of strikers for special treatment.
43. 43 S.E.2d 382 (W. Va. 1947).
or directly interested in the dispute. The strikers in *Copen* were members of a foremen’s union, which was affiliated with the United Mine Workers of America (UMWA).

The claimants were also members of the UMWA, but they were all nonsupervisory workers who had no legal relationship with, nor influence over, the striking foremen. Nonetheless, the court found that the common membership of the claimants and the foremen in the UMWA was sufficient to disqualify the claimants because they participated in, financed, and were directly interested in the dispute. Hence, although the claimants had no dispute with the employer and even had reported to work but were told to go home, they still fell under the LDD.

In 1986, the court in *Ash v. Rutledge* did not explicitly overrule *Copen*, but it mentioned the dissenting opinion with approval. This suggests that *Copen* is no longer good law. Still, however, *Copen* serves as a useful illustration of the possibilities for injustice that are inherent in the Act. Courts have few reliable guidelines to help them to interpret the meanings of terms like “participating,” “financing,” and “directly interested.” *Copen* disposed of approximately two hundred claims for UCB. The LDD’s vagueness unjustly imposed economic hardship on approximately two hundred miners and their families. The dissent, penned by Justice Riley, stated that broadly defining the terms in the LDD, such as the *Copen* majority did, conflicts with all five of the Act’s stated purposes. *Copen’s* failure to reconcile the purpose of the Act with a broad interpretation of the LDD suggests that there is no rational basis to harmonize the LDD with the purposes of the Act.

45. *Copen*, 43 S.E.2d at 385. For a recent case involving the LDD and supervisory employees, see *Laursen v. Kiewit Constr. Co.*, 390 N.W.2d 534 (Neb. 1986) (holding that LDD applied to a supervisor laid off because of lack of work caused by a strike involving only non-supervisory employees). Such a holding blatantly contradicts with federal labor law policy because supervisory employees are excluded from the definition of employee under the National Labor Relations Act. See 29 U.S.C. § 152(3) (1988).

46. *Copen*, 43 S.E.2d at 386.

47. *Id.*


49. *Copen*, 43 S.E.2d at 383.

50. *Id.* at 387 (Riley, J., dissenting).

51. *See, e.g., Lesser, supra* note 21, at 171 (discussing the difficulties finding a convincing policy to justify the LDD). Almost all states have case law that emphasizes the
This doctrinal confusion continued in *State v. Ruthbell Coal Co.*, where the claimants refused to cross a picket line set up by the UMWA. There was no dispute between the claimants and the coal company. The claimants were paid UCB because, unlike the claimants in *Copen*, they were not members of the UMWA. The employer complained that the UCB paid to the claimants should not be charged to its account because the claimants voluntarily refused to work without fault on the employer’s part. The court held that the UCB should not be charged to the employer. However, the court also found that the claimants had good cause to cease working because crossing the picket line could be dangerous.

If *Ruthbell Coal* and *Copen* are compared, difficulties arise. For example, the court found that the claimants in *Ruthbell Coal* had good cause to leave work, but the claimants in *Copen* did not. In *Copen*, the claimants reported to work but were told to go home because there was no work due to the foremen’s strike. In *Ruthbell Coal*, the claimants refused to cross a picket line. What distinguishes *Copen*’s claimants from *Ruthbell Coal*’s is not clear. Despite the common UMWA membership, the claimants in *Copen* appeared for work. Yet the court did not find good cause for the claimant’s failure to work in *Copen* despite the evidence that the claimants were not voluntarily unemployed. If fault has anything to do with the LDD, it is not clear how it operates when one compares *Copen* and *Ruthbell Coal*. In *Ruthbell Coal*, the court found that the refusal to work did not further the labor dispute. However, it seems clear that joining strikers in a work stoppage is a form of participating in the dispute. There was no allegation that the claimants in *Ruthbell Coal* would have been in any danger had they crossed the picket line. If danger can be assumed when a person attempts to work at a business involved in a labor dispute, then the assumption would apply as much to *Copen*’s claimants as to

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52. 56 S.E.2d 549 (W. Va. 1949).
53. Id. at 558.
54. Id. at 559.
55. Id. at 558.
56. Id.
Ruthbell Coal's claimants. Finally, the employer in Ruthbell Coal kept its mine fully operational in case the claimants should decide to return to work, while the Copen claimants were told that work had stopped.57

The main reason that the claimants in Ruthbell Coal received UCB while those in Copen were disqualified is that the Copen claimants belonged to the same union as the strikers. Hence, these claimants were of the same "grade" or "class" as the striking foremen.58 In Ruthbell Coal, the claimants did not belong to the same union and were not, therefore, members of the same "grade" or "class" as the strikers.59 No doubt there is a difference between the two groups of claimants, but the difference is not important enough to justify awarding UCB to one group of claimants and not the other. Both groups of claimants faced essentially the same predicament: they were unemployed due to strikes over which they had no control.

Another problem illustrated by Ruthbell Coal is the vagueness of the word "voluntary" when it is used to justify a decision involving the LDD. Many cases point to the voluntariness of a striker's unemployment to justify the LDD in West Virginia and other states.60 Deciding which strikes are the result of the workers' free will and which strikes are the result of employer intransigence requires an improbably high degree of understanding of the facts surrounding the dispute and the motives of the parties.61 Furthermore, as Ruthbell Coal reveals, some work stoppages might be voluntary, yet good cause exists. Determining if good cause exists also will require extensive inquiries into the motives of the parties and the facts surrounding the dispute. Not only is making the determination of voluntariness difficult, but determining whether good cause exists further complicates an already complicated investigation. Ironically, however, even if the court makes the

57. Id.
58. Copen, 43 S.E.2d at 386.
59. Ruthbell Coal, 56 S.E.2d at 558.
60. Schoenfield, supra note 32, at 866 (the voluntariness of strikers' unemployment is a leading rationale for the LDD).
61. See also Lesser, supra note 21, at 171 (for a test of voluntariness to be fair it would have to consider the economic and psychological pressures surrounding the dispute).
difficult decision that a strike is voluntary, voluntariness fails to justify the LDD. This is because there is an inherent conflict between the LDD and the stated purposes of the Act. The Act does not disqualify one for voluntarily quitting. It disqualifies one for voluntarily quitting without good cause. Voluntariness alone does not justify the LDD. For example, a worker who is discharged for voluntary misconduct can receive UCB after a six-week disqualification period. If even voluntary misconduct does not result in indefinite disqualification, what policy justifies disqualifying strikers for the duration of the work stoppage when they are engaged in legal activity? Unless one is willing to believe that no striker ever has good cause for stopping work, it is difficult to discern what purpose of the Act is furthered by allowing workers who have voluntarily quit to have the opportunity to prove good cause while denying strikers the same opportunity.

Copen and Ruthbell Coal do nothing to explain how voluntariness is determined or why it is a sufficient rationale for the LDD. One of the main questions presented in Copen was whether the claimants left work voluntarily and whether there existed "good cause not involving fault on the part of the employer." The court found that work was available to the claimants if they had chosen to do it. Hence, the court implied that the claimants were voluntarily unemployed even though they were told by their foremen to go home because there was

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62. Schoenfield, supra note 32, at 866 (several difficulties are inherent in any attempt to harmonize the LDD with the stated purposes of the UCB Acts).
64. The problem of the lack of a persuasive rationale for the LDD strongly suggests that the LDD's main purpose is to punish strikers for engaging in concerted activity. Several commentators have discussed the inconsistency involved in not permitting striking employees to attempt to show good cause for strike activity. See e.g., Lesser, supra note 21, at 171; Robert Hutchens et al., Government Transfer Payments and Strike Activity: Reforming Public Policy, 1990 Lab. L.J. 505, 511. West Virginia, however, does allow an attempt to show good cause in connection with the LDD. Ash v. Rutledge, 348 S.E.2d 442, 444 (W. Va. 1986) (applying good cause standard in W. Va. Code § 21A-6-3(1) (Supp. 1992) to LDD). Despite this liberal interpretation, the practical effect of Ash is diminished by vague standards and lack of guidance regarding "good cause." See Ash, 348 S.E.2d at 447 (Brotherton, J. & Neely, J., dissenting).
65. Copen, 43 S.E.2d at 387.
66. Id.
no work. Surprisingly, the court proceeded to state that it is not "a matter of particular consequence" if the claimants voluntarily stopped working. The court said if the claimants had "reported for duty bona fide and were really seeking work," such actions might have shown they were not participating in, financing, or directly interested in the dispute. The court concluded, without explaining how, that the claimants were not "really seeking work" and voluntarily participated in the foremen's dispute with the company.

In *Ruthbell Coal* the court gave no more analysis of what voluntariness is than it did in *Copen*. The court asked, "But did defendant's employees leave work 'voluntarily for good cause'? We think they did." The voluntariness rationale raises many problems. The *Copen* court noted that the claimants might have exposed themselves to danger if they had tried to cross the picket line. Nonetheless, the court found their work stoppage to be voluntary. In a real sense, the refusal to cross the picket line was voluntary, a conscious decision not to expose one's self to danger. On the other hand, the decision is involuntary because the claimants were prevented from going to work. Certainly, the decision not to work was not an unfettered exercise of free will. The court perceived no contradiction in stating that the claimants were voluntarily unemployed but also unemployed because of "the threatened risk" from the strike. Clearly, the main reason that the claimants did not cross the picket line was fear. A decision partly caused by fear is not completely voluntary.

67. *Id.* at 386.
68. *Id.* at 387 (in the preceding paragraph voluntariness was the "question presented" but now is described as of no consequence).
69. *Id.*
70. *Id.* (the court concludes suddenly: "So without going into a great deal of detail we wish to say that in our opinion there was available work" for the claimants).
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* For discussion of the complexity and contradictions involved in deciding whether refusal to cross a picket line is voluntary, see Thomas Gross, *A Possible Cure For a Case of Mistaken Identity: Non-Striking Workers Who Have Failed to Cross a Picket Line*, 42 U. Pitt. L. REV. 87 (1980).
LABOR DISPUTE DISQUALIFICATION

B. The Attempt in Davis v. Hix To Clarify the Meaning of Participating, Financing, or Being Directly Interested in a Labor Dispute

In *Davis v. Hix*, the court attempted to clarify its decision in *Copen* that a claimant who has no labor dispute with the employer but belongs to the same national union as the strikers disqualifies the claimant because she or he is participating in, financing, or directly interested in the dispute.

As in *Copen*, the claimants in *Davis* belonged to the UMWA. The main difference in *Davis* was that the claimants had all been separated from employment prior to the strike. The Unemployment Compensation Board of Review (Board) disqualified the claimants for "participating in" a labor dispute. The Board based its decision on testimony from the claimants that if they had been offered "new work" in the mines, they would have refused to have worked during the strike. Hence, the Board concluded that the claimants were not available for full-time work. They were, by refusing the work, participating in the dispute. The Board correctly noted that ordinarily a claimant cannot be disqualified for refusal to accept a position created by a labor dispute. However, it found that this exception was not applicable in this case because the refused work was the claimants' "usual and customary work" in the mines. The court found that the Board's holding was so broad that it would result in denying to all unemployed miners the right to rely on the exception in section 21A-6-6(1) of the West Virginia Code.

76. 84 S.E.2d 404 (W. Va. 1950).
78. *Davis*, 84 S.E.2d at 406-07 syl. pt. 11.
79. *Id.* at 409.
80. *Id.*
82. *Davis*, 84 S.E.2d at 409.
84. *Davis*, 84 S.E.2d at 412.
85. *Id.*
The court refused to find membership in the UMWA sufficient to implicate the LDD in a case where the struck employer and the claimants have no employer-employee relationship. The court distinguished *Copen* by pointing out that those claimants still had an employment relationship with the employer. Therefore, their membership in the UMWA was sufficient to disqualify them.

The odd conclusion that results from reading *Copen* and *Davis* together is that it is better to quit or be fired before a labor dispute occurs than it is still to be an employee. The liberal intent of the Act makes it difficult to justify the technical distinctions regarding the employer-employee relationship made in *Copen* and *Davis*. The *Davis* court stated that its finding for the claimant was partly the result of liberally construing the statute in favor of eligibility. It is not clear why the same liberal construction was not applied in *Copen*. For example, one of the purposes of the Act is to stimulate "stability of employment." It hardly stimulates stability of employment to award UCB in *Davis* because the employment relationship had been severed and not to award UCB in *Copen* because the employment relationship was still intact. Nor is it clear why the Unemployment Compensation Board of Review's application of *Copen* was wrong. The key to *Copen* was the common membership of claimants and strikers in the UMWA. This common membership, the court concluded, means that the claimants were financing, participating in, or directly interested in the strike. The *Davis* claimants were also members of the striking UMWA. Presumably, they should have been disqualified under *Copen*. An important reason for the different outcomes is that the *Copen* court found that the burden of proof to show they were not participating in the dispute was on the claimants. However, the court stated that this rule putting the burden of proof on the claimants does not apply when

86. *Id.* at 415.
87. *Id.* at 406, syl. pt. 6.
89. *Davis*, 84 S.E.2d at 415 (distinguishing *Copen* because the claimants in *Copen* were still employed at the time of the strike).
90. *Copen*, 43 S.E.2d at 386.
91. *Id.*
92. *Davis*, 84 S.E.2d at 414.
claimants had no employment relationship with the struck employer at
the time the strike began.\textsuperscript{93} The court cited no authority for this prop-
osition. Furthermore, the court’s extensive discussion of the importance
of the employment relationship simply does not justify such different
treatment of the two groups of claimants.

As mentioned before, the LDD is vaguely worded; its ambiguities
lead to inconsistent results. Without an articulable rationale to reconcile
the purposes of the Act with the LDD, inconsistency is nearly inevita-
ble. There are inherent conflicts between the Act’s stated purposes and
the LDD. It is one of the main purposes of my proposal in part IV to
resolve these conflicts.

C. Lockouts, Voluntariness, and the Purposes of UCB

\textit{Cumberland \& Allegheny Gas Co. v. Hatcher}\textsuperscript{94} is significant as
an illustration of the problems inherent in the LDD. In \textit{Cumberland}
the court found that “a lockout is but a counterpart of a strike” and
held that a stoppage of work caused by a lockout disqualifies the
locked out employees.\textsuperscript{95} This holding was overruled in \textit{Lee-Norse Co.
v. Rutledge}.\textsuperscript{96} However, \textit{Cumberland} is still worth looking at as an
illustration of the LDD’s propensity to cause injustice. That the court
could conclude that a lockout and a strike are the same for purposes
of the LDD, even though it is well-accepted that the Act should be
given a liberal construction, serves to warn us that the LDD’s vague-
ness is susceptible to many inconsistent, socially harmful decisions.

Fortunately for the claimants in \textit{Cumberland}, the court found that
no work stoppage had occurred.\textsuperscript{97} The employer argued that the lock-
out prevented much of its routine work from being done.\textsuperscript{98} The court

\begin{itemize}
  \item \textsuperscript{93} \textit{Id.}
  \item \textsuperscript{94} 130 S.E.2d 115 (W. Va. 1963).
  \item \textsuperscript{95} \textit{Id.} at 120.
  \item \textsuperscript{96} 291 S.E.2d 477, 480 (W. Va. 1982).
  \item \textsuperscript{97} \textit{Cumberland}, 130 S.E.2d at 123.
  \item \textsuperscript{98} \textit{Id.} at 121 (the employer noted that during the dispute no work was performed on
meters, no handling was made of routine service orders, no domestic meter reading was
performed, no work constructing new lines or repairing old ones was done, no meter tests
were conducted, no routine maintenance at customers’ homes was performed, and no engi-
\end{itemize}
noted, however, that production levels were not affected. There was "no substantial showing of unfilled demands or unfilled requirements... and no showing of an accumulated backlog of work or services... sufficient to require overtime employment." The court stated that a work stoppage cannot be found "solely on the basis of the proportionate number of employees affected." Instead, there must be a showing of reduced production. Unfortunately, the court offered little guidance on how to determine the amount of production diminution needed to have a work stoppage. The court said that this determination will depend on the facts of each case. However, the court did not suggest even general guidelines for interpreting the facts of each case. After discussing other cases that had addressed the issue, the court concluded only that a stoppage of work means "a substantial curtailment of the normal operations of the employer." This circular definition is no help at all.

Lee-Norse Co. v. Rutledge is notable for attempting to reconcile the LDD and the Act's purposes. As mentioned above, Lee-Norse also overruled Cumberland's holding that a lockout can result in disqualification. Lee-Norse also addressed the concept of "voluntariness," but without much success. Finally, Lee-Norse overruled the holding in Miners in General Group v. Hix that a work stoppage caused by a labor dispute exists even when the parties are still negotiating a new contract. The Lee-Norse court based its finding that the claimants were eligible for UCB on the main purpose of the Act, which is not to regulate the employer-employee relationship but

99. Id.
100. Id.
101. Id.
102. Id.
103. Id. at 123.
104. 291 S.E.2d 477 (W. Va. 1982).
105. Id. at 481.
106. Id. at 480.
107. 17 S.E.2d 810 (W. Va. 1941).
108. Lee-Norse, 291 S.E.2d at 481 ("We find that when a contract has expired, and there has been no new agreement, there is not created thereby a disqualifying 'dispute' per Code 21A-6-3(4).")
which rather is to provide means "for the promotion of social and economic security by reducing as far as practicable the hazards of unemployment."\textsuperscript{109} The court stressed the remedial nature of the Act and the requirement of liberal construction.\textsuperscript{110} One wonders, however, what policy justifies denying UCB to strikers legally involved in a work stoppage if the Act is not intended to regulate the employment relationship but exists to alleviate the hazards of unemployment.\textsuperscript{111} Clearly, excluding strikers from receiving UCB has the effect of regulating part of the employment relationship, namely the part involving disputes over wages, benefits, and conditions of employment.

The \textit{Lee-Norse} decision is based on the voluntariness argument.\textsuperscript{112} This is the argument that the Act’s benefits should not be available to the voluntarily unemployed.\textsuperscript{113} The court acknowledged that some strikes are forced by the employer’s unreasonable behavior and are involuntary.\textsuperscript{114} The court concluded that the purposes of the Act are served when a claimant receives UCB because she or he is forced to strike.\textsuperscript{115}

Despite \textit{Lee-Norse}’s more liberal attitude toward the LDD, the opinion fails to explain why any person involved in legal collective activity should be disqualified. Strikers are always at least partly involuntarily unemployed because of the other employees’ refusal to agree to terms. Furthermore, even if one accepts the argument that strikers are voluntarily unemployed, it does not follow that they should be denied UCB. The same purposes that justify paying UCB to locked-out employees and to strikers not involved in a work stoppage seem to apply with equal force to strikers involved in a work stoppage.\textsuperscript{116}

\textsuperscript{109} \textit{Id.} (quoting Homer Laughlin China Co. v. Hix, 37 S.E.2d 649, 655-56 (W. Va. 1946)).
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id. at 482.}
\textsuperscript{113} \textit{Id.} ("Workers who ... make a conscientious choice that the loss of wages during a strike is worth any potential benefits they hope to gain" have made a voluntary choice).
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
Strikers' families also need security from unemployment.\textsuperscript{117} Paying UCB to strikers would guard against the menace of unemployment to health, morals, and welfare.\textsuperscript{118} Providing UCB to strikers also helps to maintain society's purchasing power\textsuperscript{119} and stimulates stability of employment.\textsuperscript{120} Additionally, paying UCB to strikers eliminates the negative consequences of having families reduced to depending on welfare to survive.\textsuperscript{121}

The most likely reason for the LDD appears to be to punish strikers for deciding to exercise their right to strike. That exceptions are made when an employer offers terms of employment that are substantially inferior to employment conditions for similar work in the locality does not support the position that voluntariness alone is the LDD's rationale.\textsuperscript{122} After all, those who refuse such substantially inferior terms of employment make a voluntary decision not to work just like other strikers. Also, claimants are not disqualified for voluntarily refusing to accept a job that is vacant because of a labor dispute.\textsuperscript{123} From a practical perspective, it is difficult to see what the major distinction is between striking and refusing to accept a job created by a strike. Either case is one where the claimant is "voluntarily" unemployed.

D. Ash v. Rutledge and the Attempt to Narrow the LDD

Ash v. Rutledge\textsuperscript{124} narrowed the scope of the LDD by giving a restrictive interpretation to the provision that disqualifies one for participating in, financing, or being directly interested in a labor dispute.\textsuperscript{125} Ash involved a strike by a painters union at a plant owned by Dupont.\textsuperscript{126} The claimants were members of the International

\begin{itemize}
\item \textsuperscript{117} W. VA. CODE § 21A-1-1(1) (1989).
\item \textsuperscript{118} W. VA. CODE § 21A-1-1(2) (1989).
\item \textsuperscript{119} W. VA. CODE § 21A-1-1(3) (1989).
\item \textsuperscript{120} W. VA. CODE § 21A-1-1(4) (1989).
\item \textsuperscript{121} W. VA. CODE § 21A-1-1(5) (1989).
\item \textsuperscript{122} W. VA. CODE § 21A-6-3(4) (Supp. 1992).
\item \textsuperscript{123} W. VA. CODE § 21A-6-6 (1989).
\item \textsuperscript{124} 348 S.E.2d 442 (W. Va. 1986).
\item \textsuperscript{125} W. VA. CODE § 21A-6-3(4) (Supp. 1992).
\item \textsuperscript{126} Ash, 348 S.E.2d at 443.
\end{itemize}
Brotherhood of Electrical Workers. They had no dispute with the employer. However, they did not cross the painters’ picket line. The court held that the claimants were not disqualified because they were not participating in, financing, or directly interested in the dispute. The Unemployment Compensation Board of Review affirmed, but the Circuit Court of Kanawha County reversed because the claimants’ unemployment was caused by their refusal to cross the picket line.

The West Virginia Supreme Court of Appeals reversed and awarded the claimants UCB. The court focused on the “directly interested in” phrase. The court maintained that the word “directly” requires more than “merely sympathy or an abstract attitude of mind.” Among other things, the court noted that the claimants were powerless to avert the event that precipitated the dispute, namely, the expiration of the collective bargaining agreement between Dupont and the painters’ union. The court also noted that the claimants did not join in the picketing and indicated a willingness to work if the gate they normally entered had been open.

Although Ash can be justified by its consistency with the purposes of the Act and the requirement of liberal construction, other problems exist. For example, the court focused almost exclusively on the “directly interested in” phrase, giving little analysis of the “participating in” or “financing” provisions. Also, the court did not reconcile its holding with the provision in the LDD disqualifying claimants for being members of the same “grade” or “class” of workers participating in the dispute. Participating in a dispute need not mean actually joining the picketing. It can also mean participation by withdrawing one’s

127. Id.
128. Id. at 444.
129. Id.
130. Id. at 446.
131. Id.
132. Id.
133. W. VA. CODE § 21A-6-3(4) (Supp. 1992). The “participation” requirement has been criticized for the purposelessness of applying the LDD to workers’ status only. See Schoenfield, supra note 32, at 894 (the grade, class, and participation provisions of the LDD are striking examples of vicarious guilt.)
Additionally, the painters and the electrical workers both belonged to the AFL-CIO. The electrical workers could be said to be partly financing the dispute by contributing to the AFL-CIO's strike fund.

The LDD requires claimants to prove two separate things: that one is not participating in, financing, or directly interested in the dispute and that one is not a member of the same grade or class of the employees involved in the labor dispute. A claimant may not be directly interested in a dispute but still be disqualified for being of the same grade or class as the strikers. If defined broadly, the phrase "grade or class" could eliminate many employees who are not directly interested in a labor dispute. However, even a narrow definition of "grade" or "class" can yield unfair results. As one commentator noted, "It seems both unfair and unwise to disqualify a claimant based on his status rather than on his conduct." It is hard to conceive of a situation when it would be consistent with the benign purposes of the Act to disqualify a claimant solely because of her or his "grade" or "class." Even if a valid policy underlies that LDD, it is hard to see how any legitimate public policy could be served by imposing great financial problems on a person who is guilty of no misconduct.

So despite Ash's liberal construction on the phrase "directly interested in," the court did not explain why the other disqualifying provisions did not apply. As the dissent argued, why the claimants should not have been disqualified simply for voluntarily refusing to work is not clear. Lee-Norse, after all, maintained that the purpose of the Act is to assist the involuntarily unemployed. The claimants in Ash could have entered by another gate. They chose not to cross the picket line—an understandable decision, but still a voluntary one. So, once again, it seems that voluntariness is not the rationale

134. Ash, 348 S.E.2d at 447 (Brotherton, J., dissenting).
136. For a discussion of the unfair results that can be caused by the terms "grade" and "class," see Schoenfield, supra note 32, at 894-95.
137. Id. at 895.
138. Ash, 348 S.E.2d at 447.
139. Lee-Norse Co. v. Rutledge, 291 S.E.2d 477, 482 (W. Va. 1982).
140. Ash, 348 S.E.2d at 446.
141. Recently, three states have clarified their LDD provisions to provide that one who
for the LDD. Indeed, if one can be disqualified because of one’s "grade" or "status," voluntariness cannot possibly be the rationale for the LDD.

E. Roberts v. Gatson: An Unjustified Narrowing of Key Exceptions To the LDD

In 1990 the West Virginia Supreme Court of Appeals decided Roberts v. Gatson, in which the court for the first time addressed two of the exceptions to the LDD. These exceptions are that employees involved in a work stoppage can nevertheless receive UCB if they are "required to accept wages, hours, or conditions of employment substantially less favorable than those prevailing for similar work in the same locality" or if they are denied the right to collective bargaining.

Roberts concerned a strike by the International Chemical Workers Union against Pittsburgh Plate Glass, Inc., following the expiration of the collective bargaining agreement. During negotiations the union asked the employer to supply information related to a proposed increase in employer-provided medical coverage. The employer failed to supply the requested information, and the union filed unfair labor practice charges with the NLRB on the ground that the employer failed to bargain in good faith.

The union argued that it should be eligible for UCB because the employer's last wage offer was substantially less than the wages prevailing in the locality in similar businesses. The court noted that it refuses to cross a picket line may not receive UCB. See COLO. REV. STAT. § 8-73-109(2) (1986); KAN. STAT. ANN. § 44-706(d) (Supp. 1992); TEX. REV. CIV. STAT. ANN. art. 5221 b-3(d)(1) (West 1987).

144. Roberts, 392 S.E.2d at 211 (the employer offered to raise the cap on medical insurance benefits from $200,000 to $225,000. The union requested information regarding total medical costs which had been paid to employees and their dependents during the period of the old contract).
146. Roberts, 392 S.E.2d at 212.
had never addressed this issue before, but decided that a sensible method to address the union’s claim about wages was to compare the employer’s last offer with the wages existing in the locality. 147

First, however, the court addressed the issue of denial of right to collective bargaining. The court stated that it would look to the National Labor Relations Act148 (NLRA) as a starting point.149 When a party is accused of a refusal to bargain, the basic inquiry is whether there is evidence of a lack of good faith.150 The relevant question in Roberts was whether the employer’s failure to turn over the requested information regarding prior medical benefits paid constituted a refusal to bargain in good faith.151 The court pointed out that cases decided under the NLRA have identified several factors that are relevant in determining if a failure to turn over requested information evidences a lack of good faith.152 Important factors are the relevance of the information to a mandatory bargaining subject and whether there is a reasonable basis for nondisclosure.153

The court stated that the duty to exchange information does not mean that every rejected request for information will constitute a denial of the right of collective bargaining.154 The court held that requested information must relate to a mandatory bargaining subject155 and must be so essential that the collective bargaining process would be frustrated without it.156 Also relevant is whether the employer had a bona fide reason not to disclose information.157 The court admits that the state law collective bargaining standard is a stricter test than that used to determine an unfair labor practice under the NLRA.158 The court justifies the adoption of the stricter test by pointing out that

147. Id. at 212-13.
149. Roberts, 392 S.E.2d at 208.
150. Id. (quoting 29 U.S.C. § 158(d) (1988)).
151. Id. at 210.
152. Id.
153. Id.
154. Id. at 211.
155. Id.
156. Id.
157. Id.
158. Id.
the Act requires a complete denial of the right to collective bargaining as opposed to the NLRA’s provision that failure to bargain in good faith over a mandatory subject is illegal.159

The Roberts court applied this test to the facts and concluded that the requested information was not so vital as to cause a complete denial of the right to collective bargaining.160 However, there is evidence that the employer tried to deny the right of collective bargaining. When the negotiations were beginning, the employer warned that the negotiations were not going to be "business as usual."161 Indeed, the employer’s initial offer contained forty-nine items, thirty-nine of which were requested givebacks and two of which would have frozen benefits.162 Evidence also indicated that the employer’s final offer was substantially less favorable than the terms of the existing contract.163 Other actions indicate the employer’s disregard for the bargaining process. For example, the employer unilaterally instituted a drug testing policy without first bargaining with the union. As a result, the NLRB issued a complaint.164 Also, the past practice of the parties was to allow the union to make the first contract proposal, but this time the employer made its demands first with its proposed thirty-nine givebacks.165 Finally, in past negotiations, the union had never had any difficulty obtaining information needed for bargaining.166 The claimants, therefore, argued that the totality of the circumstances revealed the employer’s lack of good faith.167 The claimants also pointed out that an inference of illegal surface bargaining is stronger when there are accompanying violations of the NLRA.168

159. Id. Applying a stricter test than the NLRA requires clearly interferes with the federal policy favoring collective bargaining. See NLRB v. Insurance Agents’ International Union, 361 U.S. 477, 483 (1960); Steve G. Eisenberg, Policy Considerations Underlying the Payment of Unemployment Compensation to Strikers, 56 N.Y. St. B.J. 30, 32 (1984) (LDD likely violates Supremacy Clause of United States Constitution.)

160. Roberts, 392 S.E.2d at 211-12.


162. Id.

163. Id. at 10.

164. Id. at 9.

165. Id. at 8.

166. Id. at 10.

167. Id. at 19.

168. Id. at 19-20 (quoting CHARLES MORRIS, THE DEVELOPING LABOR LAW 579
Roberts failed to address the issue of surface bargaining and, therefore, Roberts serves to encourage disregard of the NLRA. The court emphasized that its holding rested on the Act’s requirement that collective bargaining be totally frustrated by an employer’s behavior and a mere lack of good faith is not sufficient to invoke the exception to the LDD. The court made it quite clear that the Act’s use of the phrase “denial of the right of collective bargaining” means a total denial.

It is not clear how egregious an employer’s behavior must be to frustrate totally the right of collective bargaining. Apparently, a great deal of proof would be needed to show that negotiations were so deeply flawed as to completely frustrate the right of collective bargaining. Roberts makes it possible for employees who go out on strike because an employer has failed to bargain in good faith over a mandatory topic to be disqualified from receiving UCB because the entire bargaining process was not completely frustrated.

The court’s failure to discuss voluntariness of unemployment in Roberts, even though Lee-Norse stated that compensating the involuntarily unemployed is the purpose of the Act, is a glaring omission. A discussion of voluntariness would have been particularly appropriate in Roberts because the exception to disqualification for being denied the right to collective bargaining appears to have as its purpose the protection of those who are involuntarily unemployed because of the denial of collective bargaining. If the purpose of the Act really is to aid the involuntarily unemployed, then a strike caused by an employer’s bad faith bargaining should not result in disqualification. However, Roberts appears to permit sham bargaining so long as it is not so extreme as to completely deny the right to collective bargaining. That the employer might have committed an unfair labor practice


170. Id.

is not dispositive. The court does not explain how disqualifying persons on strike because of an employer's bad faith bargaining furthers any purpose of the Act.

The Roberts court did not discuss the well-established rule that the Act is to be liberally construed. A liberal construction of the phrase "denial of the right of collective bargaining" could not have resulted in such a narrow interpretation of the exception to disqualification. Clearly, a liberal construction would favor UCB eligibility. The court did not have to construe the exception so narrowly. It could have held that any time an employer's behavior is such that an unfair labor practice for failure to bargain in good faith should issue, then the exception applies. Nothing in the language of the Act forecloses such a conclusion, and, indeed, as mentioned above, the purposes of the Act would favor such an interpretation. However, the court clearly stated that behavior which might result in a violation of the NLRA is not sufficient in itself to invoke the exception to LDD disqualification. The court noted that the NLRA and the Act use different phrases regarding bargaining. However, the court fails to explain why the somewhat different wording compels a narrow reading of the LDD exception. The court should have construed the LDD exception to "achieve the benign purposes of the Act to the full extent possible" and ruled in favor of the claimants.

172. The court has often stated that "[u]nemployment statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent possible." See, e.g., Roberts, 392 S.E.2d at 215 (McHugh, J., dissenting, in part) (citing Gordon v. Rutledge, 337 S.E.2d 920, 922 (1985); Pennington v. Cole, 336 S.E.2d 210, 212 (1985); Belt v. Cole, 305 S.E.2d 340, 342 (1983)); Lee-Norse Co. v. Rutledge, 291 S.E.2d 477, 482 (W. Va. 1982); Davis v. Hix, 84 S.E.2d 404, syl. pt. 6 (W. Va. 1954); Sole v. Kindelberger, 114 S.E. 151, 153 (W. Va. 1922) ("Compensation Acts, being highly remedial in character, though in derogation of the common law, should be liberally and broadly construed to effect their beneficent purpose.").

173. Id. at 211.

174. Id.

175. Id. at 211.
III. UNITED STATES SUPREME COURT CASES

A. Ohio Bureau of Employment Services v. Hodory:176 States May Disqualify The Involuntarily Unemployed Under the LDD

In 1976 the Supreme Court of the United States refused a constitutional challenge to an Ohio statute which disqualified any person from receiving UCB if her or his unemployment was due to a labor dispute at any place of business owned by the claimant’s employer, even if such business was located in another state.177 The claimant was laid off by United States Steel Company because its coal supply was low due to the strike.178

The district court found the statute to be unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.179 The court acknowledged that a legislature may create classifications that discriminate against certain persons if the classification furthers a legitimate government purpose.180 However, the court stated that no legitimate purpose was served by disqualifying individuals who have no control over the dispute, are not at fault in some way, or stand to benefit from the dispute.181 Furthermore, the court pointed out that the laid-off steel workers were victims, not beneficiaries, of the strike.182

The Supreme Court reversed.183 The Court stated that the legislative history of the Social Security Act reveals that states are free to disqualify from receiving UCB even those who are involuntarily unemployed.184 The Court further stated that “innocence” is not a determinative factor and even employees who actively oppose the labor dis-

177. Id. at 472.
178. Id. at 473.
180. Id. at 1021.
181. Id. at 1022.
182. Id.
184. Id. at 482-84.
pute may nevertheless be disqualified.\textsuperscript{185} The Court found that the Ohio statute implicated no fundamental interest and the claimants were not a part of a protected class.\textsuperscript{186} Therefore, the statute was evaluated under the lenient rational basis standard.\textsuperscript{187}

The claimant argued that the statute was overbroad because it disqualifies individuals who are not only geographically remote from the dispute but who have no direct interest in it at all.\textsuperscript{188} The Court found this argument to be unpersuasive because it focuses solely on the harm done to the claimant without considering the employer’s interest or the state’s interest in the fiscal integrity of the fund.\textsuperscript{189} The Court concluded that because Ohio’s LDD statute prevents employers from having to pay higher UCB premiums because of a strike and protects the UCB fund’s fiscal integrity, the statute is rationally related to a legitimate governmental purpose.\textsuperscript{190}

\textit{Hodory}’s holding is far reaching. It rejected the argument that voluntariness of unemployment is the rationale for the LDD.\textsuperscript{191} The Court stated that even a worker who opposes the strike (but participates in it) can be disqualified.\textsuperscript{192} The Court’s extraordinary conclusion was that a completely innocent claimant can be disqualified even if the claimant has no interest at all in the strike which might be occurring hundreds of miles away from where the claimant works.

Not only does \textit{Hodory} amply illustrate the possibility of the LDD’s leading to injustice, the Court applied the rational basis test in a way that totally ignores the remedial purposes of the Act. The Court did not demonstrate how the LDD’s broad scope is truly rationally related to the goal of providing basic economic assistance to those who are unemployed through no fault of their own. A provision that not only does not further the Act’s purposes but actually undermines

\begin{footnotesize}
\textsuperscript{185} \textit{Id.} at 485-86.
\textsuperscript{186} \textit{Id.} at 489.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.} at 490.
\textsuperscript{189} \textit{Id.} at 491.
\textsuperscript{190} \textit{Id.} at 492.
\textsuperscript{191} \textit{Id.} at 489-90.
\textsuperscript{192} \textit{Id.}
\end{footnotesize}
them is not rationally related to the government’s interests as articulated in the Act. Furthermore, the impact of paying UCB in a situation like Hodory’s would not be great since such occurrences are exceptional. Likewise, the Court failed to demonstrate that the statute actually saves Ohio a significant amount of money or is needed to protect the fiscal integrity of its fund. A rational LDD would be a narrow one that is consistent with the stated purposes of the Act.

B. New York Telephone Co. v. New York State Department of Labor: States May Pay UCB To Those Voluntarily Unemployed Due to a Labor Dispute

New York permits strikers to receive UCB after a seven-week waiting period. In 1971, employees of Bell Telephone went on strike. New York Telephone Company eventually paid out over $49 million in UCB. The employer sued to have the New York statute declared to be preempted by the NLRA. The district court agreed with the employer that New York’s LDD violated the principle that states should remain neutral in labor disputes. The court believed that paying UCB to strikers is tantamount to forcing the employer to subsidize a strike.

The United States Court of Appeals for the Second Circuit reversed. The appellate court pointed out that Congress has been asked more than once to exclude strikers from receipt of UCB, but Congress has refused to do so. Hence, there is no evidence that Congress ever intended to preempt state laws like New York’s. The court opined that providing UCB to strikers after a seven-week period

196. Id.
198. Id. at 392 (excluding strikers was proposed to Congress in 1935, 1947, and 1969. Each time Congress refused to exclude strikers and left the matter to the states).
"represents a good-faith effort to strike a balance between neutrality... and the social and economic well-being of its citizens." The court recognized that neutrality does not consist of the state’s denial of UCB during the duration of a work stoppage but requires a state to strike a balance that attempts to avoid unduly punishing one party to a dispute. Clearly, to deny UCB to strikers involved in a legal work stoppage when the employer is not denied any kind of state benefits is not state neutrality. New York’s policy of distributing the costs of a work stoppage more equally on both parties is much closer to neutrality.

The Supreme Court affirmed the appellate court’s decision. The court stressed that the New York statute does not primarily involve labor-management relations. The Court also stressed that UCB are not a direct form of compensation from employer to employee but are public funds for public purposes. Therefore, the argument that paying UCB to strikers forces an employer to finance a strike is not accurate. The Court also rejected the employer’s argument that voluntariness is the key to UCB eligibility. The court explained that nothing supports the idea that Congress intended to restrict UCB eligibility to only the involuntarily unemployed. The Court observed that in the case of a purely federal program—the Railroad Unemployment Insurance Act—Congress expressly allows strikers to receive UCB. Finally, the Court stated that the mere fact that

199. Id. at 393 (discussing public policy expressed in N.Y. LAB. LAW § 501 (McKinney 1977)).

200. Schoenfield, supra note 32, at 866-67 (denial of benefits to strikers is not a neutral act because: (1) it places severe economic pressure on workers not to combine their economic strength in unions, (2) states offer many types of financial aid to business which are not affected by a business’s involvement in labor disputes, and (3) in most cases, employers are in a much better position to endure a strike. Hence, the doctrine of state neutrality, rather than requiring disqualification of strikers, requires states to pay UCB to strikers).


202. Id. at 534.

203. Id.

204. Id. at 534-35.

205. Id. at 537 n.28.

206. Id.

207. Id. at 545 n.44 (discussing 45 U.S.C. § 354).
receipt of UCB might alter the balance of power in a labor dispute is not sufficient to assume that Congress intended to preclude strikers from receiving UCB.\footnote{Id. at 546.}

This important case disposes of some of the most common rationales for the LDD: that UCB are intended only for the involuntarily unemployed, that payment of UCB to strikers forces employers to finance strikes, and that altering the relative power of the parties to a dispute is sufficient reason to preclude paying UCB to strikers. After New York Telephone it is particularly difficult to determine what policies actually do justify the LDD.

\section*{C. Lyng v. UAW: Anti-Union Animus and the Constitutionality of the LDD}

\textit{Lyng v. UAW}\footnote{485 U.S. 360 (1988).} is relevant to this discussion even though it involved food stamp eligibility for strikers, not UCB eligibility. \textit{Lyng} upheld a 1981 amendment to the Food Stamp Act\footnote{See 7 U.S.C. \textsection 2015(d)(3) (1988).} that excludes strikers from receiving food stamps.

For the purposes of this Article, the important part of \textit{Lyng} is Justice Marshall's dissent in which he states that the striker amendment impermissibly singles out strikers "for special punitive treatment."\footnote{\textit{Lyng}, 485 U.S. at 374-75 (Marshall, J., dissenting). For support of Justice Marshall's position, see Archibald Cox, \textit{Strikes, Picketing, and the Constitution}, 4 VAND L. REV. 574, 575 (1951) (briefly tracing the history of Congressional and judicial hostility to labor unions); see also JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) (many references illustrating the history of congressional and judicial hostility to the labor movement).} Justice Marshall assessed the three proffered justifications for the amendment, found them unconvincing, and concluded that the amendment's real purpose is to harm a politically unpopular group.\footnote{\textit{Lyng}, 485 U.S. at 385.}

The government argued that food stamps are not intended for those who voluntarily refuse to work.\footnote{Id. at 378.} Justice Marshall found this
argument unpersuasive because of the great disparity between the way strikers are treated and the way persons who voluntarily quit their jobs are treated.214 Justice Marshall pointed out that voluntary quitters are disqualified for only ninety days, while strikers are disqualified for the duration of the strike.215 Also, voluntary quitters have an opportunity to prove good cause existed and become immediately eligible.216 Strikers are not afforded the opportunity to show good cause no matter how unfair their employers' actions might have been.217

The government also argued that the amendment seeks to preserve the financial integrity of the fund.218 Justice Marshall replied that this argument can be used to justify the exclusion of any unpopular group because the exclusion will always save money.219 Justice Marshall quoted from another case that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating the resources."220

Finally, the government argued that the LDD is necessary to ensure state neutrality during a labor dispute.221 Justice Marshall noted that this argument was the only one relied upon by the majority to support its position.222 However, the neutrality argument rests on an inadequate understanding of the government's influence on a labor dispute.223 Businesses receive many benefits from the government, such as tax subsidies, government contracts, and government loans. None of these depends on the businesses' abstaining from involvement in a labor dispute.224 Justice Marshall concluded that if one views the relationship between business and government in its totality, the

214. Id. at 379.
215. Id.
216. Id.
217. Id.
218. Id. at 376.
219. Id.
220. Id. (quoting Plyler v. Doe, 457 U.S. 202, 207 (1982)).
221. Id. at 380.
222. Id.
223. Id. at 382.
224. Id.
withdrawal of food stamp eligibility from strikers can hardly be viewed as neutrality.\textsuperscript{225}

After rejecting the government's reasons for the striker amendment, Justice Marshall opined that the real reason for the striker amendment is antistriker animus.\textsuperscript{226} He concluded that the amendment could not even survive the rational basis test because a "bare Congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."\textsuperscript{227}

Justice Marshall's dissent concerned only food stamps, not UCB.\textsuperscript{228} Nonetheless, his discussion can be usefully applied to the UCB context.\textsuperscript{229} The same rationales offered by the government to explain the food stamp amendment are often used to justify the LDD. Just as antistriker animus can be viewed as the reason for denying food stamps to strikers, so can it also be viewed as the reason for denying UCB. It is time for a reconsideration of the LDD to determine if there is sufficient rationale for it.\textsuperscript{230} If a legitimate rationale does exist, then efforts should be made to narrow the wide scope of the LDD to minimize injustice and to further the stated remedial purposes of the Act.\textsuperscript{231}

IV. A RADICAL PROPOSAL

A. The Inherent Contradictions of the LDD and the New York Alternative

I propose that West Virginia adopt New York's LDD provision. Three reasons support this proposal. One is that the stated purposes of

\textsuperscript{225} Id.
\textsuperscript{226} Id. at 383.
\textsuperscript{227} Id. at 385 (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). Several commentators have argued that the rational basis review is so deferential as to be tantamount to no review at all. See, e.g., Ann H. Denney, Comment, Rational Basis Review Under the Equal Protection Clause—A Double Standard Review—City of Cleburne, Texas v. Cleburne Living Center, 55 Miss. L.J. 329, 336 (1985).
\textsuperscript{228} Lyng, 485 U.S. at 381.
\textsuperscript{229} Schoenfield, supra note 32, at 903 (Justice Marshall's arguments apply equally well to food stamps and UCB).
\textsuperscript{230} Id. at 905.
\textsuperscript{231} Id.
West Virginia’s Act and the LDD are inconsistent. Another is that the LDD violates constitutional rights to association, free speech, and equal protection. Finally, the LDD conflicts with federal labor law.

West Virginia’s Act has as its goals providing security to families of unemployed persons; guarding against the menace to health, morals, and welfare caused by unemployment; stimulating as great a purchasing power as possible; stimulating stability of employment; and allaying and preventing the debilitating consequences of poor relief assistance. The LDD undermines rather than furthers these goals. For example, if protecting the welfare of families during periods of unemployment is a legitimate goal, inflicting economic harm on the families of strikers conflicts fundamentally with one of the Act’s stated purposes. The purpose is to protect families. Spouses and children have no say whether a labor dispute will occur and how long it will last. Even if one were persuaded that strikers were truly voluntarily unemployed and that, therefore, denial of UCB is justified, there is still no reason to punish the families of strikers who are involuntarily enmeshed in a dispute in which they have no voice.

Another example of how the LDD conflicts with one of the Act’s stated purposes concerns the purpose of maintaining as great a purchasing power as possible despite unemployment. For instance, a strike in a small West Virginia community can be much more devastating financially to the community’s economy than a similar strike would be in a larger community. Providing UCB to strikers would help to keep the local economy from collapsing during a prolonged strike. As Justice Stephens pointed out in New York Telephone, UCB Acts are concerned with the public welfare, not with regulating labor-management relations. Because this is the case, strikers, in prolonged strikes at least, should receive UCB to promote the public welfare by preventing economic collapse in affected communities. Arguments to the contrary, such as the need to maintain state neutrality in a labor dispute, rely on the idea that the Act has as one of its goals the regulation of labor-management relations. Because this idea

has been rejected by the United States Supreme Court and because the stated purposes of the Act are to promote the public good, the state neutrality argument is not a valid reason for the LDD.

The inconsistencies caused by the LDD are compounded by the confusion caused by attempts to narrow the LDD so that it will conflict less with the purposes of the Act. For example, Roberts concerned the denial of collective bargaining exception to the LDD. The exception seeks to protect collective bargaining rights from being too greatly damaged by the LDD’s penalty on strikers. However, the LDD severely damages the only weapon labor has for enforcing the right to collective bargaining, the strike. The denial of collective bargaining exception is a weak attempt to repair the damage that the LDD does to collective bargaining. Furthermore, the denial of collective bargaining exception makes little sense when one considers that UCB is not denied to one who refuses to accept a position created by a labor dispute. Although strikers and those who refuse to take a position created by a strike are not in identical positions, the difference between these two groups hardly seems great enough to justify denying UCB to one group but not the other. Such inconsistencies are evidence that the LDD lacks a reasonable rationale and support the position that the LDD’s main purpose is to punish strikers for invoking their right to strike.

Roberts, discussed in part II, is an example of how the LDD’s lack of a rationale leads to wasteful litigation and inconsistent results. Roberts sets forth a standard for determining if a claimant meets the exception of being denied the right to engage in collective bargaining, a standard stricter than that for finding the existence of unfair labor practices under the NLRA. Roberts requires more than a lack of good faith bargaining. Instead, it requires a complete denial of the right to bargain. So, a provision that is supposed to be an

235. Id.
238. See discussion supra part II.
239. Roberts, 392 S.E.2d at 211.
240. Id.
exception to the LDD is now a message to employers that they can bargain in bad faith and incur no UCB liability as long as bad faith does not rise to whatever level would be needed to find that a complete denial of collective bargaining had occurred. In Roberts, the court simply ignored its own principle of liberal construction of remedial acts. Not only that, but the court construed the provision more narrowly than required by the language of the exception. Interpreting the exception as meaning that employers must have engaged in actions that would constitute a breach of good faith bargaining under the NLRA would not have conflicted with the exception's wording and would have accorded with the principle of liberal construction. Roberts' reading of the denial of collective bargaining exception also conflicts with federal labor law.241 Roberts weakens the incentive to bargain in good faith by adopting a test for UCB eligibility that is much stricter than the NLRA's.242 Roberts allows bad faith bargaining and other behavior that could amount to an unfair labor practice to undermine the key provision of the NLRA, namely, the duty to meet and confer over mandatory subjects of bargaining. Roberts not only permits employers to ignore their good-faith obligations, it penalizes employees who go out on strike in reaction to an employer's bad faith. It is difficult to comprehend what public policy is advanced by punishing the victims of bad-faith bargaining.

New York's law dealing with strikers and UCB eligibility is superior to those of other states. The New York LDD is a simple, fair one that can make unnecessary much of the lengthy litigation involved by having to examine closely the facts of a dispute and having to make difficult decisions over issues such as strike/lockout, voluntary/involuntary, good-faith bargaining/bad-faith bargaining, and so on.243 West Virginia's Act also requires other difficult decisions, such as whether a person is participating in, financing, or directly interested in the labor dispute; whether a person is a member of the grade or class of persons involved in the dispute; and whether a work stoppage has occurred.244 By contrast, New York's LDD provision

242. Id.
244. One commentator has pointed out that the typical LDD provision contains about
makes the intelligent assumption that after a strike has lasted for a long period, in this case, more than seven weeks, both parties should share the blame and the cost of the dispute.\textsuperscript{245} This realistic approach attempts to deal evenhandedly with both parties (real neutrality), and it does not require extensive intrusion into the bargaining process. Also, the New York provision does not unfairly require one party to shoulder a disproportionate share of the costs of a dispute. Furthermore, it does not require the employee to carry the burden of proving that she or he falls into an exception. As \textit{Roberts} revealed, proving that one meets an exception to the LDD might be very difficult. New York's LDD avoids, to a large extent, "the inherent conflict between the underlying policy of employment security law . . . and the policy underlying the labor dispute disqualification."\textsuperscript{246} Some writers have called this conflict impossible to resolve "because the notion of unemployment compensation for involuntary unemployment apparently cannot be accommodated under the express terms of the labor dispute disqualification."\textsuperscript{247} However, New York's LDD provision does overcome this conflict.

\textbf{B. The Constitutionality of the LDD}

Cases like \textit{Lyng} and \textit{Hodory} reveal that the Supreme Court does not accord much weight to strikers' constitutional arguments. \textit{Hodory}'s holding that the LDD affects no fundamental interest or protected class

\begin{itemize}
\item ten major questions, each one of which can lead to extensive litigation: (1) What constitutes a work stoppage? (2) What constitutes a labor dispute? (3) What causal relationship is required by the words "unemployment due to a labor dispute"? (4) What causal relationship is required by the words "stoppage of work which exists because of a labor dispute"? (5) What constitutes a "factory, establishment, or other premises"? (6) What constitutes "participating in" a labor dispute? (7) What constitutes " financing " a labor dispute? (8) What constitutes being "directly interested in a labor dispute"? (9) What constitutes membership in a "grade" or "class" of workers, some of whom are participating in, financing, or directly interested in a labor dispute? (10) What constitutes "separate branches of work which are commonly conducted as separate businesses in separate premises"?\textsuperscript{248} Williams, \textit{supra} note 33, at 339.
\end{itemize}

\begin{itemize}
\item 245. Eisenberg, \textit{supra} note 159, at 46.
\item 247. \textit{Id.}
\end{itemize}
and, therefore, laws that disqualify strikers from receiving government-
tal benefits should be judged by a rational basis review makes the chance of prevailing on constitutional grounds seem dim.\textsuperscript{248} Nonetheless, some persuasiveness remains in the argument that the LDD infringes on rights of free speech and association. I believe these constitutional arguments merit another look.

Some courts have been persuaded by constitutional attacks against the LDD. For example, in a three to zero decision, a district court found that Ohio's LDD disqualifying claimants who are unemployed because of a labor dispute involving a union over which the claimants had no control violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.\textsuperscript{249} The court found that such a broad exclusion did not bear a rational relationship to a legitimate state purpose because the claimants had no say at all over the strike.\textsuperscript{250} Therefore, the court observed, denying benefits to the claimants in no way serves the state interest of not subsidizing a strike.\textsuperscript{251} Unfortunately, the United States Supreme Court reversed and asserted that the Ohio LDD was rationally related to the fiscal integrity of the fund and the financial concerns of employers.\textsuperscript{252}

The district court in \textit{Lyng} was persuaded that the food stamp striker amendment was unconstitutional.\textsuperscript{253} The court found that the denial of food stamps interferes with the right to associate with one's family and with one's fellow union members.\textsuperscript{254} The amendment also, according to the court, interferes with the strikers' right "to express

\begin{footnotesize}
\begin{enumerate}
\item See Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 477, 489 (1977). For arguments that the First Amendment should apply to labor picketing, see Cox, \textit{supra} note 211, at 591-602.
\item Hodory v. Ohio Bureau of Employment Servs., 408 F. Supp. 1016, 1022 (N.D. Ohio 1976), \textit{rev'd}, 431 U.S. 471 (1977) (unemployed steel worker, a USWA member, disqualified by Ohio LDD because his unemployment occurred as a result of a coal miners' strike by the UMWA).
\item Id.
\item Id.
\item 431 U.S. at 471-72.
\item Id. at 1239.
\end{enumerate}
\end{footnotesize}
themselves about union matters free from government coercion." Interestingly, the court also suggested that strikers should be considered a protected class because historically they have been discriminated against as an unpopular group. As mentioned above, Justice Marshall believed that the striker amendment to the Food Stamp Act was a violation of equal protection.

Perhaps the major obstacle to constitutional arguments against the LDD is the longstanding doctrine that a decision by the government not to subsidize a right is not an infringement of the right. This is not the place for a lengthy discussion of constitutional law. It should be noted, however, that this doctrine has been vigorously attacked. For example, James Atleson has written persuasively about the negative effects on free speech resulting from the massive concentration of wealth in the hands of a relatively few large businesses. This concentration of capital results in the inability of many viewpoints to find adequate means of dissemination. Voices, such as those of labor unions, are drowned out by the mainstream media which is greatly influenced by massed capital. If such drowning out of alternative views is to be avoided, then the doctrine that the state has no duty to expend public funds to facilitate the right to free speech must be modified. To think that denying UCB to strikers does not seriously impinge on First Amendment rights strains credulity. In many cases economically weak groups, such as labor unions, do need governmental assistance to have their message heard, especially in an environment where massed capital can afford to saturate the public with its message.

255. Id.
256. Id. at 1240. Justice Marshall later suggested that stricter scrutinizing should apply to legislation impinging on strikers' rights. See 485 U.S. at 375 n.1.
257. See supra notes 207-29.
258. Lyng, 485 U.S. at 368.
259. James B. Atleson, Reflections on Labor, Power, and Society, 44 MD. L. REV. 841 (1985); see also Lesser, supra note 21, at 171-76.
260. Atleson, supra note 259, at 856.
261. Id. at 857.
262. Id. at 870 (Atleson writes that the power of unions has always been exaggerated with the result that the law is interpreted as if no imbalance of power exists between labor and capital).
Charles Reich has written eloquently about the need to protect individuals from the massive power of modern corporations. Reich argues that our Constitution is unbalanced because our courts interpret the law in ways that privilege organized power. Reich believes that we need a new constitutional theory that approaches rights not merely as the right to be left alone by the state but as sources of empowerment. Reich argues that current constitutional doctrine undervalues individual rights as it overvalues state interests. In this era, the powerful administrative state has such influence over our lives that constitutional rights must be affirmatively supported lest they be forever lost.

Considering Reich's views in connection with the constitutionality of the LDD, one can see that the doctrine that the state has no obligation to affirmatively aid the enjoyment of constitutional rights fails to address modern reality. Cases discussing the LDD are remarkable in their privileging of the state's interest, for example, the interest in neutrality during a labor dispute, over the interests of strikers to associate with each other and to engage in free speech. Our country is a system of huge organizations which monopolize "the ways of making a living and the ways of fulfilling our needs." In such a system the lone individual is powerless. Empowering individuals so that they can exercise their individual rights must be a concern of the government if such rights are to be meaningful. Denying benefits to strikers who are engaged in legal activity is a serious impingement of the right to associate with others and to engage in free speech.

C. The LDD and Federal Policy Favoring Collective Bargaining

The third reason that New York's LDD provision is superior is that it is more consistent with the longstanding federal policy in favor

264. Id. at 1411-12.
265. Id. at 1416.
266. Id. at 1430.
267. Id. at 1430-32.
268. Id. at 1435.
269. Id. at 1441.
not only does the denial of UCB impinge on the constitutional rights of strikers, it damages the equality of economic power that is the basis of collective bargaining. Many years ago the Supreme Court noted that the presence of effective economic weapons is a "necessity for good-faith bargaining between parties." The Court observed that the presence of effective economic weapons serves the purpose of encouraging negotiation.

A union’s basic economic weapon is the strike. If government policies, such as the LDD, make the strike so impractical that it is no longer an effective weapon, then collective bargaining itself becomes damaged beyond repair. Many scholars believe that the strike already is an ineffective weapon.

The inequality between employers and employees is great. Strike funds are seldom adequate to support long strikes. Individual workers seldom have the personal resources to last in a prolonged strike. This is especially true in the 1990s because real wages have been falling since the 1970s. As one court put it, strikers might be able to pay their debts for one month with savings, but a lack of income for more than two months would create devastating

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271. Id. at 496.
273. HECKSCHER, supra note 272, at 30. As one court noted, the combination of low strike benefits, ineligibility for UCB, and the fact that most people have only modest savings compel one to conclude that paying UCB is conducive to achieving state neutrality. Doing so would help equalize the bargaining positions of the parties. Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir.), cert. denied, 414 U.S. 858, 879 (1973). Achieving greater equality of bargaining power is one of the NLRA’s stated purposes. 29 U.S.C. § 151 (1988).
hardships. Unions themselves are suffering from declining membership and, hence, from dwindling resources to sustain a strike.

The courts have also done much to harm the union movement. The first major decision to limit the Wagner Act's efficacy held that employers have a right to hire permanent replacements during a strike. Other decisions vastly curtailed the number of topics which are mandatory bargaining topics. Also, unions may not fine members who desert the strike and return to work. Recently, the NLRB ruled that unions may not require persons who quit the strike to reimburse the union for strike benefits paid to them. In an action brought under the Railway Labor Act, the Supreme Court recently handed down a decision that allows employers to retain employees who deserted a strike even if doing so means denying reinstatement to employees with more seniority once the strike has ended.

In addition to the harm caused by the courts, many employers during the 1980s proved to be willing to commit thousands of unfair labor practices to destroy unions. For example, charges of discriminatory discharge for union-related activities soared to approximately 16,000 per year in the early 1980s. This willingness to illegally discharge employees for union activities creates a climate of fear. One survey found that seventy percent of nonunion workers believe that many employers would discharge or otherwise mistreat employees for engaging in union activities.

276. Keeran & Tarpinian, supra note 272, at 463.
277. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (overturning NLRB decision that employer had committed an unfair labor practice by not rehiring five strikers).
278. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (subjects which comprise the core of entrepreneurial control are not mandatory bargaining subjects).
283. Weiler, supra note 169, at 1020.
284. Id. at 1027.
In this legal climate, unions can seldom manage a credible strike threat. Although some might applaud the decline of the strike, one must remember that the entire collective bargaining process depends on a union’s ability to wage a successful strike. If collective bargaining is to survive, legal reforms to strengthen labor’s position must be made. One of these reforms should be to pay UCB to those engaged in a legal strike.

New York’s LDD provision is more consistent with the federal policy favoring collective bargaining than other states’ provisions are. New York’s LDD provides for more equal treatment of strikers and employers by refusing to fix fault on one of the parties to a dispute. Therefore, New York’s Act achieves a greater degree of neutrality by trying to avoid favoring either party to a dispute.

New York’s LDD also comports better with labor law’s premise that both parties to a labor dispute must have effective economic weapons to encourage good-faith bargaining. New York’s LDD provides economic incentives to both parties to resolve their dispute. Strikers must undergo the hardship of a seven-week period of disqualification before becoming eligible for UCB. Even after the seven weeks, strikers will still have an incentive to bargain because UCB only provides partial wage replacement. Furthermore, all acts provide that benefits cease after a specified period. Knowing that UCB will cease in a relatively short period of time provides an incentive to resolve the dispute before UCB terminates. On the other side, employers have an incentive to avert strikes of longer than seven weeks so they can escape liability for UCB payments. Hence, New

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286. Id.
287. Robert Stern et al., Government Transfer Payments and Strike Activity: Reforming Public Policy, 41 LAB. L.J. 505, 510 (1990). (New York’s LDD is the most desirable in light of public policy.)
288. Eisenberg, supra note 159, at 50.
289. Id.
290. In West Virginia, UCB may not exceed 66 2/3% of the state’s average weekly wage. W. VA. CODE § 21A-6-10 (1989).
291. In West Virginia, UCB ceases after twenty-six weeks. Id.
York's LDD achieves the neutrality that other states' LDDs do not because state power is distributed equally among the parties.

D. Possible Objections to Adopting New York's LDD Statute

It is important to note that New York's LDD has not resulted in a greater frequency of strikes. New York's Act is also much easier to administer because courts and administrative agencies do not have to make very difficult determinations such as whether a dispute is a strike or a lockout, whether a person is voluntarily unemployed, whether a person is participating in, financing, or directly interested in a strike, and many others.

Of the possible objections that could be raised against West Virginia's adopting New York's LDD, the two strongest probably are that an employer should not have to subsidize a strike and that the LDD is needed to preserve the fund's fiscal integrity. Regarding the first objection, one should recall Justice Stewart's words in *New York Telephone* that UCB are not a form of direct compensation from the employer to the striker. UCB come from a public fund to effect a public purpose. Payment is not made by the employer to discharge any liability but to carry out a policy of social betterment. Secondly, the New York LDD recognizes that a strike that lasts for a relatively long period cannot be assumed to be solely the employees' fault. Hence, the employer's alleged "financing" of the dispute results at least in part from its own intransigence as much as the employees'. West Virginia's LDD unjustly imputes fault to strikers despite judicial statements about neutrality. If one accepts the proposition that strikers are voluntarily unemployed, no reason exists to reject the converse: By refusing to reach an agreement, employers themselves voluntarily prolong the dispute and, therefore, voluntarily "choose" to pay UCB. New York's LDD avoids useless inquiries into fault by presuming that after seven weeks, both parties share the fault. Furthermore, the public poli-

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292. Stern et al., *supra* note 287, at 509.
293. *Id.* at 510.
cy purposes of UCB outweigh an employer’s financial interests. UCB attempt to preserve the welfare of families, maintain levels of purchasing power as far as possible to protect the community, protect the health and welfare of the public, and promote employment stability.

There are yet other responses to the first objection. Most strikes do not last eight weeks or more. Hence, paying UCB to strikers under New York’s LDD would be a rare event. As mentioned above, empirical evidence indicates that New York’s LDD does not increase the length of strikes.295 So, if West Virginia were to adopt New York’s LDD, the increase in payments of UCB to strikers would not be great. Also, making employers liable for UCB after the seventh week of the strike should reduce the incidence of strikes. “Joint Cost Theory” provides that as the costs of strikes rise, the more likely it is that parties will develop improved bargaining procedures to avoid strikes.296 In this way, requiring payment of UCB to strikers encourages employers to settle quickly, thus promoting the main goal of labor policy—industrial peace. Finally, all Acts have built-in limits on liability. Benefits are only a fraction of real wages, and UCB terminate after a short time (twenty-six weeks in West Virginia).297

The second objection concerns the fiscal integrity of the unemployment funds. Some of the above arguments also apply to this objection. Strikes do not usually last eight weeks or more. The important public policies of the Act should be effectuated when at all possible due to the individual and communal harms caused by unemployment. New York’s LDD provision promotes industrial peace and might well lower the incidence of strikes. The state has a great interest in maintaining levels of purchasing power and in maintaining employment stability.

A further response to the second objection is that collective bargaining is the key to federal labor policy and effective economic weapons are essential.298 Unions are presently in the weakest position.

295. Eisenberg, supra note 159, at 46.
296. Shadur, supra note 34, at 298.
297. Stem et al., supra note 287, at 509.
298. Id. at 508.
that they have been in since before the Wagner Act. Unions are so vulnerable that a failed strike is devastating. The strikers put everything on the line, and the risk of failure is great. Indeed, commentators have said that the strike weapon has become so weak that it has become employers’ most effective weapon.\textsuperscript{299} Employers often deliberately provoke strikes so that they may destroy unions.\textsuperscript{300} If the strike is to remain labor’s only true weapon, then there must be legal reforms to make this weapon effective again. I argue that one of these reforms should be adoption of LDDs identical to New York’s to help put the disputants on more even ground. Otherwise, collective bargaining will speed onward to its demise and the dream of workplace democracy will vanish into history.

V. CONCLUSION—
THE PRESENT SYSTEM DOES NOT MAKE SENSE

In this Article I have argued that West Virginia’s LDD lacks an underlying rationale to justify it. Attempting to make some sense of an Act that undermines its own beneficent goals by singling out strikers for special treatment, West Virginia’s courts repeatedly reach decisions which are inconsistent and which conflict with federal labor policy. Worse, they reach decisions that result in considerable injustice.\textsuperscript{301} Recent cases like \textit{Roberts} continue to yield unjustifiable results and lay the foundation for future injustice. The LDD requires courts to make very difficult decisions regarding the merits of the parties’ positions. The LDD implies by its existence that striking itself is a form of fault. The LDD’s existence cannot otherwise be explained adequately. Imputing fault to strikers is an intrusion of state courts into federal labor policy.\textsuperscript{302}

New York’s LDD offers a fairer alternative. It does not impute fault to one party only. It is consistent with the Act’s goals of alleviating hardship resulting from unemployment. At the same time, New

\begin{footnotes}
\item[299.] HECKSCHER, \textit{supra} note 272, at 30.
\item[300.] \textit{Id}.
\item[301.] \textit{Id}. at 61.
\item[302.] \textit{Id}. at 62.
\end{footnotes}
York's LDD evenhandedly distributes the costs of engaging in a prolonged dispute and, therefore, encourages settlement and industrial peace.

I agree with the writers who concluded that the present "system does not make sense." A system that imposes great hardships on the families of persons involved in labor disputes conflicts with the reasons for the Act's existence. As one article on the LDD puts it, "It is time for reform."

303. Stearn et al., supra note 287, at 511.
304. Id.