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Roger C. Hartley

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RECONCEIVING THE ROLE OF SECTION 8(B)(1)(A)—1947-1997: AN ESSAY ON COLLECTIVE EMPOWERMENT AND THE PUBLIC GOOD

*Roger C. Hartley**

I am confident that history will record the Taft-Hartley Act as a great forward step in labor relations law. I am proud . . . of the part I played in its development and enactment.**

From its enactment over President Truman's veto, and for many years thereafter, the debate surrounding the Taft-Hartley Act was sharp but relatively contained. Partisan energy focused on whether one should celebrate the balance Taft-Hartley returned (brought) to labor law or whether to lament its bias, its antiunion roots, and its invasion of workers' fundamental right to self-organization.

Today, the debate has decidedly shifted. Criticism of the New Deal labor relations system itself has become ubiquitous. On the right, the Wagner Act is seen as a "massive 'pro-labor' invention" that needs to be repealed because it grants unions the power to coerce both employees and employers into involuntary associations with unions.¹ On the left, the assessments are, if anything, even less generous: that the Wagner Act provides workers a "counterfeit liberty," merely the "opportunity to participate in the construction of their own subordination."² To be sure,

* Professor of Law, Columbus School of Law, The Catholic University of America. © 1997 Roger C. Hartley.

** FRED A. HARTLEY, JR., *OUR NEW NATIONAL LABOR POLICY: THE TAFT-HARTLEY ACT AND THE NEXT STEPS* 138 (1948). There is no known familial relationship between Congressman Hartley and the author of this essay.

1. Holman W. Jenkins, Jr., *Free Ron Carey! Repeal the Wagner Act!*, WALL ST. J., Oct. 14, 1997, at A23.

2. CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 326-28 (1985); see also JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 42-43 (1983) (discussing one view of the New Deal as representing "a series of stratagems designed to strengthen and revitalize American capitalism"); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 268-70 (1978) (discussing how judicial interpretation of labor law channels industrial conflict in ways that repress workers' aspirations for

there remains a solid moderate core. Most workers' advocates can so be situated. They emphasize the "unprecedented protection" the Wagner Act has provided workers and warn that its contributions should not be dismissed too hastily.³ But even critics supportive of labor law's contribution to the social good warn that the Act is badly in need of reform, for without reform, collapse of the collective bargaining system is a real possibility within the coming decade.⁴

In short, across the political and ideological spectrum, the question increasingly being asked is whether the New Deal labor relations system, of which Taft-Hartley is an integral part, can be made to serve the interests of management, unions, workers, and the public interest as we enter the post-industrial twenty-first century? The academic and professional journals overflow with remedial suggestions.⁵ Yet nothing happens as

equality); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1544-45 (1981) (stating that the theory of "joint sovereignty," the foundation of postwar labor law policy, is illusory).

3. Craig Becker, *Individual Rights and Collective Action: The Legal History of Trade Unions in America*, 100 HARV. L. REV. 672, 684, 687 (1987) (reviewing CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985)) (stating that "[t]he Wagner Act was of signal importance to the labor movement, notwithstanding . . . extended argument[s] to the contrary, for it gave workers ground to contest the arbitrary power exercised by both government and employers against unions and labor organizers"); Russell Hollander, *Book Review*, 11 N.Y.L. SCH. J. HUM. RTS. 421, 440 (1994) (reviewing WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991)) (arguing that the author's "zeal to demonstrate that the courts played a dominant and motivating role in Labor's decision to abandon legislative reform in favor of private action . . . mistakenly assumes that the American working class has suffered as a result").

4. William Gould, currently the chair of the National Labor Relations Board (NLRB), has been referred to as "an utterly mainstream, accomplished, 'establishment' labor law professor." Joel Rogers, *U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 100-01 n.9 (1993). Gould has argued, for example, that the current system needs reform if we are to reverse the erosion of worker dignity and job security and provide for the continuing efficacy of the collective bargaining process. See WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 9 (1993); Rogers, *supra*, at 100-01 n.9. Others, also fairly situated in the "mainstream," have sounded the alarm that the "the NLRA has become an antiquated and relatively meaningless statute." Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616, 1643 (1995) (reviewing WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* (1993)); see also Rogers, *supra*, at 97 (noting that while the New Deal system of labor law "may have been well-suited to the industrial society of the 1930s-1950s [it has failed because it] has not adjusted to the 'new economic realities' of the 1990s").

5. The quest for answers has become so overwhelming during the past 15 years that one author has offered that today "[i]t is almost quaint to search for causes explaining the steep decline in the fortunes of the American labor movement at the close of the twentieth century." Christopher D. Cameron, *How the "Language of the Law" Limited the Ameri-*

the union density rate among private sector nonagricultural employees continues to slip. It now teeters at 10.2% with responsible estimates warning that it could drop to 7%.⁶ There are even respectable estimates of a drop to 5% by the end of the century.⁷

The Taft-Hartley section 8(b)(1)(A)⁸ union discipline cases are linked to the impending collapse of collective bargaining in two ways. At one level, they have helped cause it by denying union majorities an important tool to enforce solidarity during economic disputes with employers and thereby have contributed to the loss of worker empowerment. At another level, the union discipline cases reflect certain shifts in national sentiments with respect to the role of unions and collective bargaining in general and the accommodation of collective bargaining to the competing claims of individuals and employers in particular. This paper is about both linkages.

I. THE TRANSFER OF BARGAINING POWER THROUGH NLRB REGULATION OF UNION DISCIPLINE

Labor policy incorporates the well-recognized tension between an employee group's right to choose an exclusive bargaining representative and the individual's right to refrain from participation in the group.⁹ Thus,

can Labor Movement, 25 U.C. DAVIS L. REV. 1141, 1141 (1992) (reviewing WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991)). For a summary by the most recent blue ribbon presidential commission assembled to look into these questions, see U.S. DEP'T OF COMMERCE & U.S. DEP'T OF LABOR, *FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 1-27* (1994) (Dunlop Commission Report).

6. See Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 632 n.232 (1992) (citing the work of Leo Troy).

7. See Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 400 (1992) (citing Daily Lab. Rep. (BNA) No. 241, at A-1 (Dec. 18, 1989)); see also Rogers, *supra* note 4, at 100 n.6 (stating that the "United States now approximates the 'union free' environment favored by professional anti-unionists [and] on a continuation of current trends [union density] should fall to about 5 percent by the end of the decade").

8. 29 U.S.C. § 8(b)(1)(A) (1994). This section provides:

It shall be an unfair labor practice for a labor organization or its agents— (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

Id.

9. See *id.* § 157. Section 157 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for . . . mutual aid or protec-

when a union membership majority disciplines an offending member for violating a union rule, the question arises whether this violates section 8(b)(1)(A) of Taft-Hartley.

A. *The Modest Origins of Section 8(b)(1)(A)*

Section 8(b)(1)(A)'s legislative history demonstrates the section was added as a floor amendment by a small group in the Senate to quell certain union organizing tactics—particularly “physical violence and intimidation, including mass picketing in connection with an organizational strike.”¹⁰ This was the conclusion of Professor Archibald Cox in his influential 1947 article entitled *Some Aspects of the Labor Management Relations Act, 1947*.¹¹

Section 8(b)(1)(A)'s legislative history surely supports Professor Cox's conclusion that it was designed to outlaw certain union conduct employed to recruit new members and to quell violence against persons wishing to cross a union picket line to work. It was not enacted to regulate union internal affairs. The account of the section's legislative history has been told elsewhere and well.¹² A short version is added here, as

tion, and shall also have the right to refrain from any or all such activities.

Id.

10. Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 33 (1947) (Part One) [hereinafter Cox, Part One]; Archibald Cox, *Some Aspects Of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 292 (1947) (Part Two) [hereinafter Cox, Part Two].

11. See Cox, Part One, *supra* note 10, at 1; Cox, Part Two, *supra* note 10, at 274.

Professor Cox predicted that “Section 8(b)(1) may plunge the Board into a dismal swamp of uncertainty.” Cox, Part One, *supra* note 10, at 33. Many have cited this forecast. See Kevin C. Marcoux, Comment, *Section 8(b)(1)(A) from Allis-Chalmers to Pattern Makers' League: A Case Study in Judicial Legislation*, 74 CAL. L. REV. 1409, 1411 n.8 (1986) (collecting authority). The uncertainty Professor Cox observed in section 8(b)(1)(A)'s legislative history needs to be understood. The section's Senate sponsors expressed varying opinions regarding which union organizing tactics needed legal control. It was these differences of opinion that Professor Cox believed threatened to create a “dismal swamp of uncertainty” for the NLRB. Because the new section “follows the familiar phraseology of Section 8(a)(1)” and because “its sponsors repeatedly explained that the new section would make it unfair for labor organizations to engage in activities which were unfair when engaged in by employers,” Professor Cox argued that the full intent of the sponsors was unclear regarding which organizing tactics were now to be unlawful. Cox, Part One, *supra* note 10, at 30-31 & n.126 (citing legislative history). As Professor Cox stated, “[i]ts vagueness alone, not to mention the broad interpretations put upon it during the debates in Congress, encourages the filing of great numbers of charges as weapons in fighting the unionization of a plant.” *Id.* at 33 (emphasis added). Of particular concern were references in the legislative history that union promises or false statements made during an organizing campaign might be found to violate the new section. It was only in this respect that the sponsors were unclear regarding section 8(b)(1)(A)'s sweep. See *id.* at 32-33.

12. See Marcoux, *supra* note 11, at 1411-15 & n.8 (collecting authority); cf. James B. Atleson, *Union Fines and Picket Lines: The NLRA and Union Disciplinary Power*, 17

Appendix A to this essay, for those who may be unfamiliar with it or wish to refresh their recollection.

B. Judicial and Administrative Abstinence Until 1964

During the first seventeen years following the enactment of section 8(b)(1)(A), the NLRB adhered to the limits its sponsors had conceded so readily and often. In 1948, the Labor Board applied the section to curb union violence against certain persons wishing to cross a union picket line established as part of a union economic strike.¹³ In 1949, in *International Typographical Union (American Newspaper Publishers)*,¹⁴ the NLRB reviewed that legislative history in a case posing the issue of whether a union violates section 8(b)(1)(A) by threatening members with summary expulsion for refusing to engage in behavior violative of the duty of good faith bargaining.¹⁵ Agreeing that the section created no governmental authority to invade the internal affairs of unions, the Board stated that "Congress unmistakably intended to, and did, remove the application of a union's membership rules to its members from the proscriptions of Section 8(b)(1)(A), irrespective of any ulterior reasons motivating the union's application of such rules or the direct effect thereof on particular employees."¹⁶ Many other NLRB cases decided during the decade following 1947 acknowledged the unions' freedom of self-regulation to expel, even when expulsion threatened important labor policies.¹⁷ So clear were the NLRB's decisions in this regard that in 1954, the NLRB General Counsel refused even to issue a complaint in a case involving a union suspension of several members for filing unfair labor practice charges against the union and the employer. The Board's Gen-

UCLA L. REV. 681, 711 (1970) (arguing that "confident reliance on . . . [section 8(b)(1)(A)'s] legislative history is not warranted for any position").

13. See *International Longshoremen's & Warehousemen's Union (Sonset Line and Twine Co.)* 79 N.L.R.B. 1487, 1516 (1948).

14. 86 N.L.R.B. 951 (1949), *enforced*, 193 F.2d 782 (7th Cir. 1951), *aff'd on other grounds*, 345 U.S. 100 (1953).

15. See *id.* at 956-57.

16. *Id.* at 957 (emphasis added). In *American Newspaper Publishers*, the Board used the cited text to explain its 1948 decision in *National Maritime Union (The Texas Co.)* 78 N.L.R.B. 971, 982 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949) (finding no section 8(b)(1)(A) violation to attempt, through collective bargaining, to obtain an unlawful closed shop agreement).

17. One commentator, reviewing those early cases, has concluded that they demonstrate the NLRB's recognition "that use of section 8(b)(1)(A) as a free-floating mechanism to enforce other policy concerns reflected in the Act is inappropriate [These cases permit] a union . . . to cause its members to violate a collective bargaining agreement, respect an illegal secondary picket line, or respect the illegal picket line of another union." Marcoux, *supra* note 11, at 1417-19 & nn.33, 37 (collecting cases).

eral Counsel reasoned that the "Act permits [a] union to take any action it desires respecting acquisition or retention of membership."¹⁸

As recently as 1964, the NLRB held to the view that section 8(b)(1)(A) made "unlawful the use of force, violence, physical obstruction, or threats thereof to accomplish certain purposes associated with organizational activity and strikes."¹⁹ As the Board concluded in upholding a union's right to enforce fines judicially against members who exceeded a union-imposed production quota, whatever else section 8(b)(1)(A) may prohibit, "internal union disciplines were not among the restraints to be encompassed by the section."²⁰

During this period, the Supreme Court in two cases, found that non-violent union organizing tactics violated section 8(b)(1)(A).²¹ Both turned on legislative history demonstrating a congressional intent "to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights."²² But as the Court subsequently explained in *NLRB v. Allis-Chalmers Manufacturing Co.*:

However apposite this parallel might be when applied to organizational tactics, it clearly is inapplicable to the relationship of a union member to his own union. Union membership allows the member a part in choosing the very course of action to which he refuses to adhere, but he has of course no role in employer conduct, and nonunion employees have no voice in the affairs of the union.²³

In *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*,²⁴ the Court concluded that section 8(b)(1)(A) "is a grant of power to the

18. Case No. 1059, Admin. Rulings of the NLRB Gen. Counsel, 35 L.R.R.M. (BNA) 1167, 1167 (1954). The charges arose out of an agreement between the union and employer resulting in some employees being assigned undesirable job duties. See Marcoux, *supra* note 11, at 1417-18.

19. Local 283, UAW (Wisconsin Motor Corp.), 145 N.L.R.B. 1097, 1100 (1964), *enforced, sub nom. Scofield v. NLRB*, 393 F.2d 49 (7th Cir. 1968), *aff'd*, 394 U.S. 423 (1969); see also *Minneapolis Star & Tribune Co.*, 109 N.L.R.B. 727, 729 (1954) (finding that a non-judicially enforced \$500 fine for refusing to perform picket duty did not violate section 8(b)(1)(A) because "[s]ection 8(b)(1)(A) precludes any such interference with the internal affairs of a labor organization").

20. *Local 283, UAW*, 145 N.L.R.B. at 1100.

21. See *ILGWU v. NLRB*, (Bernhard-Altman Texas Corp.), 366 U.S. 731, 733 (1961); *Capital Serv., Inc. v. NLRB*, 204 F.2d 848, 853 (9th Cir. 1953), *aff'd*, 347 U.S. 501 (1954).

22. *ILGWU*, 366 U.S. at 738; see also *Capital Serv.*, 204 F.2d at 852.

23. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 190-91 (1967).

24. 362 U.S. 274 (1960).

Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes.”²⁵ And just days prior to the twentieth anniversary of the section’s enactment, the plurality opinion in *Allis-Chalmers* concluded that “the repeated refrain throughout the debates on [section] 8(b)(1)(A) and other sections [was] that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union’s internal regulations to affect a member’s employment status.”²⁶

C. Section 8(b)(1)(A)’s Transformation

By the late 1960s, national labor policy shifted to a very different view of government’s role, in several cases rejecting a literalist approach to section 8(b)(1)(A).²⁷ *NLRB v. Industrial Union of Marine & Shipbuilding Workers*²⁸ was an expulsion case—not a fine case. The Court interpreted its previous decision in *Allis-Chalmers* as “assur[ing] a union freedom of self-regulation where its *legitimate* internal affairs are concerned.”²⁹ The next term, in *Scofield v. NLRB*,³⁰ the Court upheld the discipline but reasoned that proper analysis entails considering the object of the rule, not just the means of its enforcement, so that it neither “invades nor frustrates an overriding policy of the labor laws.”³¹

25. *Id.* at 290; *see also* *International Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 701-03 (1951) (stating that “[t]he words ‘induce or encourage’ [in section 8(b)(1)(A)] are a ‘restricted phrase’ amount[ing] to a ‘threat of reprisal or force or promise of benefit’”).

26. *Allis-Chalmers Mfg.*, 388 U.S. at 195.

27. *See* *Scofield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968).

28. 391 U.S. 418 (1968).

29. *Id.* at 424 (emphasis added). In *Marine & Shipbuilding Workers*, the Court held that a union may not expel a member for filing an unfair labor practice charge with the NLRB prior to exhausting internal union procedures. *See id.* at 421, 426. By 1968, the Board’s view on this question was clear: a union may not discipline a member for failing to exhaust internal union appeal procedures prior to filing an unfair labor practice charge—whether by fine or expulsion. *See Cannery Workers Union (Van Camp Sea Food Co., Inc.)*, 159 N.L.R.B. 843, 845 (1966), *enforced*, 396 F.2d 955 (9th Cir. 1968) (expulsion); *Local 138, Int’l Union of Operating Eng’rs*, 148 N.L.R.B. 679, 682 (1964) (fines). Relying on neither the text of the Act nor its legislative history, but without abandoning any of its previous holdings or rationalizations in prior cases, the Board simply held that the freedom of self-regulation assured to unions by section 8(b)(1)(A) is trumped if discipline “run[s] counter to other recognized public policies . . .” *Id.*

30. 394 U.S. 423 (1969).

31. *Id.* at 429. The Court then added, in dicta, additional limitations that had not previously received prominence in its union discipline cases: whether the rule was (1)

In retrospect, it seems clear that some government activism in overseeing the purposes of union discipline was probably inevitable. First, in 1947, Congress assured employees the right to refrain from union activities and prohibited union actions restraining that right. Moreover, once the Court in *Allis-Chalmers* endorsed the NLRB's view that unions may nevertheless participate in the government's coercive power by enforcing its fines judicially, much of the game was over: government really had no choice but to oversee the reasons for the discipline it was being asked to enforce. In addition, notwithstanding the literal privilege given unions in the section 8(b)(1)(A) proviso to establish their own rules for the "acquisition or retention of union membership," it was unrealistic to expect that the NLRB and the Court would stand by silently if unions expelled members for reasons highly prejudicial to national labor policy. As early as 1964, Board Member Leedom had filed a dissenting opinion in which he expressed that view. Labor law, he argued, should not give unions a green light to discipline members for testifying at an NLRB hearing, "filing a decertification petition, . . . refusing to give the union a copy of any statement made to a Board agent, . . . giving a statement to a Board agent without the union's approval, . . . refusing to participate in unlawful union activity, . . . working with [black] employees, . . . [or] filing a grievance not approved by the union [laws]"³²

By 1969, after *Scofield*, the NLRB and the Court, without the benefit of a legislative amendment of section 8(b)(1)(A), had rearranged American labor policy to limit the union majority's authority to quell disloyalty within its ranks. With the upgrade of section 8(b)(1)(A) came a promotion for the NLRB. The Board now would be a major player whose most important task would be determining whether union discipline "invades or frustrates . . . overriding" labor policies.

properly adopted; (2) reasonably enforced; and (3) enforced only "against union members who are free to leave the union and escape the rule." *Id.* at 430. The sanction imposed also is important, of course, if it affects the employees' job rights. *See id.* at 428.

In *Scofield v. NLRB*, the Court considered whether a union may assess judicially enforced fines and suspensions on members who violate a bylaw limiting the amount of production pay members may draw when performing piece-work. *See* 394 U.S. at 425. The bylaw was enacted to combat the threat to members of an employer-instituted production speed-up. *See* John Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L. REV. 187, 193 (1969) (finding the discipline in *Scofield* to be valid).

32. Local 283, UAW (Wisconsin Motor Corp.), 145 N.L.R.B. 1097, 1112 n.37 (1964) (Member Leedom dissenting).

II. ALTERING RELATIVE BARGAINING POWER THROUGH THE CONTAINMENT OF UNION DISCIPLINE

During the thirty years since the NLRB and the Supreme Court reconceived section 8(b)(1)(A), the Board has decided hundreds of union discipline cases. Appendix B, entitled *The Contemporary Reading of Section 8(b)(1)(A) Regulation of Union Discipline*, is provided for the reader who is unfamiliar with this body of law or wishes to refresh his recollection. It summarizes some of the more important applications of the NLRB rules governing union discipline.

Some cases, such as *Marine & Shipbuilding Workers*, develop from a union's desire to resolve disputes internally prior to members seeking relief from government. In others, union majorities occasionally discipline members for various behavior associated with internal union political activities. Most union discipline cases occur when unions use discipline to gain leverage against employers to advance workers' collective interests.³³ Examples are bans on crossing a picket line or assisting employers attempting to discipline co-workers, or discipline for attempts to eliminate the union through filing a decertification election petition or a petition in behalf of a rival union. When discipline is used to gain leverage, as just described, interference by the state poses the greatest risk of diminishing workers' collective strength.

The 1980 case, *GAIU Local 13-B (Western Publishing Co.)*,³⁴ is a good example. There, a union attempted to gain bargaining leverage by disciplining members who performed compulsory overtime. The ban was enacted by a majority vote of the members of the local union at a special meeting of the local's 490 members.³⁵ The tactic was totally effective in

33. For example, *Allis-Chalmers*, in the union fined members who had crossed its picket line established during a strike against the employer. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 177 (1967). The lawyer who argued the union's case in *Allis-Chalmers* recounts that "in arguing the propriety of fines imposed on strikebreakers, the union emphasized the legitimacy and importance of strike solidarity to the success and even the very survival of the union." Silard, *supra* note 31, at 192. The Court agreed. It viewed union fines for strikebreaking a legitimate and essential tool to maintain member cohesion. See *Allis-Chalmers Mfg.*, 388 U.S. at 183. Therefore, a fundamental policy choice animating such cases is that law must not be dismissive of a union majority's legitimate interest in maintaining a united front during times of economic conflict with employers.

34. 252 N.L.R.B. 936 (1980), *enforced*, 682 F.2d 304 (2d Cir. 1982).

35. See *NLRB v. GAIU Local 13-B*, 682 F.2d 304, 306 (2d Cir. 1982). The proposal provided that "no overtime shall be worked by any member of Local 13-B Poughkeepsie," and any discipline taken against union members observing this ban "shall be considered an action taken against all of the members and will be treated by the Local as a lock out."

forcing an employer to withdraw a demand that the length of the workday be increased.³⁶ Both the NLRB and the Court of Appeals acknowledged the union's motive and did not dispute the democratic means used to enact the ban.³⁷ Nevertheless, both concluded that the union discipline invoked against several members to enforce the overtime ban was unlawful because repeated refusal to perform compulsory overtime is an unprotected concerted activity.³⁸

The *GAIU Local 13-B* case illustrates how NLRB policy in union discipline cases can disarm the union. Nothing in the labor laws makes union inducement to refuse to work overtime an unfair labor practice. Yet inducement through union discipline is made unlawful by the NLRB through section 8(b)(1)(A). The legal reasoning is straightforward. It begins with the proposition that union discipline violates section 8(b)(1)(A) if it contravenes an overriding policy of the labor laws, which

GAIU Local 13-B, 252 N.L.R.B. at 936. The 320 union members in attendance ratified the overtime ban by a vote of 220 for and 100 against after a vigorous debate. See *GAIU Local 13-B*, 682 F.2d at 306.

The ban on working overtime was also the membership majority's response to a widely held perception that the company was unlawfully delaying the negotiations, undermining its union by dealing directly with the employees, and otherwise failing to deal fairly with the employees regarding negotiation of the new agreement. These were not idle perceptions. The NLRB Regional Director filed an unfair labor practice complaint against the company alleging surface bargaining and direct dealing with the bargaining unit employees to bypass the union as the exclusive bargaining agent. See *id.*

The Regional Director subsequently amended the complaint to allege that the company also had refused to meet with the union for several months and had unilaterally instituted its last offer to the union prior to good faith impasse. See *id.*

36. Two days after the union promulgated its no-overtime rule, the company discontinued all overtime, citing as its reason the risk of union fines for those who might choose to violate the ban. Even when it later reinstated mandatory overtime due to the needs of one of its largest customers, the company stated that it did not intend to discipline any employee who refused to work overtime. It was in response to this latest twist that certain union members violated the union's overtime ban and were fined by the union. See *GAIU Local 13-B*, 682 F.2d. at 306.

Four months after reinstating compulsory overtime, the company announced it unilaterally would implement its last contract offer to the union but would not, for now, unilaterally increase the length of the work day. One month thereafter, the union suspended the overtime ban but stated it would be reinstated should the company increase the length of the workday as it previously had proposed. The workday expansion threat was checked by the union overtime ban, enforced through union discipline. See *id.*

37. The NLRB and the Court of Appeals agreed that the "overtime ban was . . . adopted . . . solely as an economic weapon to improve the Union's bargaining position in on-going negotiations." *Id.* at 310.

38. See *id.* at 308-09. The union unsuccessfully argued that the ban was in response to the employer's unfair labor practices but both the NLRB and the Court rejected the claim. See *id.* at 310; see also *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 270 (1956) (finding that a strike over serious unfair labor practices is protected notwithstanding a broad no-strike clause in the contract).

it does if it is invoked against a member for refusing to engage in conduct unprotected by section 7 of the Act. A concerted refusal to perform overtime is an unprotected concerted activity. Therefore, discipline for violating a union work rule banning overtime work is unlawful. Q.E.D.!

Through this simple formulation, the NLRB and the courts have outlawed most union discipline used to provide the union leverage in its economic struggles with employers. Examples are: union discipline for crossing a picket line that violates a contractual no-strike clause;³⁹ discipline invoked for refusing to honor a picket line that violates the secondary boycott laws; and discipline of members who cross an unlawful picket line to work for a primary employer—an employer against whom the union has every legal right to strike.⁴⁰ Union attempts to promote harmony among its members and the solidarity harmony brings are thwarted by NLRB rules prohibiting union discipline of members who harm co-workers by testifying against them in disciplinary proceedings⁴¹ or signing witness statements harmful to co-workers.⁴²

39. See *United Bhd. of Carpenters, Local 1780*, 296 N.L.R.B. 412, 419 (1989) (finding unlawful a fine or any other discipline of a member for refusing to participate in sympathy strike found by the NLRB as violative of a no-strike clause); *Local 12419, Int'l Union of Dist. 50 (National Grinding Wheel Co.)*, 176 N.L.R.B. 628, 632 (1969) (discussing how union interests must be considered, but the union has no legitimate interest in discipline for refusing to breach a no-strike clause).

40. See *NLRB v. Local 18, Int'l Union of Operating Eng'rs*, 503 F.2d 780, 783 (6th Cir. 1974) (disagreeing with NLRB, and concluding that discipline for crossing an unlawful picket line to work for primary was lawful); *Local 388, United Ass'n of Journeymen & Apprentices*, 280 N.L.R.B. 1260, 1260 (1986) (finding that discipline for crossing an unlawful secondary boycott picket line to work for neutral was unlawful); see also *Local 520, Int'l Union of Operating Eng'rs*, 298 N.L.R.B. 768, 768 n.2 (1990) (disciplining workers for crossing an unlawful picket line, violative of section 8(b)(7)(C), held unlawful).

41. See *UMW Local 1058*, 299 N.L.R.B. 389, 390-91 (1990) (recognizing the "argument that the Board should not stand in the way of a union's effort to discipline one of its own who . . . has subverted the arbitration process in order to gain his own ends at the expense of a union brother").

42. See *Oil, Chemical & Atomic Workers Int'l Union*, 269 N.L.R.B. 129, 131 (1984) (holding that discipline for signing a witness statement was harmful to the arbitration process); see also *Local Lodge D-357, Cement Workers*, 288 N.L.R.B. 1156, 1158 (1988) (finding it unlawful to reprimand but not otherwise discipline for signing a witness statement).

The NLRB has held that a union lawfully may discipline a member who voluntarily informs employers of a co-worker's misconduct. See *Local 5795, Communications Workers*, 192 N.L.R.B. 556, 557 (1971) (finding that imposing a fine for informing the employer of co-employee infractions was lawful when the informer's job duties did not include informing co-workers); accord *Amalgamated Transit Union Local Div. No. 1225*, 285 N.L.R.B. 1051 (1987). In addition, unions may protect members from perjured testimony of other members. See *Graphic Communications Int'l Union*, 300 N.L.R.B. 1071, 1073 (1990) (disciplining union workers for giving perjured testimony at an arbitration hearing).

The open-textured possibilities of the reasoning in these cases is well-illustrated in the 1992 decision of *George A. Hormel & Co. v. NLRB*.⁴³ The employer fired an employee who already had been permanently replaced during an economic strike. The employee was discharged for disloyalty because he had attended a rally that urged the boycott of the employer's product.⁴⁴ The Court of Appeals accepted the NLRB's finding that the employee had no intent to advance the boycott by his attendance and "did not carry a sign, wear a t-shirt or button, or otherwise express a position for or against the boycott. Nor did he speak at the rally."⁴⁵ Also, having been permanently replaced, he was not drawing wages from the employer when he attended the rally. Yet, the Second Circuit found that the discharge was lawful. The court reasoned that the employee's mere presence at the rally was an unprotected act of disloyalty since it swelled the ranks of those protesting.⁴⁶

The *Hormel* case was not a union discipline case, but it might well have been if a membership majority had voted that all members failing to attend the rally were subject to discipline. Nothing in our labor law prohibits a union from requiring members to attend such a rally, but inducing attendance through union discipline can be made an unfair labor practice since the discipline encourages unprotected concerted activity. One can readily see that the ability of the NLRB and the courts to disarm the union through outlawing union discipline is limited only by the creativity and willingness to find employee self-help in dispute resolution unprotected.

III. ACCOUNTING FOR THE SHIFT IN LABOR POLICY

The above discussion invites the question, why have the NLRB and the courts shifted labor policy as they have to transfer bargaining power away from unions? If one looks at these cases from the vantage point of those who have been the winners, three emerge: the NLRB itself, individual union members, and employers. Examining what each has gained from these cases, and at what costs, may help clarify the social struggles that operate below the surface in labor law cases and the choices that legal institutions made regarding unresolved tensions within those struggles.

was held lawful when perjury was determined by forum other than internal union procedures).

43. 962 F.2d 1061 (D.C. Cir. 1992).

44. *See id.* at 1063-64.

45. *Id.* at 1063.

46. *See id.* at 1066.

A. *The Bureaucratic Power Aggrandizement Theory*

It has been suggested that the impulse of “state managers” to add to their own “institutional power and prestige” must be considered when trying to understand decision making by judges or labor-relations bureaucrats.⁴⁷ To test that idea, we might examine the two arguments deployed to support the NLRB’s expansive view that a union may not use control of union discipline to compel a member’s participation in activity that Congress has not protected in section 7 of the Act. First, unions have no fair claim of autonomy to use their control of members to advance outcomes that contravene labor policy. Second, a union member is placed in an untenable situation when a union threatens discipline for refusing to engage in unprotected concerted activity: resistance to the union’s demands may result in union discipline while compliance may result in the employer’s discipline, including discharge.

The first justification parallels NLRB claims in other cases that if some union activity contravenes labor policy, the NLRB has inherent power to outlaw it even though Congress has not. On at least *four previous occasions* the United States Supreme Court has rejected this version of NLRB authority.

In 1946, in *In re Colgate-Palmolive-Peet Co.*,⁴⁸ the Board found that an employer violated the Wagner Act when it discharged an employee under a closed shop agreement when the employer knew the employee had lost its union membership because of activity protected by section 7—there dual unionism. The Supreme Court’s response, in a 1949 reversal, was sharp. The Board, the Court stated, had ignored the plain provisions of a contract, lawful at the time, in an attempt to “reform [the Wagner Act] to conform to the Board’s idea of correct policy. . . . To sustain the Board’s contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress . . . [through] ‘administrative amendment.’”⁴⁹

A few years later, in *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*,⁵⁰ the Court again had to warn the Board about attempted

47. See TOMLINS, *supra* note 2, at xiii (citing Fred Block, 33 SOCIALIST REVOLUTION 6 (1977)); see also Joel Rogers, *Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws,”* 1990 WIS. L. REV. 1, 27 (noting that “[s]tate actors also have interests of their own—in careers, advancement, and, no doubt, other things—and these may materially affect the terms of particular compromise arrangements”).

48. 70 N.L.R.B. 1202 (1946), *enforced*, 171 F.2d 956, *rev’d*, 338 U.S. 355 (1949).

49. *Colgate-Palmolive-Peet Co. v. NLRB*, 388 U.S. 355, 363-64 (1949).

50. 362 U.S. 274 (1960).

administrative amendment of the statute. There, a minority union peacefully picketed an employer's business with the object of obtaining recognition to represent the employer's employees. If recognition had been granted, the employer would have violated section 8(a)(2) of the Act.⁵¹ Prior to 1959, the labor laws did not explicitly prohibit such union picketing to obtain recognition.⁵² Undeterred, the Board concluded that the picketing violated the Act, using section 8(b)(1)(A) as the vehicle, "[b]ecause the object of the Union's picketing in this case was to force the Company to commit an act prohibited by the statute itself, and . . . deprive the employees of a right expressly guaranteed to them by the . . . Act."⁵³ The Supreme Court disagreed, this time relying primarily on section 13 of the Act. That section, the Court pointed out, denies the NLRB the authority to "impede or diminish in any way" the right to strike "except as specifically provided for" in the Act.⁵⁴ This means that "[section] 13 declares a rule of construction which cautions against an expansive reading of [section 8(b)(1)(A)] which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute."⁵⁵ The Court concluded that Congress did not enact section 8(b)(1)(A) in order to empower the NLRB to "sit in judgment upon, and to condemn, a . . . union's resort to a specific economic weapon."⁵⁶

In 1961, the Court again had to caution the Labor Board against adding limits on union activities that Congress had not chosen to add when enacting the Taft-Hartley Act. In *Local 357, International Brotherhood of Teamsters v. NLRB*,⁵⁷ the Board found that section 8(b)(2) condemned *per se* a union-employer exclusive hiring hall agreement notwithstanding that the agreement contained "an express provision that employees would not be discriminated against because they were or were not union members."⁵⁸ The Court rejected the Board's *per se* approach. The Court

51. See *ILGWU v. NLRB*, 366 U.S. 731, 732-33 (1961).

52. It was not until 1959 that Congress regulated such union picketing to achieve recognition. See 29 U.S.C. § 158(b)(7) (1994) (section 8(b)(7) of the Labor Management Relations Act as amended by the Labor Management Reporting and Disclosure Act of 1959).

53. See *Drivers Local 639*, 362 U.S. at 280 (quoting 119 N.L.R.B. 232, 238 (1957)).

54. *Id.* at 281 n. 9 (quoting section 13 of the NLRA).

55. *Id.* at 282. (stating that "[section] 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of [section] 8(b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act").

56. *Id.*

57. 365 U.S. 667 (1961).

58. *Id.* at 669.

explained that Congress could have, but did not, ban all union hiring hall agreements. Accordingly, the Court reasoned,

There being no express ban of hiring halls in any provision of the Act, those who add one, . . . engage in a legislative act. . . . It may be that hiring halls need more regulation than the Act presently affords. . . . Yet, where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. . . . [T]he Board cannot go farther and establish a broader, more pervasive regulatory scheme.⁵⁹

A very similar issue arose again in *NLRB v. Insurance Agents' International Union*,⁶⁰ this time through the attempted use of section 8(b)(3) of the Act. For a fourth time the Supreme Court foiled the Board's effort to limit union economic weapons. In *Insurance Agents'*, a union had used certain harassing tactics to gain bargaining leverage during a collective bargaining dispute.⁶¹ Constituting a partial strike, these harassing tactics were unprotected concerted activity.⁶² The employer was privileged, if it had chosen, to discipline employees engaging in the partial strike, including discharging them. The NLRB concluded that the partial strike, used as a union bargaining tactic, constitutes bad faith bargaining violative of section 8(b)(3). The Supreme Court disagreed, reasoning that Congress had been "rather specific when it has come to outlaw[ing] particular economic weapons on the part of unions . . . [and that] the activities here involved have never been specifically outlawed by Congress."⁶³ Accordingly, the NLRB had no authority to supplement the statute administratively to have it conform to the Board's view of proper labor policy. Administrative lawmaking by the NLRB threatened the policy that bargaining outcomes are to be determined through a process of private ordering, not governmental fiat. As the Court said, "if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract."⁶⁴ What Congress left unregulated it intended to be available to the parties

59. *Id.* at 674, 676.

60. 361 U.S. 477 (1960).

61. *See id.* at 480. The employees refused to solicit new business, follow certain reporting procedures, and attend meetings. In addition they picketed the company offices and set their own arrival and departure times. *See id.*

62. *See Elk Lumber Co.*, 91 N.L.R.B. 333, 336-37 (1950).

63. *See Insurance Agents'*, 361 U.S. at 498.

64. *Id.* at 490.

as self-help alternatives⁶⁵ unregulated by any governmental entity.⁶⁶

These repeated rebukes of the Board by the Supreme Court expose the error in the argument that the Board has inherent authority under section 8(b)(1)(A), or any other section of the Act, to ban union conduct it determines frustrates some policy in our labor laws. In *NLRB v. Scofield*,⁶⁷ it is true that the Court, in dicta, invited the Board to oversee the purposes of union discipline, but limited the Board's authority to prohibiting union discipline that contravenes or frustrates "overriding" policies in our labor laws. The Board disregards this limit when it bans *all* union discipline that induces a member to engage in any conduct that is not protected by the Act. To read *Scofield* otherwise is to assume that the Court intended in *Scofield* to provide the NLRB the very open-textured authority to supplement Congress's work that it has repeatedly denied the Board in other contexts.⁶⁸

65. See *id.* at 499-500 (stating that the NLRB is not authorized to determine the parties' permissible economic weapons in an effort to create an "ideal" or "balanced" context for bargaining); *accord* *Garner v. Teamsters*, 346 U.S. 485, 499-500 (1953) (stating that the NLRA policy is not to prohibit all economic weapons "but only that ascertained by its prescribed processes to fall within its prohibitions").

66. The Supreme Court reaffirmed this point emphatically when a state labor relations commission attempted to make a union's refusal to work overtime (another form of partial strike) a violation of state law. In *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), the Court found such state laws are preempted by federal labor law. The parties' use of economic pressure is not a grudging exception to our labor laws but rather is part and parcel of the congressional plan. Congress's choice neither to protect nor prohibit certain conduct has a specific intent: to leave such conduct unregulated by any government agency and instead controlled by the free play of economic forces.

67. 394 U.S. 423 (1969).

68. In December 1946, six months before the enactment of Taft-Hartley, the NLRB forwarded a remarkable memorandum on labor legislation to the President. In it, the Board urged that no new labor legislation was needed, arguing in part that the responsibility for directing the course of labor policy is best left with the Board rather than Congress. See TOMLINS, *supra* note 2, at 271-72. As a last-ditch effort to deflect a conservative counterattack on the New Deal labor relations system, the December memorandum might be dismissed as a political instrument, part of an effort "to commit the Truman administration to a gradualist strategy [of reform]." *Id.* at 273-74 (discussing the memorandum as part of the flurry of activity in the spring of 1947 effectuating a "strategy of reform through administrative discretion"). Or, the December memorandum might reflect what Professor Tomlins has referred to as "[t]he Board's desire to retain the whip hand in the design and implementation of revisions in federal policy." *Id.* at 272. In either event, the congressional rejection of the Board's 1946 entreaty, combined with the repeated post-1947 rebukes by the Supreme Court that the Board was not privileged to direct labor policy by adding restraints on the right to strike that Congress did not clearly provide, reinforce the argument that the Board lacks authority to design and implement labor policy through the union discipline cases.

The second argument mounted in support of the NLRB's authority in its modern union discipline cases is that the union places the member in a double bind when it disciplines because the member refuses to engage in unprotected concerted activity. In the *GAIU Local 13-B* case discussed above, the Court of Appeals repeatedly returned to this theme stating that "[a] union rule requiring an employee to engage in . . . unprotected activity, even though adopted by a majority of the union's members, amounts to an unlawful restraint or coercion It forces them [the members] . . . to risk being lawfully discharged by their employer or subjected to lawful imposition of disciplinary measures."⁶⁹ This argument raises a false conflict.

Since as early as the *Scofield* decision in 1969, it has been clear that the union may enforce its rules only "against union members who are free to leave the union and escape the rule."⁷⁰ If a member resigns, the union may not lawfully enforce its rules against that person.⁷¹ In 1985, the Supreme Court made plain that the union may place no limits on the right to resign.⁷² Accordingly, there is no conflict. A union member desiring to avoid risking employer and union discipline may resign from the union and comply with the employer's lawful demands.

There are costs associated with resignation from union membership. The former member no longer is privileged to participate in the internal governance of the union. In almost every union this forfeiture includes exclusion from membership meetings and denial of the right to vote upon matters properly before the membership and ineligibility to be nominated and elected to union office. In many American communities there also may be social stigma associated with a refusal to conform to group norms at the workplace. Our labor policy accepts these costs as necessary to accommodate the twin goals of voluntary unionism and collective empowerment.⁷³

69. NLRB v. GAIU Local 13-B, 682 F.2d 304, 308-09 (2d Cir. 1982).

70. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969).

71. See *Booster Lodge No. 405, Int'l Ass'n of Machinists v. NLRB*, 412 U.S. 84, 88-89 (1973) (stating that lawful resignation terminates a union's right to discipline); *NLRB v. Granite State Joint Bd., Textile Workers Union*, 409 U.S. 213, 217-18 (1972) (rejecting the argument that by participating in a strike vote, a member waives the right to resign and engage in strikebreaking).

72. See *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985).

73. See *Distillery Workers Union, Local 186*, 296 N.L.R.B. 519, 520 (1989) (Chairman Stephens concurring) (stating that a member's freedom to resign from a union and "[give] up the benefits and obligations of union membership" was properly considered in a case involving a fine for announcing a fixed intent not to honor a union's lawful picket line); *Amalgamated Meat Cutters Local 593 (S & M Grocers)*, 237 N.L.R.B. 1159, 1161 (1978)

In the *Scofield* case itself, if members conformed to the majority's desires and agreed not to collect pay for work in excess of the union-imposed production ceiling, they sacrificed income. If they defied the majority's wishes, they risked union discipline. The Supreme Court perceived no conflict. As the Court said, "if members are prevented from taking advantage of their contractual rights bargained for all employees it is because they have chosen to become and remain union members."⁷⁴ The negative implication is that the cost of exclusion from the union's political and, perhaps, social community is an acceptable price for exercising a member's individual autonomy to resign from the union.⁷⁵

Of course, labor policy sometimes does protect a member from having to make the choice of conforming to group norms or resigning from the union. In *Scofield*, the Court's direction to the NLRB was to relieve the union member of having to make that choice only when conforming to group norms would frustrate an "overriding" policy in the labor laws. When would that be?

If Congress has made union inducement of certain behavior an unfair labor practice, then any union conduct, including union discipline, to induce that behavior is unlawful: union discipline to induce members to violate the secondary boycott laws, for example, is, and should be, unlawful. Nor may union discipline be used to frustrate any other goal Congress explicitly has set forth in our labor law. Access to the NLRB comes to mind. The goals of union democratic governance as provided by the Labor-Management Reporting and Disclosure Act (LMRDA)⁷⁶ is another example. Similarly, would it not seem to follow that a union frus-

(finding the imposition of a fine for refusing to assist a union in an organizing drive was lawful and any associated interference with free speech rights is not controlling as a member is free to leave the union to avoid a rule); *see also* NLRB v. IBEW Local 340, 481 U.S. 573, 595-96 (1987) (holding that a member-supervisors' right to resign from the union to avoid discipline should be considered in determining whether union discipline violates section 8(b)(1)(B)).

74. *Scofield*, 394 U.S. at 435.

75. In *Meat Cutters, Local 593 (S & M Grocers)*, 237 N.L.R.B. 1159 (1978), members claimed that union discipline for refusing to assist in organizing violates overriding policies in the labor laws because it interferes with free speech rights. The Board disagreed, arguing that members could resign to avoid the rule. The Board stated:

As members, they participate in the election of officers and in the other internal affairs of the Union which lead to the decision to organize particular employees. They are free to resign any time the Union sets out on a course they do not agree with. . . . However, as long as they remain members, the Union has a right to expect their support, including actual participation in the Union's organizational efforts.

Meat Cutters, 237 N.L.R.B. at 1161.

76. 29 U.S.C. §§ 401-531 (1994).

trates “overriding” labor policy when it disciplines a member who has refused to commit a crime on its behalf or refuses to be the instrument through which a union engages in some unfair labor practice specifically described in the Act?

But conduct Congress has *neither prohibited by section 8 of the Act nor protected by section 7*, and which is not otherwise unlawful, is conduct Congress intended to be permitted as self-help available to the parties. For example, we know from previous litigation, as discussed above, that Congress intended overtime bans to be reserved as self-help measures, neither to be prohibited nor protected but rather permitted. Is not a union rule against performing overtime then exactly what Congress had in mind when it determined that for some union rules members either must comply or resign? What “overriding” labor policy is frustrated by putting a member to this choice? If the Board lacks justification in outlawing discipline for failure to comply with overtime bans, then the Board similarly is incorrect in banning union discipline to induce *any other behavior* that is neither prohibited nor protected—such as striking in breach of a no-strike clause, refusing to testify against a co-worker at an arbitration hearing, signing a witness statement against a co-worker, or any other conduct Congress has chosen neither to prohibit nor protect. In its zeal to supplement Congress’s work to effectuate labor policy, the Board has not acted with the restraint contemplated by the *Scofield* decision that limits the Board to outlawing union discipline that contravenes “overriding” policies in our labor laws.

The above discussion makes plausible that regulatory zeal has contributed to some of the immoderation seen in the union discipline cases. What weakens this explanation, however, is that these union discipline cases are *so* harmful to workers’ collective empowerment. It seems unlikely that all of this harm to unions, or even most of it, could reasonably be explained by even unconscious desires of state industrial relations managers to enhance their own power and prestige when one considers that so many Boards appointed by so many different Presidents from so many different political persuasions have joined in these cases during the past thirty years. Accordingly, one is drawn to explanations implicating the interests of the other winners in the union discipline cases: individual union members and employers. That inquiry might profitably begin by clarifying how Wagner and Taft-Hartley work together to provide the state with the conceptual and ideological bases to protect these interests from perceived excesses of worker collective empowerment.

B. The Source of the State's Moral Authority to Regulate Union Conduct

The conventional wisdom is that the Taft-Hartley Act is best understood by focusing not on what it did, but on what it did not do. It added new restraints on worker collective action, but it did not jettison the national commitment to collective bargaining as the preferred mechanism for resolving and avoiding industrial conflict, contrary to the desires of some of the statute's proponents.⁷⁷ In other words, the conventional view is Taft-Hartley nibbled at the margins of national labor policy created by the Wagner Act but maintained its core. What too easily can be lost in this observation is that this core of Wagner, which Taft-Hartley preserved, provided the state all of the conceptual and ideological foundations necessary for the control of union internal life we see today.

In 1916, the dissenters on the Commission of Industrial Relations offered a prophetic observation. They pointed out that "if the State recognizes any particular union by requiring the employer to recognize it, the State must necessarily guarantee the union to the extent that it must strip it of any abuses that it may practice."⁷⁸ It would follow that the state also must guarantee unions if labor policy incorporates the exclusivity principle: that the bargaining representative chosen by the majority of the bargaining unit employees is imposed on the minority.

The Wagner Act, of course, did both. It actively facilitates union rep-

77. See THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 33 (1986) (stating that the "Taft-Hartley act . . . did not alter in any significant fashion the basic NLRA principles governing industrial relations activity"); TOMLINS, *supra* note 2, at 251.

While the [Taft-Hartley] act established beyond doubt Congress's determination to limit the influence of entrenched labor organizations, . . . the ambitions of some of its proponents to go further than this and overthrow the model of labor relations established in the United States after 1940 remained unfulfilled. The Taft-Hartley Act thus proved much less of a break with the past than has usually been assumed.

Id. at 280-81 (discussing the view of Ludwig Teller, a corporation attorney, that the Wagner Act had been a "watershed," that "little in the pre-Wagner situation . . . has survived," and accordingly, "the advocates of the 1947 amendments had had little alternative but to accept the Wagner Act's polic[ies]"); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 *TEX. L. REV.* 1563, 1567 (1996) (noting that while the Taft-Hartley Act contains provisions limiting the right to self-organization, the amendments "did not disturb the NLRA's commitment to collective bargaining as the essential means of attaining the multiple goals [of the Wagner Act]").

78. COMMISSION ON INDUS. RELATIONS, *FINAL REPORT AND TESTIMONY*, S. DOC. NO. 64-415, at 212 (1st Sess. 1916); see also CLYDE W. SUMMERS & HARRY H. WELLINGTON, *CASES AND MATERIALS ON LABOR LAW* 19 (1968) (querying whether government-compelled recognition of unions would give unions "special legal status . . . lead[ing] to government control of the union's bargaining policies and its internal affairs").

resentation through the combination of state-supervised elections, the exclusivity principle, and the federally enforced duty to bargain. Adding these provisions was the “decisive step” in the evolution of labor policy,⁷⁹ because for the first time unions were provided access to the coercive power of the state, both to enforce a duty to bargain and to impose themselves on an unwilling minority of bargaining unit employees. The state had acquired the moral authority, perhaps the duty, to guarantee unions and to pay some attention to how they obtained representative status and exercised it. It did not take long for many in the trade union movement to realize that governmental support of unions came at considerable cost, excessive in the minds of some who expressed the hope that the Wagner Act either would be held unconstitutional or repealed at the earliest opportunity.⁸⁰

In Taft-Hartley, Congress self-consciously endeavored to guarantee unions to the extent of regulating directly important aspects of their governance at the workplace. More significantly, Taft-Hartley moved state regulation of unions directly into the realm of union internal governance, albeit haltingly. It prohibited excessive or discriminatory union initiation fees.⁸¹ It required unions to file union financial reports and other reports with the Secretary of Labor in an effort to foster greater democratic procedures within unions.⁸² And unions desiring the services of the NLRB were required to have their officers file non-Communist affidavits.⁸³ Other provisions that would have much more extensively regulated union internal life were rejected for fear of creating “complete and unlim-

79. See TOMLINS, *supra* note 2, at 115.

80. See *id.* at 144 (stating that Dan Tobin, President of the Teamsters Union, hoped the Wagner Act would be held unconstitutional); *id.* at 145 (stating that A.O. Wharton, President of the Machinists Union, hoped that the Act would be repealed). In the early years following the enactment of Wagner, union leaders found this control over their autonomy unnerving, and for good reason. Soon after Wagner, the Board began rejecting the jurisdictional claims of many AFL unions, forcing an internal restructuring within some of them. This development, stated one contemporary observer, “means State control of trade union organizations, jurisdictions, elections; indeed, the death of trade unionism as we now know it.” *Id.* at 123 (internal quotation omitted) (quoting Wallace B. Donham of the Harvard Business School).

81. See Labor Management Relations (Taft-Hartley) Act, § 8(b)(5), 29 U.S.C. § 158(b)(5) (1994).

82. See *id.* § 9(f)-(g), 29 U.S.C. § 159(f)-(g) (repealed 1959).

83. See *id.* § 9(h), 29 U.S.C. § 159(h) (repealed 1959). The constitutionality of section 9(h) was upheld in *American Communications Ass'n v. Douds*. See 339 U.S. 382, 415 (1950). It was replaced in 1959 by a criminal provision, section 504(a) of the Labor-Management Reporting and Disclosure Act, which was held unconstitutional in *United States v. Brown*, 381 U.S. 437, 438, 462 (1965).

ited control by the Federal Government of the internal affairs of any labor organization.”⁸⁴

But even after Taft-Hartley, there remained one imposing bastion of union autonomy from the state: unions were to enjoy broad autonomy in their relations with their members. Both the section 8(b)(1)(A) legislative history and the early section 8(b)(1)(A) case law demonstrate that the Taft-Hartley amendments were initially wrapped tightly with government’s commitment to abstain—to respect unions’ autonomy to govern themselves internally. It was *this government commitment of self-restraint* that was in full retreat by the late 1960s and early 1970s in the union discipline cases. The question remains, why?

Part of the answer, and perhaps too easy a part, is that the die was cast in *Allis-Chalmers*. Provisions in union constitutions for judicially enforced fines for crossing a picket line were relatively uncommon prior to the 1960s.⁸⁵ That changed by 1969 when the Court decided *Allis-Chalmers*. Having sought and obtained endorsement of its access to the coercive power of government to enforce its fines against members judicially, unions hardly could expect government to remain indifferent to the circumstances surrounding the fines it was asked to enforce.⁸⁶ The Wagner Act had established the precedent of government guaranteeing unions when it provided unions access to its coercive power. So what is so stunning about the union discipline cases is not that government reserved the right to oversee the reasons for union discipline, but that the NLRB has so aggressively disarmed worker groups in the process.

John Silard, who represented the unions in several of the early Supreme Court union discipline cases, has suggested that “[a]s often happens, changing national sentiments in the years following the original enactment of Taft-Hartley gave rise to a new emphasis and an attempted reconstruction of the legislative aim [of section 8(b)(1)(A)].”⁸⁷ This seems plausible. Since the reconstruction of section 8(b)(1)(A) in the union discipline cases furthers the interests of individual members and employers, at the expense of the group interests of workers, the appro-

84. See H.R. REP. NO. 80-245, at 77 (1947).

85. See Atleson, *supra* note 12, at 696-97 (citing Thomas G.S. Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U. L. REV. 227, 270 (1968)).

86. See Marcoux, *supra* note 11, at 1422-23 (describing the nature and scope of a union’s ability to impose court-enforceable fines); Atleson, *supra* note 12, at 709 (noting that “*Allis-Chalmers* may have ironically opened the door to further federal intrusion into union disciplinary proceedings”).

87. Silard, *supra* note 31, at 188.

priate focus should be on the changed sentiments related to their interests.

C. Changing National Sentiments Regarding the Meaning of Individual Economic Liberty

“As [President Lyndon] Johnson departed from his inaugural ball in January 1965, he warned his aides, ‘Don’t stay up late. There’s work to be done. We’re on our way to the Great Society.’”⁸⁸ The Great Society was “aimed to go beyond the bread-and-butter liberalism of the New Deal [and] guarantee ‘rights’ and government entitlements.”⁸⁹ The “rights-consciousness” reflected in the Great Society and accelerated by it invites one to inquire whether the union discipline cases that so undermine employee group interests can be situated within a set of changed national sentiments redefining the meaning of individual liberty. That inquiry might best begin by examining the Wagner Act’s solution to the competing values of individual rights and group authority.

Senator Wagner and those who designed the Wagner Act mediated an uneasy truce between worker collective authority and worker individual rights through use of the exclusivity principle.⁹⁰ The Wagner Act was uncompromisingly committed to voluntarism—voluntary consent must resolve the question of whether to have a union. But as one commentator has put it, this commitment to voluntary consent “blur[red] the line between individual and group consent, in the name of collective empowerment.”⁹¹ The Wagner Act solves the free choice puzzle by viewing consent “as a group rather than an individual phenomenon.”⁹² Wagner argued that “[i]n modern society, the welfare of the individual is embedded in the destiny of the group.”⁹³ The group “‘preserve[s] order within its own ranks [and] restrain[s] the untimely and wayward acts of

88. JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974*, at 562 (1996).

89. *Id.* at 563.

90. It would be a mistake to overstate the degree Wagner had reconciled these competing claims for up to the end, there was much “ambivalence and tension in Wagner’s own thinking.” Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 *HARV. L. REV.* 1379, 1496 (1993); see also Rogers, *supra* note 47, at 2 n.3 (stating that “this problem of tension between the requirements of collective action and other liberal values is an old one”).

91. Barenberg, *supra* note 90, at 1454.

92. *Id.*

93. *Id.* at 1455 (quoting Robert F. Wagner, *Planning in Place of Restraint*, 22 *SURV. GRAPHIC* 395 (1933)).

irresponsible groups.”⁹⁴

The Wagner Act was thus built on the apparent paradox of advancing liberty by denying it.⁹⁵ In order to achieve individual power at the workplace, one must join the collective but that entails costs to individual freedoms. Conservatives in the immediate post-Wagner era had no problem attacking the idea that consent was “a group rather than an individual phenomenon.”⁹⁶ They argued that by “delegat[ing] to private organizations of citizens the power to control jobs and work [operated] as ‘a vehicle of despotism [which] attacks the fundamental rights of the individual and extols collectivism as opposed to individualism.’”⁹⁷ This view gained strength, and Taft-Hartley reinforced it—more comprehensively than often is understood.

Immediately following the enactment of Taft-Hartley, Professor Archibald Cox observed that the greatest impact of Taft-Hartley “lies less in the actual changes in the statute than in the philosophy on which they are based.”⁹⁸ He explained that in shifting labor policy from one of affirmatively encouraging union organization to one of governmental indifference to the spread of labor unions, the statute rejected “the philosophy which looks upon a labor union as the employees themselves.”⁹⁹ Professor Cox argued that Taft-Hartley labor policy looks upon the un-

94. *Id.* at 1454 (quoting 78 CONG. REC. 4229, 4230 (1934)). Wagner asked whether a “democratic process whereby the majority of the workers represent the interests of their group in dealing with employer” would not be far preferable than “despotic control of all by the employer [in the non-union workplace].” *Id.* at 1454 n.325.

95. The paradox is more apparent than real if one accepts the understanding of reality adopted by Wagner and the proponents of the Wagner Act. To them, the freedom to negotiate the individual employment contract was illusory. As Professor Barenberg has summarized their view:

There was no actual liberty of contract in the employer-employee relation because ‘when a man is without means to subsist upon, his wants compel him to work, and he must ask for employment as a favor from someone who has the property required to carry on productive work.’ Because the workers ‘do not consent, [because] they submit but they do not agree,’ wage labor was a form of ‘industrial slavery.’

Id. at 1489 (quoting DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND RADICAL REPUBLICANS, 1862-1872, at 239 (1967)).

96. *Id.* at 1454.

97. TOMLINS, *supra* note 2, at 275 (citing Lawrence to Herzog, (4 April 1947), in (*Herzog Papers*)).

98. Cox, Part One, *supra* note 10, at 45. Two years later, Arthur Goldberg referred to the “incalculable effects” on “industrial mores” caused by Taft-Hartley. Barenberg, *supra* note 90, at 1492 n.476 (internal quotations omitted) (citing CIO, PROCEEDINGS OF THE ELEVENTH CONSTITUTIONAL CONVENTION 124 (1949)).

99. Cox, Part One, *supra* note 10, at 25.

ion more as a service organization, and the member as a “customer about to buy an article with both the union and the employer competing for his allegiance, trade, and support.”¹⁰⁰ This changed philosophy, Professor Cox predicted, threatened to undercut the view that “[b]y organizing, the employees form a group, choose leaders, and surrender some measure of their freedom to take individual action.”¹⁰¹ The logical extension of this uncoupling of the group from the individual was the need to erase some of the blurring of the line between individual and group consent found in the Wagner Act. Taft-Hartley did this by creating new zones of individual consent enforceable against the group. The clearest examples of these zones are the elimination of the closed shop, the regulation of the union shop, and the addition of the right to refrain from concerted activities in section 7.¹⁰²

This philosophical uncoupling of the individual from the group came to full bloom in the late 1960s, a period punctuated by vigorous changes in the conception of both civil rights and liberties. The drive for civil rights and liberties had achieved an undeniable moral force.¹⁰³ Congress responded to this drive by enacting laws prohibiting workplace discrimination based on race, color, religion, national origin, gender, and age.¹⁰⁴ Congress reflected and accelerated the trend by providing government-financed entitlements through a broad array of legislation.¹⁰⁵ The Su-

100. *Id.* at 46 (quoting *Hearings before Committee on Labor and Public Welfare on S. 55 and Sen. Jt. Res. 22, 80th Cong., 1st Sess. 1700 (1947)* (testimony of Stephen F. Dunn)).

101. *Id.*

102. Professor Tomlins has argued that “[s]tating the right to refrain explicitly was of considerable symbolic importance [but] former Board chairman Harry A. Millis later confirmed that it ‘only made explicit what had been implicit and always so regarded by the NLRB.’” TOMLINS, *supra* note 2, at 290.

103. Senator Everett Dirksen of Illinois, a Midwestern conservative who sided with business interests during the 1947 Taft-Hartley debate, understood the period better than most. Recognizing that the drive for civil rights and liberties had achieved an undeniable moral power, he stated that “[n]o army can withstand the strength of an idea whose time has come. . . . In the history of mankind, there is an inexorable moral force that moves us forward.” PATTERSON, *supra* note 88, at 546 (Professor Patterson reported that the quoted lines are attributed to Victor Hugo).

104. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 (1994). To this list has more recently been added the Americans with Disability Act of 1990 (ADA), 42 U.S.C. § 12101 (1994).

105. *See* PATTERSON, *supra* note 88, at 568-69. Some examples are: federal aid to elementary and secondary education, immigration reform, guarantees of voting rights, Medicare and Medicaid, clean air legislation, prohibition of billboard advertising on interstate highways, student loan programs, laws improving mine safety, occupational safety, consumer protection, a war on poverty, and promotion of cultural life through creation of

preme Court weighed in by rendering landmark decisions extending the Bill of Rights protections and the Fourteenth Amendment in the areas of civil rights, voting rights, free speech, religion, and rights of criminal defendants.¹⁰⁶

The historian James Patterson has concluded that the decisions of the Warren Court accelerated the “rise of rights-consciousness [which] began to seem all-conquering by 1965.”¹⁰⁷ Liberals were inspired. Conservatives were enraged. Changed national sentiments had created “an increasingly powerful—and ultimately near-irresistible—drive for the expansion of individual rights in the United States. . . . A Rights Revolution was at hand.”¹⁰⁸

The rights revolution no doubt moved the NLRB and the courts “to enhance the individual rights of the union member.”¹⁰⁹ Certainly, some union discipline cases self-consciously reflect a preference for individual rights over group rights. One can see this influence in cases giving union members the unqualified right to resign from the union.¹¹⁰ It can also be seen in cases restricting union discipline of members for dual unionism or for filing a decertification petition, and in cases barring discipline for engaging in internal union political activities.¹¹¹

In addition, elsewhere during the 1960s, courts were expanding the rights of the individual against the group in labor law cases. The duty of fair representation that the Court had first recognized in 1944 in *Steele v. Louisville & Nashville Railroad*¹¹² was applied to Taft-Hartley Act unions in 1955 in *Syres v. Oil Workers International Union, Local No. 23*,¹¹³ and

the National Endowment for the Humanities and National Endowment for the Arts. See *id.*

106. See *id.* at 565-67.

107. *Id.* at 568.

108. *Id.*

109. David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268, 1309 (1988); accord Colette M. Foissotte, *Justice Brennan and Union Discipline Under the NLRA: The Fight for Solidarity Impinges Upon Individual Rights*, 20 J. MARSHALL L. REV. 127, 133 (1986) (stating that the post-*Allis-Chalmers* union discipline decisions “attempt to balance the employee’s [individual] right to refrain from engaging in concerted activities against the union’s [collective] need for strength and solidarity”). *Allis-Chalmers* generated a considerable academic response, much of it expressing the “fear of a green light for union abuse.” See Abraham, *supra*, at 1308 n.184; *id.* at 1307 n.183 (collecting authority).

110. See *Pattern Makers’ League v. NLRB*, 473 U.S. 95, 102-03 (1985) (explaining that the purpose of section 8(b)(1)(A) was to ensure unions could not make rules restricting the right to resign).

111. See authority cited at Appendix B.

112. 323 U.S. 192 (1944).

113. 350 U.S. 892 (1955) (per curiam).

made a section 8(b)(1)(A) unfair labor practice in 1962 in the *Miranda Fuel Co. Inc.* case.¹¹⁴ In 1961, the Court for the first time held that one who pays money to a union pursuant to an agency fee arrangement has a right under the Railway Labor Act to insist that the union return that portion of the fee equal to the percentage of the union's expenditures used for political purposes.¹¹⁵ The dues rebate cases of the 1960s have been the foundation for finding in section 8(b)(1)(A) a similar right for nonmembers who pay union fees pursuant to Taft-Hartley Act union security arrangements.¹¹⁶

Moreover, judicial rhetoric during those years demonstrates great concern for collective overreaching within unions. Justice Douglas especially articulated this concern, the two most prominent expositions being his *Emporium* dissent¹¹⁷ and his concurring opinion in *International Ass'n of Machinists v. Street*.¹¹⁸ In *Emporium*, Justice Douglas warned against union members being made "prisoners of the union,"¹¹⁹ and in *Street*, he acknowledged the necessity of some forced associations but pleaded for "special safeguards . . . lest . . . we all succumb to regimentation" and be forced to surrender "matters of conscience, belief, or expression."¹²⁰

I do not think, however, that the rights revolution can account for nearly as much of the transformation of section 8(b)(1)(A) as some people think. First, the rights revolution explanation is hopelessly underinclusive. Too many union discipline cases simply do not fit. For example, what individual rights values are preserved by prohibiting unions from

114. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); *see also* Independent Metal Workers Union Local 1, 147 N.L.R.B. 1573, 1574 (1964) (refusing to process grievances for racial reasons an unfair labor practice because breach of duty of fair representation).

115. *See* *International Ass'n of Machinists v. Street*, 367 U.S. 740, 775 (1961) (stating that an individual employee may obtain a refund of any fees the union used for political causes of which the employee was opposed); *see also* *Brotherhood of Ry. & Steamship Clerks v. Allen*, 373 U.S. 113 (1963).

116. *See* *Communications Workers v. Beck*, 487 U.S. 735, 762-63 (1988); *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995).

117. *Emporium Capwell Co. v. Western Addition Comm. Org.*, 420 U.S. 50 (1975) (Douglas J., dissenting).

118. 367 U.S. 740 (1961). One commentator has described Justice Douglas's views as an "abstract and atomistic conception of our society [where] [c]ollective action is undertaken by individuals whose connection to each other is presumed to be limited to the workplace, unrelated to the concrete conditions under which they live [and where the] great fear is collective overreaching." Abraham, *supra* note 109, at 1281.

119. 420 U.S. at 73.

120. *Street*, 367 U.S. at 775-77; *see also* Abraham, *supra* note 109, at 1281 (discussing Justice Douglas's concurrence in *Emporium*).

disciplining a member who crosses a union picket line that violates a no-strike clause, or discipline of a member who refuses to comply with the group's decision not to perform overtime work, or discipline for cooperating with an employer during an arbitration proceeding by testifying against another worker or signing a witness statement harmful to a co-worker? The argument that discipline in these situations places the member in a double bind of being disciplined either by the employer or by the union is a false conflict, as has been discussed. The member can resolve all conflict by the simple act of resigning from the union. These bans on discipline are much more calculated to preserve employer interests by weakening the union's efforts to resist employers' demands through a show of solidarity.

This leads to the second weakness in the view that the individual rights revolution can explain the union discipline cases of the late 1960s and 1970s. In many of these cases, not only were employers the big winners, but employers brought the actions, financed them, or otherwise were active supporters of the litigation. Current NLRB Board Chairman Gould conducted research in 1980 demonstrating that in many of these cases members were represented by employer counsel and employers not uncommonly filed the unfair labor practice charges.¹²¹ He concluded that a "dispute between the union and the worker [here] is actually part of the power struggle between labor and management."¹²² Abraham's research shows that "[i]n all the key cases in this area, . . . unfair labor practice charges were filed by employers who assuredly were acting primarily in their own interests and only secondarily as guardians of the individual rights of workers."¹²³ His conclusion was that these cases were "political initiatives cast on the legal waters."¹²⁴ In *NLRB v. Granite State Joint*

121. William B. Gould, *Solidarity Forever—Or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74, 112-13 (1980).

122. *Id.*; accord *Pattern Makers' League v. NLRB*, 724 F.2d 57, 61 (7th Cir. 1983) (acknowledging that the union's attempt to restrict member resignations during a strike was calculated to deny the employer the aid provided by the services of the returning former member), *aff'd*, 473 U.S. 95 (1985).

123. Abraham, *supra* note 109, at 1316-17 n.245. Obviously, the Allis-Chalmers Corporation was a party in the *NLRB v. Allis-Chalmers* case. In *Pattern Makers' League*, employer representatives filed the unfair labor practice charges against the union urging the Board to find the union's restriction on the right to resign a violation of section 8(b)(1)(A). See 473 U.S. at 98. The employer also filed the charges in *Booster Lodge No. 405, IAM*, 185 N.L.R.B. 380 (1970).

124. Abraham, *supra* note 109, at 1272 (expressing the view that the political initiative was by an "unidimensional' National Labor Relations Board").

Board, Textile Workers Union,¹²⁵ a case involving the issue of members' right to resign during a strike to avoid union discipline for crossing a lawful picket line, not only did the employer bring the litigation, but clear evidence demonstrated that the employer procured resignation letters as part of an effort to break the strike.¹²⁶ Attention therefore needs to be given to changes in national sentiments that may clarify why labor policy shifted from supporting group rights of workers to one more supportive of employers' ability to resist collective bargaining.

D. Changing National Sentiments Regarding Public Support for Collective Bargaining

In the first two decades following the enactment of Taft-Hartley, unions enjoyed what one commentator has called a "mantle of respectability in the public mind—a mantle that [unions] never before had, and since ha[ve] lost."¹²⁷ Joel Rogers has provided a lucid explanation of how unions' ability during the two decades following enactment of Taft-Hartley both to provide for its members and raise productivity permitted unions to act "as an agent of the general interest . . . [possessing] the organizational resources and social cachet that gave it political clout on other matters."¹²⁸ He explains that in the years following World War II:

[U]nions functioned as the redistributive agent of the working class. They operated in essentially closed national economies where the state relied on fiscal and monetary policy to regulate

125. 446 F.2d 369 (1st Cir. 1971), *rev'd*, 409 U.S. 213 (1972).

126. *See id.* at 371. Moreover, during the litigation, the employer informed all striking employees of an aspect of the trial examiner's opinion favorable to the right of members to break the strike. *See id.*

Referring to the cases preserving members' right to resign during strikes, Professor Abraham concludes that "[a] doctrine of unrestricted resignation rights without residual obligations might well comport nicely with Justice Douglas's vision of individual freedom, but it also substantially fortifies the employer's position vis-à-vis all his employees." Abraham, *supra* note 109, at 1316.

After 125 pages of analyzing the NLRB's work during the two administrations of President Reagan, Professor Levy concluded that the invocation of individual rights to bar union strike behavior rules contrasts with its disregard for individual rights when the employee's interests are at stake. "[R]ationalizations in terms of individual rights [and] free choice [screen the] moving force [of the Reagan Board decisions which] is to free the employer from constraint by workers and their organizations." Paul Alan Levy, *The Unidimensional Perspective of the Reagan Labor Board*, 16 RUTGERS L.J. 269, 390 (1985).

127. Stone, *supra* note 6, at 632 (high public esteem of labor unions in the decade following World War II resulted in the public respecting picket lines and the unemployed reluctant to accept employment as striker replacements).

128. Rogers, *supra* note 4, at 104.

the macro-economy. They demanded and got wage and benefit increases for their members—partially extracted from firms directly, partly extracted through the state. And, through the alchemy of Keynesian economics, they brought benefits to the broader society. By delivering solid and rising wage floors to their members, they boosted aggregate demand. This gave firms markets for sales, and reasons to renew investment. And that, in turn, increased productivity and lowered the costs of mass consumption goods, which was good for everyone.¹²⁹

As the optimism of the postwar period began to erode, things became “unstuck.” The New Deal industrial relations system began “not working as well as it once did.”¹³⁰ With recessionary economic conditions of the late 1950s came a weakening of labor’s strike threat, but the accommodation with labor seemed to hold.¹³¹ By the 1970s, foreign competition, deregulation, competition from the nonunion sector, and the recessions of 1970-71 and 1974-75 began to take their toll on the unionized sector.¹³² Union membership levels began to collapse in major industries.¹³³ The union premium, the gap between union and nonunion wages, had begun to increase due to a combination of cost-of-living (COLA) wage increases in unionized sectors and the decline in nonunion wage levels due to the “new labor-market entrants, including females, teenagers, and the baby-boom cohort.”¹³⁴ Unionized firms began to feel the pinch and could not fully compensate, as they had previously, through new productivity gains.¹³⁵

129. *Id.*

130. *Id.*

131. *See* KOCHAN ET AL., *supra* note 77, at 38.

132. *See id.* at 40.

133. *See id.* (discussing the meat packing and garment industries).

134. *Id.* at 40-41. In addition, “[t]he union/nonunion wage differential rose from 19 percent in the late 1960s to 30 percent by the late 1970s.” *Id.* at 41.

135. *See id.* at 70. These forces, joined with “[a] combination of market saturation and the entrance of new competitors into saturated markets [to] undercut the autonomy of [the U.S. and other Western] national economies, uprooting the foundations of Keynesian policy.” Rogers, *supra* note 4, at 107. “[O]nce firms began looking for export markets, it became difficult to regulate the growth of any economy by stimulating consumer demand.” *Id.* at 108.

American business responded in different ways. Many firms reacted to these pressures by reducing costs¹³⁶ and pursuing nonunion strategies.¹³⁷ All of these responses had the effect of “undercut[ing] the integrity of workers as a group [and leaving] fewer places for unskilled or semi-skilled workers in manufacturing.”¹³⁸ By the late 1970s, a labor policy stalemate had developed, as evidenced by the inability of a Democratic Congress and Democratic President to overcome a Senate filibuster that defeated the labor-law reform bill in 1977.¹³⁹ As the unions’ position weakened, they became the object of attack—from both their enemies and their friends.

By the 1980s, business opposition to unions intensified. President Reagan’s firing of the Air Traffic Controllers sent a signal that opposing unions was again a respectable thing to do,¹⁴⁰ but, as Thomas Kochan and his colleagues have demonstrated in their research, “the changes which occurred in the early 1980s reflect deep-seated environmental pressures that had been building up gradually as well as organizational strategies that had been evolving quietly for a number of years.”¹⁴¹ Changing events “by the early 1980s had set the stage . . . for an intense debate concerning the role of unions and collective bargaining in American society.”¹⁴² Increasingly, the question arose, should collective bargaining continue to be promoted or should it be supplanted by new forms of employee participation and representation?

136. See Rogers, *supra* note 4, at 108 (stating that “[f]irms reacted to these pressures [either by] cutting costs, primarily wage costs [or by] compet[ing] on quality and product differentiation rather than price”). A wage cutting strategy depleted work from rich countries and ultimately was a losing tactic for rich countries since there always was a poorer country that was better able to provide cheap labor. See *id.* Plus, the product differentiation strategy was only a partial solution because firms “get stuck in specialty niches” requiring repeated firm-level reorganization and decentralization. *Id.* at 109; see also Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT’L L. 987, 989 (1995) (discussing capital flight and the “race-to-the bottom” mentality).

137. See KOCHAN ET AL., *supra* note 77, at 44 (noting that companies began successfully pursuing nonunion strategies to escape the union premium).

138. Rogers, *supra* note 4, at 109. Joel Rogers concludes, “It is hardly surprising that even the strongest unions are on the defensive, and the weakest ones, . . . are facing a rout.” *Id.* at 110.

139. See KOCHAN ET AL., *supra* note 77, at 44.

140. See *id.* at 9 (stating that “[n]ot since the days of the American plan and company unionism that followed World War I has it been as socially or politically acceptable for U.S. management to embrace publicly a ‘union free’ preference as it is today”).

141. *Id.* at 4.

142. *Id.* at 5-6.

That debate was set against an environmental background of deep-seated managerial hostility to trade unionism.¹⁴³ Thomas Kochan and his associates, as well as many others, conclude that employer hostility was a major contributing factor in the steep and broad decline in union membership.¹⁴⁴

143. In the 1950s and early 1960s, many in the academic community expressed the view that American management had come to accept unions as a permanent industrial relations fixture. *See id.* at 8 (indicating that “[b]y the 1960s both researchers and practitioners of collective bargaining seemed to believe that relations between labor and management had matured and stabilized, that management had accommodated to the fact that collective bargaining was here to stay, and that labor unions were a permanent participant in their employment relationships”); *see also id.* at 14; TOMLINS, *supra* note 2, at xii (reporting an address by George W. Brooks of Cornell University in 1961 to the Industrial Relations Research Association, “[d]rawing to his audience’s attention the ‘astonishing degree of unanimity’ which characterized contemporary discussions of industrial and labor relations”). It turned out that this was a misinterpretation. Kochan and his associates have reported the research by Reinhard Bendix and others on this point. It demonstrates that managerial ideology toward unions, even during the reapproachment period of the 1950s and early 1960s, remained consistent with the historic hostility of the American managerial class: unions conflict with values that “stress individual initiative, the centrality of one’s right to defend individual property rights, and the desire to maintain managerial control and worker discipline.” KOCHAN ET AL., *supra* note 77, at 14-15 & n.23 (citing the work of REINHARD BENDIX, *WORK AND AUTHORITY IN INDUSTRY* (1956)). Industrial relations managers tended to view unions positively. *See id.* at 14. Those who formulated business strategies and plans maintained an ideology of opposition. *See id.* They accepted unions as a “pragmatic or strategic adaptation to the high costs of avoiding or dislodging established unions.” *Id.* at 14. Managers historically interpreted the choice to unionize as a “black mark on their professional record. Unionization was . . . an indication of managerial failure. It was unnatural, illegitimate, and un-American, and to be resisted, within the law.” *Id.* at 15 & n.24 (citing the work of HOWELL JOHN HARRIS, *THE RIGHT TO MANAGE* (1982)).

This deep-seated hostility is sometimes clouded by data showing that management also supports the “legitimacy or even the desirability of a free labor movement as a part of our democratic society. . . . [The] curious inconsistency . . . [is] unions are [viewed by management as] an essential part of the democratic fabric of society, but they are not necessarily desirable or acceptable ‘in my firm or on my property.’” *Id.* at 15.

144. The response by management to expand the nonunion sector during the late 1960s and 1970s was both intense and widespread. It has been well documented. *See* KOCHAN ET AL., *supra* note 77, at 49-50 (tracing the growth of the nonunion sector). Over the two decades of the 1960s and 1970s, underground bituminous coal mining grew from virtually a zero nonunion sector to twenty percent. *See id.* at 49. In construction, “open shop” construction began in the 1950s to slowly move into residential construction, made modest gains in commercial construction in the early 1970s, and between 1975 and 1984, nonunion activity increased from 50 to 75 percent of all construction work. *See id.* Since over-the-road trucking deregulation in 1980, one-fifth of the unionized companies have gone into bankruptcy and have been replaced by nonunion companies. *See id.* Between the mid-1960s and the mid-1980s, General Electric has gone from 30 to 40 nonunion plants to twice that many. *See id.* Other major companies such as Monsanto and 3M have seen a drop in the unionization rate of their production and maintenance employees from

This loss in confidence in the collective bargaining system, and in unions as its effectuating force, is thus rooted in economic factors and employer value systems. Part of unions' loss of esteem also can be found in the larger anti-Establishment assault on authority that caused a loss of confidence in institutions generally—schools, universities, government, corporations, the church, and others.¹⁴⁵ As James Patterson writes, “[n]o institutions could shut off the rhetoric of rights that rang throughout the land” in the late 1960s and 1970s.¹⁴⁶ The Red Scare of communist infiltration in some unions at the height of the Cold War cast a pall.¹⁴⁷ The McClellan hearings in the Senate, which uncovered corruption in a small number of unions, were well publicized and helped turn public opinion against unions.¹⁴⁸ In response, the Senate enacted the Labor-Management Reporting and Disclosure Act in 1959 to regulate union finances and promote democracy within unions.¹⁴⁹

Even some of the unions' friends turned against them during the period. The “New Left” saw unions as “stodgy and conservative.”¹⁵⁰ Even today, friends of labor on the Left argue that labor lacks the ability to command public support because “labor repeatedly alienated itself from the great social and protest movements of the 1960s and 1970s.”¹⁵¹ La-

80 to 40 percent. *See id.* at 49-50.

Employer hostility was a major contributing factor. The shift in the economy and changes in occupational distribution have contributed to this, as noted above—accounting for perhaps forty percent of the total. *See id.* at 53-54. Plus, some of the loss is attributable to the unions' failure to invest in new organizing. *See id.* at 55. But the single most significant factor has been the increased prevalence of union-avoidance values and actions by management. *See id.* at 55-62. On the “wrath” that underlies the “increased employer antipathy and resistance to unions [in the 1970s],” see Abraham, *supra* note 109, at 1319-20 & nn.268-78 (detailing the “explosion of unfair labor practice filings, . . . a vast rise in union decertification elections, and the mushrooming of the anti-union consulting industry”).

145. *See* PATTERSON, *supra* note 88, at 713-14, 764 (discussing the anti-authority movements in the 1960s and early 1970s).

146. *Id.* at 714.

147. *See id.* at 54 (discussing the successful efforts of the AFL and the CIO leadership to rid unions of communist influence). Part of that legacy is the schism doctrine that remains part of our law to this day. *See* TOMLINS, *supra* note 2, at 323-24 (writing that the schism doctrine was developed to “encourage[] the raiding of Communist-led incumbents by AFL and CIO unions”).

148. *See* KOCHAN ET AL., *supra* note 77, at 38; Stone, *supra* note 6, at 632 (indicating that broad publication of corruption in labor unions chilled public support of the unions).

149. *See* KOCHAN ET AL., *supra* note 77, at 38.

150. PATTERSON, *supra* note 88, at 623.

151. Rogers, *supra* note 47, at 82 n.222; *see also* Arnold R. Weber, *Keeping Management Awake*, N.Y. TIMES, June 10, 1984, at 22 (reviewing RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984)) (stating that “[t]he liberals' ardor has been dampened by criticisms that unions have been slow to embrace equal opportunity for

bor's political program has always extended beyond its own selfish interests,¹⁵² but unions did not always share the enthusiasm for some of the Left's more cherished political initiatives. Labor supported civil rights legislation, but "[l]abor unions were becoming increasingly divided on issues of race . . ." during the 1960s and 1970s.¹⁵³ Unions were staunch cold warriors and fierce opponents of the movement protesting the war in Vietnam.¹⁵⁴ Some unions also have opposed the women's movement and environmental movement. One commentator concluded that when one lists the movements unions opposed, "[t]here are not, for the period, a great many movements left."¹⁵⁵

No mention of this loss of confidence in collective bargaining in general and in unions in particular during the 1960s and 1970s can be found directly in case law. So it is difficult to assess its contribution to the law's retreat from protecting employee group power. There is the occasional yelp from a member of the judiciary protesting the NLRB's hostility toward unions, such as Senior Judge Swygert's conclusion that the NLRB's "off-hand dismissal" of unions' efforts to have their collective needs balanced against individual section 7 rights "evinces an unseemly hostility against trade unionism."¹⁵⁶ The academic literature certainly makes the

minorities and women in their own house, and have been staunch cold warriors in foreign affairs").

Professor Stone argues the question from a subtly different perspective. Her point is not so much that the Left abandoned unions because unions failed to support the social movements of the period but rather that "[o]ther social causes like the civil rights movement and the anti-war movement captured [their] hearts and minds . . ." Stone, *supra* note 6, at 632; *see also* WILLIAM J. PUETTE, THROUGH JAUNDICED EYES: HOW THE MEDIA VIEW ORGANIZED LABOR 8 (1992) (noting that "[t]he leftwing intellectual . . . is comfortable crusading for the downtrodden and aggrieved worker but is uncomfortable relating to the working-class union leader and the well-paid union worker"); *id.* at 12 (discussing how "the media were glad to take up [labor's] banner" when labor was viewed "as an underprivileged, generally helpless and disfranchised object of pity" but abandoned labor "when these same workers' unions were sufficiently organized to begin exerting the very power the media had formerly advocated"); *id.* at 24 (indicating that "[t]he primary social issue dominating American liberalism in the 1960s was the battle for civil rights. Largely because of the expanding economy, labor issues were not high on media agendas").

152. Labor's political program included support for issues beyond the narrow scope of collective bargaining, such as social security, minimum wage, workplace safety and health, and national health insurance. *See* KOCHAN ET AL., *supra* note 77, at 28.

153. PATTERSON, *supra* note 88, at 564.

154. It may be recounted that President Nixon appealed to working Americans as the "forgotten Americans" and the "silent Americans" during the Vietnam war years. *Id.* at 702.

155. Rogers, *supra* note 47, at 82 n.222.

156. Local 1384, UAW v. NLRB, 756 F.2d 482, 496-97 (7th Cir. 1985) (Swygert, J., dissenting).

connection between the loss of esteem for collective bargaining and unions and the deterioration of legal protection for worker collective rights.¹⁵⁷ Indeed, many argue it is “untenable” to think that the administration of labor policy by the courts and the NLRB can be divorced from the social history of the age and uninfluenced by it.¹⁵⁸ When one adds that the press generally has subjected unions either to negative coverage or malign neglect,¹⁵⁹ the case tightens that union esteem had begun to unravel from many sides and social policy responded by undermining protection of worker collective rights.

Some of the most persuasive evidence that a national sentiment less supportive of collective bargaining has transformed public policy can be found in the congressional preference, since the 1970s, for statutes protecting the individual rights, rather than the group rights, of workers.¹⁶⁰ Since the 1960s, the national commitment for “group-based” legislation, such as the Wagner Act and the Taft-Hartley Act, seeking to advance worker interests through the protection of group action,¹⁶¹ has given way to “category-based” legislation¹⁶² that “relied on individual rights and

157. See Stone, *supra* note 6, at 632 (indicating that “[l]abor’s demise in the public mind paralleled the demise of union strength”); see also Abraham, *supra* note 109, at 1319-21 (stating that “[p]ublic life in the United States entered a period hostile to labor and its allies Lawyers, jurists, and scholars became part of this new discourse. In general . . . the deterioration of organized labor’s political and cultural standing proceeded apace with the decline of its standing in the workplace”); *id.* at 1298 n.130 (collecting authority).

158. See Abraham, *supra* note 109, at 1334 (discussing how it is “untenable” to deny that the Board’s mid-1980s decisions are “highly political,” “undisguised partisan projects”).

159. See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 162-80, 207 (1984) (stating that “[i]f one’s perception of the labor movement came solely from media portraits, one would believe that crookedness, undemocratic behavior, and strikes flourish under unionism”); see also Richard B. Freeman & James L. Medoff, *The Two Faces of Unionism*, 57 PUBLIC INTEREST 69, 69-70 (1979) (noting that unions receive increasingly less news coverage and mostly of an unfavorable kind); PUETTE, *supra* note 151, at 8 (detailing the media’s bias in the reporting of labor issues).

160. Indeed, Professor James Brudney has advanced an analysis that makes the process symbiotic; the actions of the legislative branch demonstrate a loss of confidence in collective bargaining as an institution, which in turn causes a “loss of legitimacy for unions as the enablers of group action. This loss of legitimacy encourages the business community and the general public to erode and belittle the role of unions.” See Brudney, *supra* note 77, at 1563-64. Then public confidence in collective bargaining erodes even more, permitting the cycle to repeat itself.

161. See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 177-78 (1996) (discussing group-based rules such as the Wagner Act and other labor relations laws).

162. See *id.* at 179-80 (discussing category-based rules such as employment discrimination laws).

freedoms while virtually ignoring group action.”¹⁶³ Changes in national sentiment regarding individual rights combined with the loss of confidence in collective bargaining fueled change.¹⁶⁴ While on its face none of the category-based legislation was inconsistent with a commitment to group action, it nevertheless undermined group action. Category-based legislation signaled a conclusion that the collective bargaining process was unable to address pervasive workplace problems.¹⁶⁵ The new employment legislation reduced the need for unions because it created individual rights enforced by individuals,¹⁶⁶ and in most of these statutes, unions play bit parts or are cast as part of the problem.¹⁶⁷ In short, at some point in the mid-1970s, the equilibrium shifted. Employment relations were primarily addressed by protecting individual employee rights rather than through the New Deal collective bargaining system, which was permitted to fall into disrepair because the commitment to the statute’s basic approach waned.¹⁶⁸

163. Brudney, *supra* note 77, at 1568. The category-based legislation is of two types: legislation protecting equality of treatment and legislation guaranteeing minimum rights. *See id.* The former has its source in the civil rights movement of the 1960s. Professor Katherine Stone situates the latter in the “public climate which was receptive to, if not insistent upon, some protection for the job security of individual employees” following “the dramatic corporate transformations of the [1980s that] produced correspondingly dramatic employee dislocations.” Stone, *supra* note 6, at 632-33.

164. Professor Brudney notes that changing economic conditions reduced national concern for industrial stability, the restoration of mass purchasing power, and the redistribution of national income—all factors that motivated Congress to establish the postwar collective bargaining regime of Wagner and Taft-Hartley. *See* Brudney, *supra* note 77, at 1568. In addition, the collective bargaining regime itself became “part of the problem” when collective bargaining contracts perpetuated racial discrimination at the workplace. Congress responded by increased emphasis on category-based statutes protecting individual worker interests “while virtually ignoring group action.” *Id.*

165. *See id.* at 1569-70 (stating that “[t]he need for a legislative solution revealed shortcomings in the collective bargaining approach”); *see also* Stone, *supra* note 6, at 591-93 (summarizing state judicial and legislative changes creating a “renaissance of rights for individual employees” and concluding that “the emerging regime of individual employee rights represents not a complement to or an embellishment of the regime of collective rights, but rather its replacement”).

166. *See* Brudney, *supra* note 77, at 1570 (noting that “[e]mployees were now able to pursue their own rights at little or no financial cost, just as they had relied on unions to pursue their contractual and statutory rights in the past”).

167. *See id.* at 1571-72. As Professor Brudney observes, under group-based legislation, unions play the lead role in negotiating improved working conditions for employees, but under category-based legislation, “the individual rights regime assigns unions cameo appearances or even casts them as villains impeding employees’ economic progress”—obstacles to the realization of individual rights. *Id.* at 1571.

168. *See id.* Relying on empirical analysis, Professor Brudney has concluded that judicial opinions similarly have reflected a marked decrease in support of group action as

David Abraham has noted this shift, concluding that as labor's struggles increasingly seem unglamorous and routine, as American trade unions seem increasingly impotent, and as "public disenchantment with their roles" has increased, there has developed a "weakening of the public's appreciation of collective action."¹⁶⁹ Katherine Stone's research in recent years demonstrates that the legal framework regulating labor relations has shifted from one of federal statutory empowerment of groups to one of promotion of individual employment rights by state courts and legislatures.¹⁷⁰ Stone's work takes the prior scholarship a step beyond, however, by showing that not only has the loss of commitment to collective bargaining resulted in "a series of judicial and administrative decisions [undermining] collective rights [of] workers,"¹⁷¹ but relatively recent state law protecting individuals at the workplace excludes unionized employees by operation of the preemption principle embedded in section 301 of the Taft-Hartley Act.¹⁷² Judge Kozinski of the Ninth Circuit Court of Appeals has warned that the combination of adding more state employment laws and denying their protection to unionized employees through operation of the section 301 preemption principle could be detrimental to the collective bargaining process.¹⁷³ Plus, the section 301 pre-

measured by the rate of union success before the Supreme Court and the courts of appeals. *See id.* at 1572-80 (discussing the Supreme Court's shift away from group action support); *id.* at 1581-88 (discussing the courts of appeals' cynicism concerning group action).

169. Abraham, *supra* note 109, at 1283. Mark Barenberg has argued that public confidence in collective empowerment of workers was eroded by two cultural miscalculations. First, labor policy underestimated the "deep-seated resistance toward unions . . . embedded in the belief system of U.S. managers." Barenberg, *supra* note 90, at 1495. Second, labor policy failed to appreciate the fear of American business that legitimizing collective bargaining "risked opening a cultural Pandora's Box. Workers' appetite for decision-making authority, organizational democracy, and redistributive power would grow with the eating." *Id.* These miscalculations registered in the failure of the New Deal labor relations system "as amended and actually administered" to engender a "cooperationist acceptance and trust in collective bargaining." *Id.* at 1494.

170. *See* Stone, *supra* note 6, at 575.

171. *Id.* at 575 n.3 (collecting authority).

172. *See id.* at 577 (concluding that "there is a tension between the new individual employment rights and the New Deal system of collective bargaining, a tension that means, concretely, that organized workers do not share in the benefits of the new employment rights". "A survey of recent preemption cases reveals a very broad tendency for courts to preempt unionized workers' state law claims. Indeed, with very few exceptions, courts always preempt unionized workers' attempts to assert state law employment rights." *Id.* at 606.

173. *See* Livadas v. Aubry, 943 F.2d 1140, 1150 n.2 (9th Cir. 1991) (Kozinski J., dissenting) (noting the risk that an employer could argue against an effort to unionize by pointing out to employees their loss of state employment rights if they unionize), *rev'd*, 512 U.S. 107 (1994). "[E]mployers frequently inform their employees during organizing drives that they will lose various state law rights if they form a union. Under existing pre-

emption of state employment law rights for unionized employees means that now “collectively bargained rights are not always better.”¹⁷⁴

IV. CONCLUSIONS AND EVALUATIONS OF THE TREND AWAY FROM PROTECTING GROUP RIGHTS

The burden of my argument in this Article has been first, that the legislative history of section 8(b)(1)(A) supports a far more limited role for the section than the one given it by the NLRB in its union discipline cases; second, if one compares NLRB and judicial precedent during the first twenty years with the next thirty years following the enactment of Taft-Hartley, one finds a dramatic change in the scope of state control over union discipline; third, that these cases substantially disarm worker majorities in their struggles with employers; and lastly, that the section 8(b)(1)(A) union discipline cases begin to make better sense when situated within the fluctuations of a postwar legal, economic, and political culture struggling to adjust.

Of the many forces that no doubt converged to reconceive section 8(b)(1)(A) during the postwar period, the institutional interests of the NLRB itself cannot be dismissed. Postwar labor litigation is filled with examples of the Supreme Court’s efforts to suppress the Board’s appetite for adding limits to unions’ economic weapons beyond those Congress placed explicitly in the statute. The Board’s union discipline cases are so congruent with these failed attempts that it is reasonable to conclude that some, but not all, of the explanation for the Board’s immoderation in these cases is attributable to its desire to advance its vision of labor policy by limiting worker self-help options. Perhaps in the process the Board also enhances its own power and prestige.

In addition, this Article argues that the union discipline cases represent an NLRB response to the inexorable forces favoring individual rights and entitlements. The increased use by unions in the 1960s to enforce its fines judicially explains some of the government’s insistence that it oversee the reasons for the fines it was asked to enforce. Additionally, enhanced notions of rights consciousness weakened labor law’s ability to continue the blur between individual and group consent, upon which so much of the Wagner Act had been built. Taft-Hartley thus created new zones of individual rights against the group but also embraced a new philosophical stance with respect to the relationship of the individual to the group. Therefore, the union discipline cases can also be understood as the Board’s application of Taft-Hartley’s philosophical change in a

emption rules, these claims are true.” Stone, *supra* note 6, at 643.

174. Stone, *supra* note 6, at 631.

dynamic culture that increasingly insisted on more individual rights and less trust in groups.

But the Board's union discipline cases are a product of their age in yet another way because they also mirror a diminished societal commitment to collective bargaining as an institution. There has been a loss of public confidence in collective bargaining for a variety of reasons—some economic, some historical, some political. The commitment to collective action through group-based litigation as the preferred method to protect workers' rights in the workplace and insure political and industrial stability has given way to what we now call employment law—law protecting the individual rather than group rights in the workplace. We now can see much more clearly that the conventional wisdom that Taft-Hartley merely nibbled at the edges of labor policy but maintained its core may be an oversimplification. The core commitment to collective bargaining may not have been overtly repealed but the commitment of the courts, the NLRB, and Congress to the process has waned. The union discipline cases are consistent with this decreased commitment to collective empowerment of workers, this loss of esteem for collective bargaining as an institution, and a new view that workers' interests should be protected through statutes protecting them as individuals more than as members of groups.

In 1948, Congressman Fred A. Hartley wrote that he was “confident that history will record the Taft-Hartley Act as a great step forward in labor relations law.”¹⁷⁵ If Congressman Hartley was referring to Taft-Hartley being the first installment of a reduced public commitment to worker collective empowerment, then he framed the issue that must be confronted today: Is the shift away from the collective empowerment of workers through group-based legislation in favor of empowerment of individuals through category-based legislation “a great step forward in labor relations law?”

There are practical, moral, and political reasons why the interests of American workers are poorly served by any policy emphasizing individual rights legislation over group-based legislation.¹⁷⁶ The American busi-

175. HARTLEY, *supra* note **, at 138.

176. Some surely take the view that the interests of American workers are best served by a substitution of individual rights legislation for group-based legislation. See Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1040 (1984) (arguing the need to move “toward direct imposition of specific minimal terms and standards where problems in the workplace have been perceived [and] away from governmentally sheltered monopoly status for labor unions”). Some of the category-based legislation suggested by Profes-

ness community itself has an enormous stake in maintaining an emphasis on group-based protections of workers' interests. First, a one-size-fits-all approach to solving workplace problems is too inflexible to meet the diverse needs of firms and the preferences of their employees. The private ordering that is the foundation of collective bargaining remains an elegant solution to the curse of suffocating statism.¹⁷⁷ Collective bargaining is designed to permit the parties to adjust to "local differences."¹⁷⁸ Without a robust unionized sector in the economy, American business and its workers can expect more, not less, governmental regulation.¹⁷⁹

sor Fried includes: unemployment insurance, workplace safety and health statutes, anti-employment discrimination legislation, and protections against unjust dismissal. *See id.* at 1036-37; *see also* WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 3* (1991) (encouraging modern unions to model after late-nineteenth century unions that "embraced broad and radical reform ambitions"). More often, political moderates recommend that public policy expand minimum standard legislation and combine that expansion with legislation to encourage strong trade unionism. *See* Posner, *supra* note 161, at 180 n.135 (citing a variety of suggestions).

Others advocate such suggestions as work councils or representation on corporate boards of directors. *See, e.g.*, PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 152-61, 186-224 (1990) (describing various ideas for workplace governance and worker participation); Craver, *supra* note 4, at 1643 (suggesting "shop-level works councils and the election of employee representatives to corporate boards," and an infusion of new federal protective labor legislation); Stone, *supra* note 6, at 585 n.29 (citing authority). Understandably, some who believe they have been accused of suggesting a complete dependance on category-based legislation have denied vigorously the suggestion. *See*, Katherine Van Wezel Stone, *The Future of Collective Bargaining: A Review Essay*, 58 U. CIN. L. REV. 477, 483-84 & nn.26-27 (1989) (reviewing *LABOR LAW AND BUSINESS CHANGE—THEORETICAL AND TRANSACTIONAL PERSPECTIVES* (Samual Estreicher & Daniel Collins eds., 1988)) (denying emphatically that Stone or anyone else associated with the Critical Legal Studies school have urged that the current system be replaced entirely with category-based legislation but rather all have continued their commitment to union representation).

177. *See* Barenberg, *supra* note 90, at 1417 (discussing the role of collective bargaining as a counterweight to "state socialism").

178. Stone, *supra* note 6, at 637. Paul Weiler, for example, has argued that collective bargaining is the preferred method for handling employment discipline issues because collectively bargained rights to protect from unjust dismissal "will be more comprehensive and effective than anything management might be induced to offer by the pressures of an individualist labor market, and more flexible and sensitive than anything a government could hope to provide through a judicial or administrative bureaucracy." WEILER, *supra* note 176, at 93-94.

By further example, one need only contemplate the vastness of the task of setting standards for all hazardous industrial substances in the United States, and the difficulties that the Labor Department and the National Institute of Safety and Health have confronted in the attempt, to appreciate how ineffective national standards-setting legislation can be. *See* Stone, *supra* note 6, at 637-38. Depending on the plant, an OSHA standard may be too strict or too lax, and the employer and the union can bring extensive expertise to bear on the problem to frame a standard that fits. *See* Posner, *supra* note 161, at 179-80.

179. *See* Posner, *supra* note 161, at 193 (stating that "[s]olidarity groups supply collective goods that people otherwise demand from the state. Through policies of selective

Second, business has a stake in vibrant trade unionism because it is entitled to the productivity gains that trade unionism brings. Richard Freeman and James Medoff have assembled much of the vast research demonstrating that an increased employee role in workplace decision making increases responsibility and commitment to the firm and also productivity.¹⁸⁰ Yet, these new cooperative work arrangements too often degenerate and create "distrust, cynicism, and low morale."¹⁸¹ Unions help sustain employee trust that systems of workplace collaboration have and maintain integrity.

One cannot become too sanguine that the above evidence concluding that trade unionism is good for the American economy will likely break the stalemate over labor law reform. Those within the business community who may know intellectually that unions are good for the economy, also know unions erode profit levels by forcing income transfers from corporate executives and investors to workers.¹⁸² Add to this the historic hostility of American management to unions and it seems unlikely that the business community will work to strengthen group rights of workers even if unions enhance overall economic efficiency.

However, workers themselves and the public at large have other important interests at stake. First, individual rights-based legislation risks giving American workers a false sense of security.¹⁸³ A policy depending on state and local legislation simply creates an incentive not to protect workers, because all too often less employee protection is an effective

support, the state can effect increases in the supply of these goods more cheaply than it could supply them itself through direct or category-based regulation.").

180. See FREEMAN & MEDOFF, *supra* note 159. For then, the work environment becomes trust-inducing. With trust, workers are encouraged to put aside short-term desires and invest in their own and their firm's long-term interests. See Barenberg, *supra* note 90, at 1493-94 & nn.482-86 (collecting authority).

181. Stone, *supra* note 6, at 637.

182. See FREEMAN & MEDOFF, *supra* note 159, at 22. Freeman and Medoff noted:

Unionized employers tend to earn a lower rate of return per dollar of capital than do nonunion employers . . . because the increase in wages and the greater amount of capital used per worker are not compensated for by the higher productivity of labor associated with unionism. The reduction in profitability . . . is centered in highly concentrated and otherwise historically highly profitable sectors of the economy.

Id.; see also David Montgomery, *Labor Pains*, WASH. POST, July 22, 1984, at 5 (reviewing RICHARD B. FREEMAN & JAMES MEDOFF, *WHAT DO UNIONS DO?* (1984)) (stating that "[i]n general, Freeman and Medoff conclude that unions are advantageous 'to organized workers, almost always; beneficial to the economy, in many ways (including promoting efficiency); but hard on the bottom line of company balance sheets.' Unions face intense resistance because they hurt profits").

183. See Susan L. Catler, *The Case Against Proposals to Eliminate the Employment at Will Rule*, 5 INDUS. REL. L.J. 471, 471-72 (1983).

strategy for attracting new business investment into a community. Federalizing individual rights labor legislation provides no greater long-term protection. The outright hostility to labor and civil rights legislation by the federal judiciary in our own time is a matter of record. The infamous 1989 Term of the United States Supreme Court is but the most notorious example.¹⁸⁴ Congress was required to remedy the harm done that Term, which it did, but only in part, in the Civil Rights Act of 1991.¹⁸⁵ Professor Brudney's research demonstrates that "[j]udicial efforts to retreat from [protection of group rights] seem to reflect less disagreement over what Congress meant than discomfort over the wisdom of adhering to what Congress is known to have meant."¹⁸⁶ The union discipline cases that have been the focus of this essay substantiate that disagreement with what Congress is known to have meant is strong medicine in day-to-day enforcement of labor legislation. The research by many others cited in this essay, as well as periodic outcries from members of the judiciary, corroborate the risk of periodic administrative and judicial hostility workers suffer.¹⁸⁷

All of this illuminates a fundamental practical problem resulting from

184. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting the coverage of the Civil Rights Act of 1870); *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900 (1989) (interpreting Title VII limitations period to make recovery more difficult); *Martin v. Wilks*, 490 U.S. 755 (1989) (holding that white employees who were not parties to consent decrees have had their interests harmed); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) (limiting the "disparate-impact" theory of recovery under Title VII of the 1964 Civil rights Act); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (changing burden of proof, making recovery under civil rights statutes more difficult).

185. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in 42 U.S.C. § 1981). But many of those gains were eroded by subsequent judicial interpretation. See Hollander, *supra* note 3, at 443 (stating that "early indications with respect to the Civil Rights Act of 1991 . . . indicate that the conservative federal judges . . . will continue to disembowel any progressive legislation").

186. Brudney, *supra* note 77, at 1591.

187. Even when protective labor legislation has not been judicially eroded or repealed legislatively, it denies American workers the protections they need. Lawsuits are immensely more complex and expensive than grievances and often provide inadequate remedies. Susan Catler's research shows that most wrongful discharge cases, for example, are brought by highly paid professional employees who can finance the litigation and that the reinstatement remedies most wrongful discharges. See Catler, *supra* note 183, at 496-97.

On the recent development of undermining the protection of individual employment rights through the use of arbitration to resolve statutory disputes, see Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1019 (1996) (noting that a trend requiring arbitration of workers' statutory claims "threatens to turn back the clock on workers' rights").

de-emphasizing group-based legislation. Without it, workers lack the political clout needed to obtain and sustain meaningful protective labor legislation and protect against the risk that legislative gains will prove vulnerable and transitory. Yet the subliminal cultural message of individual rights legislation is workers should not, or at least need not, combine to protect their legitimate interests. The message is that collective bargaining is insufficient to provide workers the protections to which they are entitled, and workers do not need collective bargaining because workers can depend on government to provide and sustain adequate individual rights legislation to protect them.

Katherine Stone has observed that a public policy protecting worker interests through protective labor legislation, rather than through group-based legislation that enhances collective worker empowerment, "contains a built-in self-destruct dynamic. It functions to disorganize labor, to prevent the very group-formation that is necessary to retain or improve the minimal terms."¹⁸⁸ For all persons of goodwill who care about workers' rights, this is a chilling observation.

Finally, to these practical reasons for not substituting minimum standards legislation for legislation protecting group rights must be added the moral deficiency in any labor law system lacking adequate legal protection of group empowerment at the workplace. At the center of Senator Wagner's ideological firmament was "an integrationist and cooperationist vision of class relations" where "achieving workers' democratic consent and substantive freedom through collective empowerment" took precedence over all other legislative goals.¹⁸⁹ To Senator Wagner, union representation was not only an economic and political good but also a "moral imperative."¹⁹⁰ And so today, even if workers could achieve distributive justice through individual rights legislation, without group power there can be no genuine consent to workplace authority relations.¹⁹¹ To Senator Wagner it was clear that workplace tranquility

188. Stone, *supra* note 6, at 638; see also Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 300-02 (1995) (discussing the role of unions as voluntary organizations transforming private issues of workers into public issues and legislative action thereby invigorating the democratic process); Rogers, *supra* note 4, at 98 (noting that "the basic political idea [of the Wagner Act] was that, inside the firm and out, worker organization would help American democracy by providing a 'countervailing power' to otherwise overwhelming business domination.").

189. Barenberg, *supra* note 90, at 1390 n.31, 1400.

190. Rogers, *supra* note 4, at 98.

191. Wagner believed that "only collective bargaining could legitimately elicit the acquiescence of workers, at least in the mass production industries." Barenberg, *supra* note 90, at 1402 n.88.

through duress is no more moral than the tranquility of the slave system in the Old South.¹⁹² Each lacks democratic consent in the achievement of industrial peace. Shall the employer-employee relationship remain what the common law called it—a master-servant relationship? Collective bargaining reduces the power disparity on which the work relationship necessarily is based in an economy such as ours and the disparity that remains is legitimate in the sense it is cleansed of much of its duress. That always has been, and remains, the moral claim of collective bargaining.

One commentator has asked, “how might [labor law] reform be seen as in the *general* interest of American society,” as “a paladin of the general will?”¹⁹³ Ironically, the union discipline cases at least in part offer a clue. If it is true that group rights were sacrificed in the union discipline cases because of a loss of commitment to the collective bargaining process as an institution and because of a perceived need to enhance the individual rights of workers, then these two considerations need to be the starting point of any design to reinvigorate group rights of workers. Collective bargaining must regain its mantle of respect and importance. And the national appetite for freedom without responsibility must be discussed openly. Senator Wagner’s vision of the “moral imperative” of group empowerment is thus an inviting invitation to refocus the debate about labor law reform. Making collective bargaining the “cooperative venture guided by intelligence, rather than a mere test of relative strength,”¹⁹⁴ that Senator Wagner envisioned will always be a challenge but remains a viable goal. Plus, collective bargaining remains the best means through which workers render democratic consent to authority through their participation in the conditions of employment under which they work. The alternative is unacceptable. It has workers submitting but not consenting. There is no moral integrity to such an approach, even if the legislature sedates the process with additional layers of category-based workplace statutes that provide workers minimum rights. Charles Craver has framed the issue as well as anyone. He has stated that “Americans must decide whether we believe that independent labor organizations are an important aspect of a democratic society. If we do not act quickly to reverse the long-standing union decline, labor entities may become irrelevant by the end of the decade.”¹⁹⁵

192. *See id.* at 1423.

193. Rogers, *supra* note 4, at 101, 123.

194. Barenberg, *supra* note 90, at 1420.

195. Craver, *supra* note 4, at 1642.

In an article in the sports section of the *Washington Post*, Michael Wilbon wrote of baseball's "[f]atal [d]etraction."¹⁹⁶ He wrote that the sport's shortcomings had caused a changed national sentiment that threatened to make baseball like the train: "Sure once in a while when you want something slow and lazy that will harken you back to a simpler time you'll settle in for a nice, long train ride. But for the most part, its a museum piece. Something we'll explain to our children, who probably won't care to listen."¹⁹⁷ Predicting the end to baseball is a cottage industry that has been around a long time. So also is the industry of predicting the demise of the trade union movement. That said, we all know that there used to be many more passenger trains in this country than there are today. Cultural icons do die, except of course the Rolling Stones, who are still packing them in night after night even though their last hit was *Brown Sugar* in March of 1971.

It is my view that the only hope for keeping collective bargaining off the museum shelves and protecting it from the malaise in which it finds itself is to focus on what the world of work will be like if we do not have collective bargaining available to workers who want it. The union discipline cases help us understand the forces that threaten the collective empowerment of workers upon which collective bargaining depends. They also stand as beacons to unions showing the competing interests to which they must be sensitive. The time to refocus the debate to address the normative underpinnings at stake is now.

196. Michael Wilbon, *Baseball's Fatal Detraction*, WASH. POST, Oct. 22, 1997, at C1.

197. *Id.*

APPENDIX A

A. *Summary of the Legislative History of Section 8(b)(1)(A)*

By 1947, the Congress was resolutely committed to the elimination of closed-shop agreements. Individual freedom unduly suffered, it was argued, when unions' unbridled power to grant or withhold membership determined whether one obtained and maintained employment. Unlinking control over membership from control over employment opportunities was deemed essential. Sections 8(a)(3) and 8(b)(2) were enacted to eradicate the closed shop. They banned what was referred to as "external enforcement" of union rules by "preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules."¹⁹⁸ Thus entered into our national labor policy the ideology of voluntary membership: (1) one may not be compelled into actual union membership for the membership obligation is reduced to its "financial core;" and (2) noncompliance with union rules may have no effect on one's employment opportunities.¹⁹⁹

Congress did not intend to probe into the internal enforcement of union rules through methods not requiring employer complicity. The Senate report discussing section 8(b)(2) disclaimed any intent "to limit the labor organization with respect to either its selection of membership or expulsion therefrom."²⁰⁰ Individual senators made the same representations on the floor of the Senate. For example, Senator Taft, in response to Senator Pepper's concern that unions would be helpless to protect themselves from those who betray the objectives of the union, represented to the Senate that:

The pending measure does not propose any limitation with respect to the internal affairs of unions. . . . All that [unions] will not be able to do, after the enactment of this bill, is this: If they fire [expel] a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his

198. *Scofield v. NLRB*, 394 U.S. 423, 429 (1969).

199. See *Pattern Makers' League v. NLRB*, 473 U.S. 95, 105-06 (1985) (discussing how "mounting objections to closed shop" agreements prompted Congress to enact section 8(a)(3) prohibiting discharge for "failing to abide by union rules or policies with which [member] disagrees").

200. S. REP. NO. 80-105, at 20 (1947), reprinted in 1 NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 426 (1948) [hereinafter S. REP. NO. 80-105].

job and throw him out of work.²⁰¹

Section 8(b)(1)(A) did not appear in the bill reported to the Senate by the Senate Committee on Labor and Public Welfare. It was added as a floor amendment to the Committee bill by five members of the Senate Labor Committee, including Senators Taft and Ball.²⁰² The Court in *Allis-Chalmers* stated that:

What legislative materials there are dealing with [section] 8(b)(1)(A) contain not a single word referring to the application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in particular. On the contrary there are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions.²⁰³

This is not surprising because those who sought the addition of section 8(b)(1)(A) “believed that the Senate bill did not go far enough in the regulation of practices employed by unions for organizational purposes.”²⁰⁴ In other words, section 8(b)(1)(A) was offered as a floor amendment to regulate union organizing tactics.

The report of supplemental views, which announced the intention by the five members of the Senate Committee on Labor and Public Welfare to propose amendments to the Committee bill, listed the abuses their proposed amendments were designed to address.²⁰⁵ They proposed the language of what is now section 8(b)(1)(A) to curb “union coercion of employees . . . and their families in the course of organizing campaigns” and “direct interference [with employee free choice during organizing campaigns] by mass picketing and other violence.”²⁰⁶ “Similar expressions pervaded the Senate debates on the amendment. The note repeatedly sounded [was] the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal.”²⁰⁷

201. 93 CONG. REC. S4193 (daily ed. Apr. 29, 1947) (statement by Sen. Taft).

202. See *NLRB v. Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274, 285 (1960).

203. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 185-86 (1967).

204. *Drivers Local 639*, 362 U.S. at 285.

205. See Marcoux, *supra* note 11, at 1411-12 n.11.

206. S. REP. NO. 80-105, *supra* note 200, at 50; see also *Allis-Chalmers Mfg.*, 388 U.S. at 186 (noting that “[t]he mischief against which the Statement [of supplemental views] inveighed was restraint and coercion by unions in *organizational campaigns*”); accord *Drivers Local 639*, 362 U.S. at 285.

207. *Drivers Local 639*, 362 U.S. at 286; see also *id.* at 285-89 (providing a myriad of citations indicating that the focus of the Senate’s concern was union coercion of unorganized workers who refused to join the union); accord *Allis-Chalmers Mfg.*, 388 U.S. at 187 (stating that “the consistent thrust of [Senator Ball’s] arguments was the necessity of controlling union conduct in *organizational campaigns*”).

The approach of the House was in sharp contrast to that of the Senate. The House "strictly circumscribed" union picketing by "imposing drastic limitations upon the right to picket. But the House conferees abandoned the House bill in conference and accepted the Senate proposal."²⁰⁸

The open-textured language comprising the proposed section 8(b)(1)(A) caused some in the Senate to seek assurances that the section would be cabined as promised and would not be used to regulate union internal affairs. These assurances were given repeatedly by the sponsors and others.²⁰⁹ The authoritative legislative history of section 8(b)(1)(A) thus consists primarily of these floor explanations and clarifications of the reach of the proposal by the sponsors of the amendment. During a period of several days, the sponsors repeatedly assured the Senate that "the section was not meant to regulate internal affairs of unions."²¹⁰ Unconvinced, Senator Pepper from Florida insisted on the addition of the section 8(b)(1)(A) proviso, to which the sponsors readily consented. As one sponsor, Senator Ball, stated, "I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions."²¹¹ Later that day, Senator Ball again reassured the Senate "[t]hat modification [the proviso to section 8(b)(1)(A)] is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize."²¹²

In one colloquy, Senator Taft suggested that the Senate bill reached beyond coercive organizational tactics to protect union members from arbitrary acts of union leaders.²¹³ This single exception from Senator Taft to the otherwise consistent legislative record by the sponsors of section 8(b)(1)(A) that it was not intended to reach union internal affairs has led

208. *Drivers Local 639*, 362 U.S. at 288-89. *But see* *Pattern Makers' League v. NLRB*, 473 U.S. 95, 111 (1985) (indicating that Congress was "aware that the broad language of [section] 8(b)(1)(A) would reach some of the same union conduct proscribed by the" House bill).

209. *See Allis-Chalmers Mfg.*, 388 U.S. at 186.

210. *Id.* at 186.

211. 93 CONG. REC. S4272 (daily ed. Apr. 30, 1947) (statement by Sen. Ball).

212. *Id.* at S4433.

213. *See Allis-Chalmers Mfg.*, 388 U.S. at 194-95 (stating that "the only indication in the debates over [section] 8(b)(1)(A) of a reach beyond organizational tactics which restrain or coerce nonmembers was Senator Taft's concern with arbitrary and undemocratic union leadership"); *cf. id.* at 209-13 (Black, J., dissenting) (discussing references in legislative history to section 8(b)(1)(A) reaching internal union affairs).

the Supreme Court to conclude that “any inference that Senator Taft envisioned that [section] 8(b)(1)(A) intruded into and regulated internal union affairs is negated by his categorical statements to the contrary in the contemporaneous debates on [section] 8(b)(2).”²¹⁴

APPENDIX B

A. The Contemporary Reading of Section 8(b)(1)(A) Regulation of Union Discipline

With some notable exceptions, the means a union uses to enforce internal union rules and policies against members are irrelevant.²¹⁵ The end sought to be achieved by the discipline normally is determinative.²¹⁶ The current rule can be summarized as follows:²¹⁷ A union may not impose any discipline by means of expulsion, or by any other coercive means, if the discipline contravenes an overriding policy in the Taft-Hartley Act²¹⁸ or any other federal labor statute.²¹⁹ This approach has permitted the NLRB to ban union discipline intended to achieve a wide array of union objectives that fall into four broad groupings:

Rules designed to bind union members to maintenance of membership commitments made when joining the union or made among members pursuant to strike decisions.

- A union may not enforce its rules against one who has validly resigned from the union prior to having engaged in the conduct that is the basis for the discipline even if membership is granted on the condition that the member agrees to be bound to union

214. *Id.* at 189-90.

215. See *Cannery Workers Union*, 159 N.L.R.B. 843, 846-47 (1966) (stating that “[w]e are unable to conclude that a reasonable reading of the proviso to Section 8(b)(1)(A) permits a valid distinction to be drawn between fines and expulsions . . . [F]ines and expulsions are to receive equal treatment under the [Act]”), *enforced*, *NLRB v. Cannery Workers*, 396 F.2d 955 (9th Cir. 1968).

216. See *Scofield v. NLRB*, 394 U.S. 423, 429 (1969) (discussing union discipline lawfulness measured by whether it contravenes overriding labor policies).

217. See generally Roger C. Hartley, *National Labor Relations Board Control of Union Discipline and the Myth of Nonintervention*, 16 VT. L. REV. 11 (1991) (discussing the current rule regarding the regulation of union discipline).

218. See *Scofield*, 394 U.S. at 429.

219. *Carpenters Local Union No. 22 (Grazziano Constr. Co.)*, 195 N.L.R.B. 1 (1972) (finding that a union fine for opposing an incumbent in an internal union election violated the Act because it frustrated the labor policies found in the Labor Management Reporting and Disclosure Act); *id.* at 2 (discussing how “the Board is charged with considering the full panoply of congressional labor policies in determining the legality of a union fine”).

rules following resignation;²²⁰

- A union may not impose any restriction on the right to resign and attempt to impose discipline on one who has resigned in violation of that restriction even if the union majority votes to limit the right to resign concurrent with a vote to strike.²²¹

Rules designed to regulate behavior of members harming group efforts to assert economic pressure on employers during times of labor struggle.

- Unions *may enforce*, by fines or expulsion, rules forbidding members from:
 - Engaging in strikebreaking—crossing lawful picket lines or advocating civil disobedience to the union majority's decision to strike;²²²
 - Exceeding production quotas set by the membership;²²³ or
 - Refusing to support an organizing campaign;²²⁴
- Unions *may not enforce*, either by fines or expulsion, rules prohibiting members from:
 - Engaging in strikebreaking—crossing picket lines that themselves violate some provision of the Act;²²⁵

220. See *Booster Lodge No. 405, Machinists v. NLRB*, 412 U.S. 84, 89-90 (1973) (holding that lawful resignation terminates a union's right to discipline); *NLRB v. Granite State Joint Bd. Textile Workers Union*, 409 U.S. 213, 215-16 (1972) (rejecting an argument that by participating in a strike vote, a member waives his right to resign and engage in strikebreaking); see also *Scofield*, 394 U.S. at 430 (holding that union fines against members are lawful only if they are "free to leave the union and escape the rule").

221. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 104 (1985).

[A] union commits an unfair labor practice when it enforces a worker's promise to his fellow workers not to resign from his union and return to work during a strike, even though the worker freely made the decision to join the union and freely made the promise not to resign at such a time, and even though union members democratically made the decision to strike in full awareness of that promise.

Id. at 117 (Blackmun, J., dissenting).

222. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

223. See *Scofield*, 394 U.S. at 425, 436.

224. See *Amalgamated Meat Cutters Local 593*, 237 N.L.R.B. 1159, 1160 (1978).

225. Discipline for crossing a picket line violates section 8(b)(4)(B). Compare *Local 388, United Ass'n of Journeymen*, 280 N.L.R.B. 1260 (1986) (finding that discipline for crossing unlawful picket line to work for neutral was unlawful), with *NLRB v. Local No. 18, Int'l Union of Operating Eng'rs*, 503 F.2d 780, 783 (6th Cir. 1974) (disagreeing with the NLRB and concluding that discipline for crossing unlawful picket line to work for primary was lawful). Discipline for crossing a picket line that violates section 8(b)(7) is unlawful. See *Local 520, Int'l Union of Operating Eng'rs*, 298 N.L.R.B. 768, 772-773 (1990) (finding unlawful discipline for crossing picket line violative of section 8(b)(7)(C)).

-Engaging in strikebreaking—crossing picket lines that are not unlawful but the NLRB deems contravene some overriding policy in the labor laws;²²⁶

-Performing mandatory overtime work in contravention of a union rule promulgated by the membership majority in an effort to gain leverage during collective bargaining negotiations.²²⁷

Rules regulating behavior harming co-workers individually by betraying them to employers:

- Unions may enforce rules
 - against voluntarily informing employers of misconduct by co-workers;²²⁸ or
 - against giving perjured testimony against a co-worker;²²⁹
- Unions may not discipline for
 - Giving testimony adverse to another worker at an arbitration hearing or administrative proceeding;²³⁰ or
 - Signing a witness statement as requested by employer with knowledge that the statement will be used to discharge a co-worker and used in a subsequent arbitration.²³¹

Behavior undermining union efforts to resolve disputes internally without the aid of the state:

- Unions may not enforce rules prohibiting union officers from

226. See *United Bhd. of Carpenters Local 1780*, 296 N.L.R.B. 412, 418 (1989) (finding that the imposition of a fine or any other discipline of a member for refusing to participate in sympathy strike that the NLRB finds violative of the no-strike clause was unlawful); *Local 12419, Int'l Union of Dist. 50*, 176 N.L.R.B. 628, 633 (1969) (discussing how union interests must be considered but the union has no legitimate interest in discipline for refusing to breach a no-strike clause).

227. *NLRB v. GAIU Local 13-B*, 682 F.2d 304 (2d Cir. 1982); see also *United Paperworkers Int'l Union Local No. 5*, 294 N.L.R.B. 1168, 1172 (1989) (finding that disciplining workers for performing mandatory non-unit work was unlawful).

228. See *Local 5795, Communications Workers*, 192 N.L.R.B. 556, 556-57 (1971) (finding that a fine for informing the employer of co-employee infractions was lawful); *accord Amalgamated Transit Union Local 1225*, 285 N.L.R.B. 1051 (1987).

229. See *Graphic Communications Int'l Union Local 388M*, 300 N.L.R.B. 1071, 1073 (1990) (holding that discipline for giving perjured testimony at an arbitration hearing was unlawful when perjury was determined by forum other than internal union procedures).

230. See *UMW Local 1058*, 299 N.L.R.B. 389 (1990), *enforcement denied*, *NLRB v. Local Union 1058, UMW*, 957 F.2d 149 (4th Cir. 1992).

231. *Oil, Chemical & Atomic Workers Int'l Union*, 269 N.L.R.B. 129, 131 (1984) (disciplining workers deemed harmful to the arbitration process); see also *Local Lodge D-357, Cement Workers*, 288 N.L.R.B. 1156, 1157 (1988) (finding it unlawful to reprimand an employee for signing witness statement).

filing unfair labor practices charges insubordinately—contrary to instructions from superiors,²³² or

- Prohibiting members from filing unfair labor practice charges against the union without first exhausting internal union appeal procedures.²³³

Though the means used to enforce union rules and policies normally are irrelevant, they do become material in certain circumstances. First, unions may not attempt to enforce any internal rules, irrespective of the legitimacy of the end sought, by enlisting the assistance of employers. In other words, a union may not seek to have an employer adversely affect one's employment opportunities as a means of enforcing internal union rules.²³⁴ Second, in three situations Board precedent does make a distinction between discipline affecting membership status and discipline resulting in judicially enforced fines—filing decertification petitions,²³⁵ filing deauthorization petitions,²³⁶ and engaging in dual unionism—supporting a rival union.²³⁷

232. See *Amalgamated Meat Cutters*, 181 N.L.R.B. 773, 776 (1970) (finding that the removal of an elected job steward from his position because he filed unfair labor practice charges against his employer, contrary to union policy prohibiting filing such charges, was unlawful).

233. See *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 418-19 (1968).

234. See *Laborers Int'l Union Local 282*, 271 N.L.R.B. 878, 883 (1984) (finding that discharge because the employee supported incumbent's political opponent was unlawful).

235. Compare *International Molders' & Allied Workers Union Local 125*, 178 N.L.R.B. 208 (1969) (holding that a fine for filing decertification petition was unlawful), with *United Steelworkers Local 4028*, 154 N.L.R.B. 692, 695-96 (1965) (concluding that a penalty for filing a decertification petition was lawful), *enforced sub nom.*, *Price v. NLRB*, 373 F.2d 443 (9th Cir. 1967) (finding suspension lawful) and *Tawas Tube Products, Inc.*, 151 N.L.R.B. 46, 49 (1965) (finding expulsion lawful).

236. See *Tool & Die Makers Lodge 113*, 207 N.L.R.B. 795, 797 (1973) (finding the fine unlawful and disqualification from holding office lawful).

237. See *Machine Stone Workers Local 89*, 265 N.L.R.B. 496, 499 (1982) (determining the fine unlawful and expulsion lawful); *Printing Specialties & Paper Products' Union No. 481*, 183 N.L.R.B. 1271, 1274 (1970) (finding fine unlawful and disqualification from office lawful); see also *Buffalo Newspaper Guild, Local 26*, 265 N.L.R.B. 382 (1982) (union discipline for filing unit clarification petitions unlawful; unit clarification petitions more akin to unfair labor practice charges than representation petitions). But see *Sheet Metal Workers' Local Union No. 22*, 296 N.L.R.B. 1146, 1148 (1989) (upholding union fining member for dual unionism).