Unions, Solidarity, and Class: The Limits of Liberal Labor Law

George Feldman†

The Wagner Act was passed in 1935 against a background of labor unrest and employer intransigence, in which workers made common cause beyond the resolution of particular workplace conflicts to a broader attack on the American class system. Supporters of the Act, responding to the crisis, intended it to both force employers to recognize unions and bargain with them, and to limit the scope of union activity to industrial disputes. Legal restrictions on class-wide activity by organized workers now prevent disputes from growing into confrontations between capital and labor, the author says. Were underlying issues of class conflict given room for exploration in the law, he writes, they would tend to assume a distinctly pre-Wagner Act flavor. Rather than a problem of regulating a process by which limited goals may be attained, they would require legal decisionmakers to choose sides and adopt a perspective implicitly based on class. Conforming to what the author characterizes as the courts’ traditional hostility to those who would challenge fundamental societal institutions, liberals and conservatives alike have limited the role of labor unions. They have done this, he maintains, by such means as limiting the constituencies for whom unions may speak, and restricting the use of involuntary dues collected from members. The evolution of secondary boycott doctrine contains a similar hostility to defining communities on the basis of class. The author’s main thesis is that labor law, faithful to its Wagner Act premises, aims at particularizing rather than generalizing workers’ struggles; it directs them towards their relationship with their employer, rather than to the relationship of their class and to work; it privatizes and depoliticizes those struggles. In so doing, the author says, the promises of the Wagner Act—to protect the rights to organize and to bargain collectively—may prove to be unfulfillable.

† Assistant Professor of Law, Wayne State University Law School. Jessica Litman, Dan Sherrick, and Jonathan Weinberg commented on an earlier draft; I thank them for their help. This article is dedicated to my daughter, Nina Cannell Feldman.

In September, 1934, textile workers throughout the South and East conducted the largest strike in American history. The strike was called by the United Textile Workers, under heavy pressure from the rank and file. The union demanded that the employers comply with the terms of both the National Industrial Recovery Act and the textile industry code of the National Recovery Administration: that employers recognize the union; that they pay the legally mandated wage and restrict the work week to the maximum hours permitted by the code; and that they halt the intensification of work and the deterioration of working conditions caused by the speedup of machinery and the “stretch-out,” an increase in the number of machines each worker had to operate.

In the textile center of Woonsocket, Rhode Island, the workers belonged to a different union, which the local employers had recognized and with which they bargained.1 Their wages and conditions already met, and sometimes exceeded, those required by the code. They seemed to have no

reason to join the strike. But the leader of the Woonsocket union, a socialist from Belgium, warned of the possibility of a sympathy strike: the union "had obligations to its fellow textile workers elsewhere." The purpose of such an action "would not be to wrest further concessions from Woonsocket employers but to increase the pressure on the government to intervene in the industry to standardize conditions throughout the country." A week after the national strike began, the Woonsocket workers voted overwhelmingly to join it, and soon all but two of Woonsocket's mills were shut down. On the evening of September 11, 1934, a crowd of two thousand people attacked one of the open mills with stones and battled the police, dispersing only when the National Guard arrived and fired tear gas. The next night, a much larger crowd, perhaps ten thousand strong, again attacked the mill with stones and rushed its gates. Again the National Guard used tear gas, but this time the attack continued. The guardsmen fired their rifles into the crowd, which still would not disperse. The battle soon spread to a nearby business district, where the crowd fought the outnumbered police, smashed windows, overturned cars, set fires, and looted stores. The rioters' control of the streets ended only when more troops finally arrived.

The textile strike was one of a series of events that shook the nation in 1934, when "strikes and social upheavals of extraordinary importance, drama, and violence [occurred] which ripped the cloak of civilized decorum from society, leaving exposed naked class conflict." In May, a strike against the Auto-Lite company in Toledo, Ohio, turned into a series of violent confrontations. Beginning on the afternoon of May 23, a battle raged for seven hours between the strikers, supported by large numbers of unemployed workers organized in the Lucas County Unemployed League, and special deputies protecting some 1,500 strikebreakers trapped in the plant. At dawn, nine hundred National Guardsmen arrived, including three machine gun companies. The troops were unable to clear the area with tear gas; twice they charged with bayonets drawn. Finally they opened fire, killing two and injuring fifteen. As the battle resumed that night, they again fired on the crowd.

The Unemployed League, led by the American Workers Party, a small Marxist group, played a noteworthy role in those events. It was hardly unusual in that period for unemployed workers to fight police. "But usually they [did] this for their own ends, to protest against unemployment or relief conditions. At Toledo they appeared on the picket lines to help striking

---

2. Gerstle, supra note 1, at 129.
3. Id.
5. This account of the Auto-Lite strike derives from Bernstein, supra note 1, at 220-24.
employees win a strike," not, as one might have expected, to take the jobs of the strikers.6

In Minneapolis, a city notorious for its anti-union atmosphere, a series of trucking industry strikes beginning in May virtually shut down the city.7 The Citizen's Alliance, an association that crossed industry lines, made decisions on the employers' side. The union, led by Trotskyists, also did not confine its efforts to those immediately involved. It dispatched pickets throughout the city and on fifty roads leading into it; it provided nightly entertainment for hundreds, sometimes thousands of supporters; it fed up to ten thousand people each day at its strike headquarters, and published a daily newspaper. Again there were large, violent clashes, including a police ambush of roving pickets in which sixty-seven strikers were shot. Again the National Guard was sent; martial law was declared. Both the governor of Minnesota and White House representatives were involved in attempts to end the confrontation. The agreement that finally ended the strike in late August was a tremendous victory for the union.

On the West Coast, the longshoremen struck. Their most important demand was an end to the "shape-up," a hiring system that both degraded workers and deprived them of job security, and its replacement by a union-run hiring hall.8 The strike soon closed down Pacific shipping. In San Francisco, the use of strikebreakers was ineffective because the Teamsters local voted to refuse to cross picket lines; cargo could be unloaded but not moved. The other maritime unions—sailors, cooks and stewards, ships' firemen, marine engineers, and the Masters, Mates and Pilots—quickly joined the strike. The longshoremen, the most powerful striking union, announced that it would not return to work until all the strikes had been settled.

Soon the Industrial Association, representing San Francisco's leading businessmen, took control from the longshore employers. In response, the striking unions formed a Joint Marine Strike Committee and elected the radical longshoreman Harry Bridges as chairman. On July 3, the Industrial Association attempted to open the port by running trucks to the docks protected by seven hundred police officers. A four-hour battle ensued. Two days later, "Bloody Thursday," the fighting involved thousands and continued all day. The National Guard arrived that evening; soldiers were sta-

6. Id. at 221 (quoting letter from Roy Howard to Louis Howe, written July 3, 1934).
7. This sketch of the Minneapolis Teamsters strike is based on Bernstein, supra note 1, at 229-52. The fullest account, however, comes from the strike's most important leader, Farrell Dobbs, Teamster Rebellion (1972).
8. This account of the San Francisco strikes is taken from Howard Kimeldorf, Reds or Racketeers: The Making of Radical and Conservative Unions on the Waterfront 100-14 (1988); Bruce Nelson, Workers on the Waterfront, Seamen, Longshoremen and Unionism in the 1930's, at 127-55 (1988); and Bernstein, supra note 1, at 252-98. Bernstein provides a vivid description of the "shape-up." See id. at 252-55.
tioned every five feet along the waterfront. The strike appeared to be broken.

Yet in the next days, one union after another, sometimes despite the opposition of their leaders, voted to strike in support of the maritime workers. By July 16, some 130,000 workers in the San Francisco area were engaged in a general strike. Joined against them were the leading business interests of the city. As the economic life of the Bay Area came to a halt, both sides, facing heavy pressure from the federal government, agreed to arbitrate the key issue of the hiring hall, and the immense confrontation ended.

The events in Woonsocket, Toledo, Minneapolis, and San Francisco had much in common. Whatever their specific causes, each involved something more than a simple conflict between workers and their own employer. In Woonsocket, the purpose of the strike was to support other workers; in Toledo, the unemployed were organized in support of the strikers; in Minneapolis, the strike became a contest between a united front of the city's anti-union employers and the city's workers, who were trying to unionize. In San Francisco, as in Woonsocket, unionized workers struck in support of others, and as in Minneapolis, the strike pitted the city's working class against its employers.

In each case there was violence on a scale approaching insurrectionary proportions, beyond the ability of local authorities to contain. Radical organizations or leaders were involved in each strike. Union victories like that in Minneapolis forever changed the political and economic life of the city, but the process by which those changes were accomplished seemed less like an industrial dispute than class warfare. In each case, it seemed to many thoughtful observers that the spreading of the conflict far beyond its origins and the resultant disorder, as well as the increasing openness of large numbers of workers to radical ideas and leadership, were caused by employers' unwillingness to concede what were basically moderate demands, especially their refusal to recognize a union. The employers' recalcitrance, it was easy to believe, threatened not only economic recovery, but the survival of the American political and economic order.

The next year, Congress passed the Wagner Act, the National Labor Relations Act, guaranteeing workers the right to form unions and requiring employers to recognize and bargain with them.

INTRODUCTION

In 1970, Justice Brennan acknowledged in Boys Markets, Inc. v. Retail Clerks Union, Local 770, that in the period before passage of the Wagner Act, "the federal courts generally were regarded as allies of management in

its attempt to prevent the organization and strengthening of labor unions."\textsuperscript{11} That situation, according to Justice Brennan, was "totally different from that which exists today."\textsuperscript{12} Six years later, Justice Stevens expressed his confidence that there was no longer "any legitimate concern about the impartiality of federal judges in disputes between labor and management."\textsuperscript{13}

In one sense, Justices Brennan and Stevens were surely correct. The open hostility to unionism that characterized the federal judiciary in the years before passage of the NLRA is gone, replaced by the appearance of more balanced adjudication.\textsuperscript{14} In many cases, this appearance accurately reflects reality. In particular, the opinions of the liberal wing of the Supreme Court, often represented by Justice Brennan, have been significantly more favorable to unions than have those of the Court's conservative members.\textsuperscript{15} For example, Justice Brennan, writing in dissent in \textit{First National Maintenance Corp. v. NLRB},\textsuperscript{16} argued that in making a decision to terminate a portion of its operation and thus eliminate a significant number of jobs, an employer should have been required to bargain with the union that represented its employees.

Moreover, Justice Brennan's favorable treatment of unions has sometimes gone well beyond what is required by the language of the NLRA. Writing for the Court in \textit{NLRB v. City Disposal Systems, Inc.},\textsuperscript{17} for example, Justice Brennan held that an employee implicitly invoking rights based on a collective bargaining agreement was engaged in "concerted activity" within the meaning of the NLRA, even though he acted entirely alone. In \textit{First National Maintenance}, Justice Brennan would have held that the NLRA requires employers to share decision-making power with their employees' representatives in areas that the Court viewed as wholly within the province of management, while in \textit{City Disposal}, his construction of the term "concerted activity" enhanced an employee's ability to invoke her union's protection against the employer.\textsuperscript{18}

\textsuperscript{11} \textit{Id.} at 250.

\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{Buffalo Forge Co. v. United Steelworkers of Am.}, 428 U.S. 397, 432 (1976) (Stevens, J., dissenting).

\textsuperscript{14} See, e.g., Wilson McLeod, \textit{The Importance of Traditional Labor Law in the Legal Curriculum}, \textit{43 J. LEGAL EDUC.} 123, 125-26 (1993).

\textsuperscript{15} The terms "liberal" and "conservative" are used in this passage in the way they are used in contemporary American political discourse. As I explain below, I consider the labor jurisprudence of contemporary liberals such as Justice Brennan to be consistent with the ideology of those who, while faithful to "liberalism" in the broader sense, abandoned aspects of classical liberal theory in the New Deal.


\textsuperscript{17} 465 U.S. 822, 841 (1984).

\textsuperscript{18} Similarly, in \textit{NLRB v. J. Weingarten, Inc.}, 420 U.S. 251 (1975) (Brennan, J.), the Court approved as a permissible construction of the Act the NLRB's position that an employee who reasonably
In other ways, however, the liberal vision of labor law that Justice Brennan exemplified has been severely limited. One obvious limitation, for instance, has been the Court’s preference for arbitration. Yet a different kind of limit also has been present in the labor jurisprudence of the Court’s liberal wing—a limit that is less obvious, usually has less immediate impact, but that is perhaps more deeply seated. The Court’s privileging of arbitration restricts the means by which unions legally may act in response to concerns that are concededly legitimate. The limits discussed here, by contrast, define the legitimate boundaries of collective actions and collective concerns. The cases discussed here reflect the liberal doctrine that labor law protects unions only insofar as they limit their role to that of representative of the employees of an individual employer, and that the law will resist any union attempt to move beyond this limitation. That doctrine rejects protection when the underlying issue implicates the proper role of unions in American society.

That question emerges in a variety of contexts. In some, a broad definition of unions’ societal function may require, or may seem to require, limiting individual rights; in others, the Court’s conclusion, or something very similar to it, is so clearly required by statute that the conclusion cannot be ascribed to the conscious or unconscious ideological views of the Justices. At other times, however, liberal members of the Court have narrowed the range of permissible union concerns and therefore of unions’ social role in contexts in which the law would have allowed a broader un-
derstanding, and in which the danger of conflict with individual rights was either absent or too attenuated to serve as a reasonable justification. In some cases this desire to narrow the sphere of union activity is central to the Court's reasoning; in others, it is a subsidiary theme, or is present only as an underlying assumption, unstated and perhaps unconscious, whose presence helps account for the result reached.

This article examines what the members of the Supreme Court who have been identified with its liberal wing have said explicitly or by necessary implication about what is the legitimate sphere of union activity in American life. This vision of the role that unions should play in society has both practical and ideological consequences. Modern labor law, faithful to the Wagner Act's premises, aims to particularize rather than generalize workers' struggles; it directs them towards their specific relationship to their employer, rather than to the larger relationship of their class to employers and to work; it privatizes and depoliticizes those struggles.23

Given the contextual limitations mentioned, this analysis necessarily must be cautious. It must take account of the constraints of statutory language and congressional intent and, where applicable, of judicial deference to the decisions of the NLRB.24 This analysis also must recognize the presence of other policy or ideological considerations that are unrelated to the theme of limiting the breadth of union concerns. Nonetheless, this theme is demonstrably present in a wide variety of legal settings, transecting the doctrinal categorizations that abound in labor law.

Part I of this article provides an account of the origins of the Wagner Act, stressing the congressional desire to counteract and channel class-based militancy as an important motivation in its passage. Part I then considers those collective activities that implicate unions' societal role, and associates those activities with issues of solidarity and to a perspective implicitly based on class. The analysis suggests that this association accounts for the hostility with which these activities are viewed by liberal decision makers.

Part II analyzes some of the ways in which labor law determines the appropriate constituency by whose efforts and for whose benefit unions may act. Because the legitimacy of collective action depends on the extent

---

23. It is in this sense that I think the frequently voiced point of authors associated with the Critical Legal Studies movement is correct. It is not that workers' struggles are channeled to arbitration rather than to a public body like the National Labor Relations Board (NLRB), see Katherine Van Wezel Stone, The Post-War Paradigm in American Labor Law, 90 YALE L.J. 1509 (1981), but rather that whatever method workers employ—even including a strike or other collective job actions—the locus of the struggle remains the particular workplace or employer. It is in this sense that workers' struggles are channeled away from "political" dimensions.

24. This theme will not be emphasized. In my view, the Justices—liberals and conservatives alike—have invoked this justification only when it has suited their purposes. Justice White perhaps has been the only consistent exception. See, e.g., Pattern Makers' League of N. Am. v. NLRB, 473 U.S. 95, 116 (1985) (White, J., concurring).
of the collective, this section considers the theoretical underpinnings behind
the Supreme Court’s definition of the bargaining unit, including the Court’s
exclusion of management from the coverage of the Act.

Part III closely examines what three Supreme Court cases say about
the desirable social role of unions. The first case limits for whom the union
may legitimately speak and for whose benefit it may act. The second limits
the use of involuntary dues to those activities that are consistent with the
Court’s understanding of the union’s place in society. In the third case, the
liberal wing of the Court, in dissent, invokes its view of the undesirability
of solidarity strikes in arguing that such strikes may be enjoined.

Part IV selectively surveys secondary boycott doctrine. First, it dis-
cusses the limitations imposed by the statutory language, and describes the
Supreme Court’s early attempts to delineate the nature of the secondary
boycott. Next, it analyzes the work-preservation doctrine as well as various
forms of union-initiated consumer boycotts, arguing that, given the con-
straints of the statute and the Constitution, the positions taken by the liberal
Justices can best be explained by the analysis advanced in this article.

The Conclusion briefly reevaluates the nature of the Wagner Act ac-
commodation in light of the limitations on unions’ role in American
society.

I

THE LIBERAL ACCOMMODATION

A. The Wagner Act: Class Militancy and Employee Accommodation

When the Wagner Act was passed in 1935, millions of Americans per-
cieved the threat to capitalism as entirely realistic, whether they welcomed
the prospect of its end or the possibility filled them with dread. As the
dimensions of the economic disaster became apparent, “[m]any Americans
who had never had a ‘radical’ thought before in their lives began to ques-
tion the virtues of American capitalism.”

Whether these hopes or fears were exaggerated is less important than
that they were shared by people who were neither crackpots nor hysterics,
including many who held positions of economic and political importance.
Army Chief of Staff Douglas MacArthur used these fears to defend his
armed dispersal of the “Bonus Army,” unemployed veterans who marched
on Washington in 1932 demanding payment of their World War I bonuses.
According to MacArthur, had President Hoover “let it go another week, I

threat really was is open to debate, but some scholars, not limited to those on the left, have posited that
the decade’s “protest and anti-capitalist sentiment . . . threatened to undermine the existing political
believe that the institutions of our Government would have been very severely threatened." As the San Francisco general strike loomed, Senator Hiram Johnson of California, a progressive, wrote to President Roosevelt that "[h]ere is revolution not only in the making but with the initial actualities." The system seemed to face danger from all sides. As the example of the Bonus Army shows, the vast numbers of unemployed workers posed a constant threat of disorder. Huge protests, often led by Communists, occurred throughout the country, especially in the first years of the Depression. More surprising, because it came from normally conservative quarters, was a nationwide "rebellion of American farmers," mobs of whom threatened sheriffs attempting to carry out foreclosures and blocked roads to force up the price of farm products. Agitation among African-Americans also increased dramatically; a major focus was the Communist Party-initiated defense of the "Scottsboro boys." What most concerned observers, however, was not the danger of generalized disorder, but that the most severe turbulence reflected a polarization of society into two camps. Like the manufacturers of Woonsocket who interpreted the events there "as the outbreak of class warfare," like the workers of San Francisco who voted for a general strike, many observers saw the two camps as workers and capitalists. The influence of Marxist groups in propagating this view may have been exaggerated by employers to enlist public and government support against strikers, but the Marxist influence was real enough.

The emphasis on the role of "outsiders" also may have been a way for employers to explain to themselves why radical ideas were flourishing among ordinary workers. From a more neutral perspective, it was easy to see that if a handful of committed Trotskyists could affect the beliefs of the

27. LEUCHTENBURG, supra note 25, at 263. While MacArthur may not have been the most stable man in Washington, and while his interpretation is certainly self-serving, it also would have lent credence to fears (and hopes) about the danger to the government.

28. BERNSTEIN, supra note 1, at 287.

29. Cf. LEUCHTENBURG, supra note 25, at 261; BERNSTEIN, supra note 1, at 221.


31. LEUCHTENBURG, supra note 25, at 261-62.

32. Goldfield, supra note 30, at 1271. The "Scottsboro boys" were nine young African American men accused of raping two white girls in Alabama. Id.

33. GERSTLE, supra note 1, at 137.

34. See, e.g., BERNSTEIN, supra note 1, at 287-88.

35. The electoral influence of radicals also grew. See, e.g., Lipset, supra note 26, at 275. As Professor Lipset also points out, the appeal of such figures as the vastly popular Huey Long "was primarily a leftist critic of the system . . . [and] was clearly class-linked." The famous "radio priest," Father Charles Coughlin, who had an audience of about forty million listeners in 1932, was similarly perceived at first "as a leftist opponent of the banking system and of capitalism." Id. at 277-78.

36. In addition, the involvement of radicals in the other protest movements mentioned, with the partial exception of farmers, ensured that the participants in these movements would be exposed to an
entire working class of Minneapolis, it was because the economic desperation of the Depression had made the workers receptive to these ideas. To the most astute observers, moreover, it was the recalcitrance of employers, who met demands for a hiring hall with machine guns, that caused this worker receptiveness to radical ideas. And to Roosevelt and his advisors, it was the reactionary anti-New Deal economic elite of San Francisco that was determined to turn a labor dispute into a class confrontation; the federal government's policy was to turn it back into a labor dispute and settle it—whether employers liked it or not.

On a national scale, that was the policy of the Wagner Act. The same fear of class warfare that employers had exploited to demand federal troops was now invoked by the Wagner Act's supporters to demand legislation to protect unions. For example, Representative Connery, who would cosponsor the Wagner Act in the House, spoke apocalyptically in 1934:

You have seen strikes in Toledo, you have seen Minneapolis, you have seen San Francisco, and you have seen some of the southern textile strikes . . . but . . . you have not yet seen the gates of hell opened, and that is what is going to happen from now on.

A year later, in hearings on the Wagner Act, Representative Connery explained that the purpose of the Act was “to save these corporations from communism and bloodshed.” Unless workers were unionized, he warned, they would say, “we get no protection from the government; we are slaves to our employers. Let us go out like they did in Russia and let us turn the government upside down and take the money away from these fellows.”

It is not possible to know whether these statements, and many others like them, represented a genuine belief that passage of the Wagner Act was necessary to avoid a revolution. But the evidence indicates that the fear of disorder was both widespread and justified, and that its class dimensions and the influence of radicals particularly disturbed policy makers, not least

analysis centering on this worker-capitalist division rather than on the more diffuse conflict between the rich and the poor.

37. Lloyd Garrison, Dean of the University of Wisconsin Law School and Chairman of the (old) NLRB, testifying in support of the Wagner Act, pointed out that when workers had “a means of expressing and redressing their economic grievances [they would] have no inducement to overthrow the social order. [The economist Harry] Millis added that revolutionary unions as frequently arose from employer opposition to labor’s right to organize and bargain as from radical theory.” Bernstein, supra note 1, at 332.

38. See Bernstein, supra note 1, at 289.


40. See Goldfield, supra note 30, at 1276.

41. Legislative History at 2789, quoted in Goldfield, supra note 30, at 1276. There are numerous other examples. Senator LaFollette, for example, warned of the “impending crisis . . . which will bring about open industrial warfare in the United States.” Legislative History at 1150, quoted in Goldfield, supra note 30, at 1272.
the leaders of the American Federation of Labor.\textsuperscript{42} It was widely believed that the "rising tide of labor unrest," as Senator Walsh, Chairman of the Education and Labor Committee, called it, was caused, not as in the past, by disputes over wages and hours, but by demands to organize and bargain collectively;\textsuperscript{43} and that unless legislation was passed to force employers to concede these rights, there would be "an epidemic of strikes that has never before been witnessed in this country."\textsuperscript{44}

The Wagner Act, then, was intended to force employers both to recognize and bargain with unions and to limit the scope of union activity to "industrial disputes." The Wagner Act in this view was not a trick used to dupe workers. The "most powerful corporate interests in the country steadfastly" opposed its passage, and "most of them" continued "to resist both the law and organized labor" even after its enactment;\textsuperscript{45} strikes remained an important method of organizing unions, and continued to be met by often violent resistance. The law changed the legal climate and allowed workers to win their battles, and unionization to triumph, in a wide variety of contexts.\textsuperscript{46} But it also channeled those battles and limited those victories. In this way, it was entirely consistent both with the statements of its supporters and with the broader policy of the New Deal.

Roosevelt's great achievement was that he "helped preserve the basic integrity and legitimacy of American capitalism by his willingness to transform it by, as he once put it, making major changes that avoided a threat to the system itself."\textsuperscript{47} Indeed, the New Deal was characterized by "conscious attempts on the part of Roosevelt and his colleagues to incorporate all forms of protest."\textsuperscript{48} The President's last-minute support for the Wagner Act, about which his administration had initially been non-committal,\textsuperscript{49} was motivated in part by a need to turn to labor to prevent the formation of a class-based third party,\textsuperscript{50} and more generally by a need to restore labor support for his administration. Because the labor provisions of the NIRA and its industrial codes lacked any effective enforcement mechanism,\textsuperscript{51} workers

\textsuperscript{42} See Goldfield, supra note 30, at 1276.


\textsuperscript{45} STANLEY VITTOZ, NEW DEAL LABOR POLICY AND THE AMERICAN INDUSTRIAL ECONOMY 152 (1987).

\textsuperscript{46} I agree with Michael Goldfield, supra note 30, that passage of the Wagner Act did not "cause" the great upsurge in labor militancy. Nonetheless, it seems plain that the existence of the Act was an important factor in union victories in the late thirties.

\textsuperscript{47} Lipset, supra note 26, at 297.

\textsuperscript{48} Id. at 295.

\textsuperscript{49} See Bernstein, supra note 1, at 342.

\textsuperscript{50} See Lipset, supra note 26, at 282-83.

\textsuperscript{51} See Bernstein, supra note 1, at 322 and accompanying text.
had lost all confidence in them. 52 When—only days after Roosevelt announced his support for the pending Wagner bill—the Supreme Court struck down the NIRA as unconstitutional in the long awaited Schechter 53 decision, the Wagner bill “assumed critical importance for FDR as the only currently visible symbol of his administration’s alleged commitment to the attainment of certain beneficial social and economic goals.” 54 By promoting unionization, the Wagner Act would serve to redistribute income from corporations to wage earners; 55 by forcing employers to recognize and deal with unions, it would allow this process to occur in the context of collective bargaining over industrial disputes and thus avoid the generalization of these disputes beyond the confines of the employer’s enterprise. The employers who almost unanimously opposed it thought Roosevelt a traitor to his class; while he compared them to a drowning man who berates his rescuer for failing to save his hat. 56

This accommodation is the framework within which liberal labor law has both protected unions and limited the scope of their activities. Whether, in the long run, unions have lost more than they have gained within this framework ultimately depends on one’s own judgment of what is desirable and what is possible. The remainder of this article assesses the costs to unionism of this accommodation.

B. Dimensions of Conflict, Echoes of Struggle

When I speak of issues that implicate “the proper role of unions in American society,” I mean to contrast them with those issues that concern the more specific role of unions in the workplace. Union power may be legally restricted or expanded in what may be characterized as two dimensions, one vertical and the other horizontal. The vertical dimension concerns either how great a role the union should legally play in limiting an employer’s ability to act as the employer sees fit, or else what economic pressure either the employer or the union may legally bring to bear to force

---

52. See Richard Hofstadter, The American Political Tradition and the Men Who Made It 336 (1948); Kimeldorf, supra note 8, at 106.
54. Vittoz, supra note 45, at 148.
55. See Kenneth M. Casebeer, Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act, 42 U. Miami L. Rev. 285, 287 (1987).

The very form and structure of the state, and of the law which is the state’s language, has continued to exhibit an “essential identity” with the essence of capitalism—the securing of profits through the production and exchange of commodities—sufficient to ensure that even those courses of action consciously chosen by state managers out of institutional self interest, or out of idealistic concern for the public interest, courses of action demonstrably damaging to the interests of particular capitalists, will in the long run exhibit an overall bias toward reproduction of the political-economic status quo.

Id. at xiii-xiv (emphasis added).
the other to concede. For example, the question in First National Maintenance Corp. v. NLRB\(^5\) was whether the employer could close part of its operations without bargaining with the union over the decision. In doctrinal terms, the issue was whether the employer's decision was a "mandatory topic" of bargaining, in which case the employer would have a legal duty to bargain in good faith with the union prior to implementation of its decision, and the union could strike over the issue. If the employer's decision was a "permissive topic" of bargaining, the employer could implement it unilaterally, without bargaining, and the union could not legally strike in response.

The horizontal dimension does not involve the relative power of the union and the employer in the workplace, but rather the legitimate scope of the union's activities, and the closely related issue of for whom it is legally proper for the union to speak. To illustrate, in Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.,\(^5\)\(^8\) the Supreme Court also addressed the "mandatory/permissive" question. In that case the employer unilaterally had altered the health care benefits of retirees. Writing for the Court, Justice Brennan held that the union was not legally authorized to represent the retirees, since they were no longer members of the bargaining unit. Nor did the medical benefits of the retirees sufficiently affect the interests of the current employees to justify union representation of the retirees on that basis.\(^5\)\(^9\)

The contrast between these cases illustrates the second, horizontal, dimension. While Pittsburgh Plate Glass still involved the relative legal rights of the employer and the union, the case is very different from First National Maintenance, though both fall under the doctrinal rubric of "mandatory/permissive." In First National Maintenance, the Court, over Justice Brennan's dissent, effectively said that the union had no right to bargain over the decision because making such decisions was part of the prerogative of ownership.\(^6\)\(^0\) The employer in Pittsburgh Plate Glass also was permitted to implement its decision without involving the union, but not because the subject matter was reserved to management by Congress. Rather, the Court held that the union was not entitled to speak for the retirees—and that the retirees were not entitled to ask the union to speak for them;\(^6\)\(^1\) the union's role in society is not to include "representing" the retirees. While phrasing the decision this way emphasizes its doctrinal basis because the legal concept of "representation" is limited by the statute, the decision is founded on something deeper than the doctrinal basis proffered.

\(^{58}\) 404 U.S. 157 (1971). These descriptions of First Nat'l Maintenance and Pittsburgh Plate Glass are meant only to illustrate the distinction between vertical and horizontal activity. The cases are discussed in greater detail infra at part III.A.
\(^{59}\) The Court's reasoning in this respect is extraordinary, and I will return to it below. See discussion infra at part III.A.
\(^{60}\) First Nat'l Maintenance, 452 U.S. at 686.
\(^{61}\) Allied Chem., 404 U.S. at 181-82.
As with the other cases discussed, the decision is based on hostility to the idea not only that a union should "represent," but that it should protect, or mobilize, or inspire workers not employed by the same enterprise—that it should see itself as engaged with them in a common cause.

This second dimension, then, involves solidarity among workers, widely understood, rather than among employees of a particular employer (or even employees within a particular industry). This kind of solidarity demands a broad view of the size and scope of the group whose interests are relevant. A union that seeks to speak for its retired members (to "represent" them—or to lead, protect, or mobilize them) has a broader view of its role than do courts that find the community of interests between the two groups insufficient.62 A union that views organizing as central to its mission has a broader vision of what unions are supposed to do in society than does the liberal wing of the Supreme Court.63 Union members who refuse to cross the picket lines of other workers understand their connection to those others in a different way than does Justice Stevens.64

Taken to the extreme, this notion of solidarity encompasses all workers, as distinct from all employers, within the relevant group. The horizontal dimension, then, goes to the issue of class. It is the difference between talking about the "employees of an employer" and talking about "workers"; it is the difference between conceiving of a community of interests as defined by the boundaries of the craft, plant, or even the industry, and the conception that "an injury to one is an injury to all."

Two points must be emphasized. First, the analysis offered here does not depend on agreement with the values associated with class-wide actions and their ideological bases. The claim that labor law strives to limit such actions is equally valid whether one believes that class-wide actions are the means to fulfill the working class' historical destiny or that they represent a destructive nineteenth-century illusion. Second, describing this horizontal dimension in terms of solidarity does not imply that union activity in this dimension is necessarily motivated, or should be motivated, by a lesser degree of self-interest. The point is not that labor law insists that collective activity is legitimate only when it is selfish (though it often does),65 but that labor law limits the scope of the relevant collective. Labor law defines self-interest in a way that is more consistent with liberal concepts of individualism than with the view of self-interest (and perhaps of "self") that arises from the experience of workers engaged in collective activity.

63. See discussion infra at part III.B.
64. See discussion infra at part III.C.
65. See discussion infra at part II.A; see generally Richard M. Fischl, Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act, 89 Colum. L. Rev. 789 (1989). Professor Fischl's article is concerned with some of the same issues that are dealt with here. Although my perspective and conclusions are quite different, his insightful analysis helped me clarify my own.
I do not mean that judges consciously decide cases or academic commentators argue for particular positions because they believe this will be the best way to limit class-wide actions. Instead, I am suggesting that at a primary level, those who share the liberal vision of society are uncomfortable with notions of solidarity and with collective organizations, such as unions, in general. That discomfort stems from the dissonance between collective activity and a conception of society as composed of individual, autonomous, and legally equal actors, a conception on which liberalism is based.

Contemporary "liberals," of course, admit the necessity of collective activity; in the context of labor law, this is what distinguishes them from "conservatives." My argument is rather that liberals are more likely to accord collective activity legal protection along its vertical than its horizontal dimension. They have little difficulty accepting as legally significant the Wagner Act's premise that because individual workers are not equal to employers organized in corporate forms of ownership, those workers effectively have no freedom of contract.

In large part, a Justice is pro- or anti-union in a particular context to the degree that that Justice believes that the economic imbalance between workers and employers in that context has legal significance, and that legal protection of collective action is therefore required. At one end of this spectrum (a position which no Justice has articulated) is the view that the state, by means of the Wagner Act, has mandated that workers, through their unions, be treated as full partners in determining all the workplace issues that affect them. At the other extreme is the view that the Wagner Act and its amendments require an employer to bargain with a majority union on limited subjects and not to discriminate against employees on the basis of union activity, but that the Act otherwise leaves the employer's common law property rights and freedom of contract intact. These conflicting views of the Wagner Act reflect a split within classical liberalism over the extent to which government intervention in the economy was, and is, desirable.

The conditions of the Depression made a regime of laissez faire, in labor relations as in the economy generally, politically unacceptable. For supporters of the New Deal, the inequality between individual workers and employers was so severe that the government's intervention was required for economic recovery and political stability. For their successors, today's "liberals," that inequality remains an important legal fact, and the inability of workers to bargain and contract meaningfully with employers absent col-

---

66. I recognize that such a regime had never actually existed in labor law. Governmental power, whether legislative or judicial, had earlier criminalized the very act of workers combining for higher wages. In this century, states still passed and judges still enforced laws criminalizing a worker's breach of an employment contract. See Richard J. Steinfeld, "Free Labor and Capitalism": English Wage Work and the American Peonage Cases, paper delivered at Fifteenth Annual North American Labor History Conference, Wayne State University, Oct. 14, 1993 (on file with author).
Collective organization requires more extensive government protection of unions than would be granted by the Court's conservatives.

For modern liberals like Justice Brennan, this inequality is seen, as the language of the Wagner Act suggests, to stem primarily from the size and power of the individual enterprise—from the organization of capital in the corporate form. That is by no means an empty admission: it implies that, ultimately, inequality stems from ownership and the nature of the relationship between capital and labor. But it also implies that the protection accorded by the Wagner Act is sufficient to solve the problems caused by that inequality; that there is no need for legal action to address inequality that involves a horizontal aspect. It denies, or denies legal significance to, the claim that employers are not only organized in the corporate form, but that they constitute a class, with interests beyond those of its constituent elements, and that workers, across enterprise lines, constitute a separate class with antagonistic interests. It is a limit on the liberals' recognition of the legal significance of economic inequality. Again, one can view this denial as corresponding to reality. One of the points of this article, however, is to demonstrate that regardless of the accuracy of this liberal view, a wide range of union actions contain elements that implicitly contest it.

The admission that economic inequality has legal significance is one of the main pillars of the Wagner Act, and leads to the policy that collective bargaining and unionization must be protected, indeed encouraged. The redistributive goals inherent in the Wagner Act's attempt to equalize power at the workplace (or at least to ameliorate the imbalance between workers and employers) by encouraging unionization may have provoked massive resistance from employers and may have been limited in fact by judicial interpretation, but these goals do not in themselves pose a challenge to liberalism any more than they were inconsistent with the economic and social policies of the New Deal. Without collective action by workers, the gap between the formal equality of liberal political theory and the actual inequality of power that results from unequal division of property might have led, in

---

67. The Act stated that commerce was burdened and depressions tended to be aggravated because of "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association . . . ." NLRA § 1, 29 U.S.C.A. § 151.

68. For those uncomfortable with this sort of terminology, the same point can be made affirmatively: the immediate interests of business, and particularly of an individual business, may not coincide with the best interests of society as a whole, for whom the preservation and strengthening of free enterprise is nonetheless essential.

69. By ascribing this limit to the liberals, I do not mean that this view is not shared by "conservatives," but only that conservatives minimize the legal significance of economic inequality generally.


71. Or at least the policies of the "second New Deal." See, e.g., Hofstadter, supra note 52, at 333-38.

72. Marxists would call it a "contradiction."
the conditions of 1935, to a working class challenge to capitalism or to drastic limitations on civil liberties and democratic processes in order to protect it.\footnote{See Joel Rogers, Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws", 1990 Wis. L. REV. 1, 13-14, for a short recapitulation of the Marxist theory. The widespread perception of a threat to capitalism is discussed supra at part I.A. As for the possibility of the abolition of political democracy, the contemporary European experience did not make it seem far-fetched, nor did the recent declarations of martial law throughout the United States.}

To concede that economic inequality creates the necessity for collective action, and of state intervention to protect it, is ultimately inconsistent with a legal regime based on the formal equality of individuals and the legal enforcement of agreements without regard to the economic status of the parties. However, this problem became—and remains—a theoretical one.\footnote{See, e.g., Stone, supra note 23, at 1511 (arguing that liberal theory is incoherent in its inability to draw a principled distinction between those areas reserved to management and those in which workers, through their unions, should share in decision-making).}

So long as no credible challenge to private control of capital developed, the tension between capitalism and political democracy could be managed. That is, so long as any such challenge failed to be institutionalized in bodies that had the social power to carry them out, this “contradiction” would not threaten existing social relations. Indeed, it could be argued that the divergence between formal equality and actual inequality actually results from “the corporate form” of ownership, from bigness, and not from the institution of private ownership and wage labor itself. In this sense, the problem is an “economic” one, and the New Deal and modern American labor policy can be seen as “fixing” it, or at least as making it tolerable—as demonstrating the success of political democracy in restraining the excesses of business. From this perspective, advocates of government protection of collective bargaining can reject the notion that control of the legal instruments of compulsion by one class for its own benefit is one of the primary features of social organization.

According legal protection to collective action on the horizontal dimension raises different problems. The possibly unconscious reluctance of labor law to protect solidarity or class-based activity is based on two concerns that are not present, or not fully present, in protecting activity directed solely against the employer (even if that activity threatens, in theory, some of the ideological constructs of liberalism). The first concern is that workers who act on the perception that their interests are intertwined with those of their class will tend to develop a view that challenges capitalism. The second is that in acting this way, workers will necessarily create organizations based on class—call them social unions—that have the potential social power to carry out this challenge. When economic conflicts over wages or working conditions become social conflicts between classes, and when the means by which those conflicts are contested become political—either in the streets or in elections—then the liberal system faces the possi-
bility that either democracy or capitalism must be abolished or radically redefined in the interests of the other.

When conflict at the workplace spills over into class-wide activity, the ramifications are significant. First, such activity places into contention the social definition of the actors. The self-conception of those engaged in class-wide activity is transformed: they will see themselves as having an essential commonality based on their relationship to capital, rather than to their craft or to their employer. Of course, such class-wide activity presupposes some degree of this class-oriented self-conception, but the number of people who consciously share this perception need not be very great, nor need they be willing to generalize their perception to include the political as well as the economic dimensions of society. Engaging in class-wide activity reinforces their view, deepening its level of sophistication and the degree to which they are willing to generalize it. Most important, class-wide activity, by involving people who did not initially share the same understanding of why such activity was desirable, broadens the basis of solidarity. This is what happened in Minneapolis in 1934.

Second, besides challenging the actors' social self-conception, class-wide collective action also challenges the political basis of the society. The nature of these activities, such as regional strikes, tends to create issues of "public order," or the public welfare, and therefore requires the intervention of public institutions. In such confrontations the institutions of the state are seen as forced to take sides—not between an employer and its employees, but between labor and capital. While this is most obvious when there are actual clashes between strikers and police, these clashes are the result, not the cause, of the state's inability to remain neutral. A city-wide general strike forces authorities either to acquiesce in the shutdown or to defend the ability of businesses to continue to operate and of non-strikers to continue to work.

Formally, the same is true in every strike, even the most localized. But the political meaning of a refusal to use the police to break a strike at one supermarket, of governmental acquiescence in the shutdown, is vastly different. In a city-wide strike, government inaction or protection of the strike allows the strikers to determine the economic policy of the town. From the point of view of employers, this is an intolerable abdication of government responsibility to ensure the "normal" functioning of society, to allow the trucks to roll, the ships to be unloaded. Employers do not view governmental inaction as neutrality, but as government intervention in favor of the strike—and employers will use their considerable political influence to attempt to force government intervention in their favor instead.

On the other hand, strikers will not view government protection of employers' efforts to continue operations as a neutral attempt to maintain order, but as strikebreaking. The same may be true if the police escort strikebreakers across the picket line in a strike against a single supermarket.
But even if the strikers perceive this action as the government taking sides against them, they are more likely to view it in terms of the particular dispute; an administration that does so will not automatically forfeit its claim to neutrality generally. This is an important difference between, for example, a regional general strike and strikes that remain confined to one employer, even if the strikes are large and violent. This difference narrows when the strike involves an entire industry, especially when that industry is the dominant economic and political power in a particular city or region, or when business in general depends on the functioning of the struck industry, as was the case with railroads a century ago. Each of these situations, like a regional general strike, poses the issue of who will make the decisions that affect the entire community. While the government intervenes to restore normality, the natural order of things, it is against the natural order of things that the strikers are engaged.

Government intervention in these circumstances calls into question the separation of the institutions of private ownership from those of political democracy. Because it challenges the neutrality of the government, of politics, it also calls into question the legitimacy of the liberal state—whose principle characteristic, after all, is the guarantee of equality before the law. When equality before the law requires government neutrality between social classes rather than between individuals, as it will in conditions of class-wide activity, formal equality appears insufficient, the liberal state’s guarantee is perceived as hollow, and the legitimacy of the entire system is implicated.

Finally, protection of class-wide activity creates a different kind of problem than does protection of collective action confined to the workplace, because class-wide activity can only occur through class-wide organizations. Class-wide activity creates the missing element in a challenge to capitalism, the institutionalized embodiment of that challenge. As with the issue of consciousness, some level of class-wide organization must be present in the first place, but this need not be very great. Indeed, a regional central labor council, ordinarily an institution wholly consistent with existing social relations, can become the basis of a class-wide organization; this is what happened in the San Francisco general strike of 1934.

A clarification is necessary here to avoid misunderstanding of my argument. I contend that liberals are more willing to give legal protection to vertical collective action in part because these activities challenge liber-

---

75. That is partly why coal miners’ strikes often have had the characteristics that I ascribe to “class-wide” activity. While my point remains generally valid, this is an important reminder, if one were needed, that schematic legal arguments of the kind made here may be too abstracted from the varied historical situations against which they ought to be tested.

76. When political and economic institutions are inseparable, every strike questions the legitimacy of the government. That is all the more intolerable when the official ideology disclaims neutrality and asserts an official bias in favor of the working class, as in Communist regimes. When these institutions are separate, and the state maintains that its function is neutral, most strikes do not raise this issue.
alism only abstractly; while according them protection may threaten the coherence of the liberal model, it does not threaten capitalism in practice. In contrast, I have argued that solidarity-based activity includes additional aspects that make the threat to capitalism more realistic. This distinction, without more, strongly implies an instrumental approach by legal decision-makers—that they disfavor class-wide activity because they perceive it as posing a threat to the system. Although the extreme version of characterizing my argument this way—that there is a conspiracy of legal decision-makers—can be rebutted simply by emphasizing that the judicial perception of solidarity-based activity may be unconscious, I don't think this is sufficient, as I will explain in a moment. In order for my explanation to be convincing, it is necessary to link the ideas that I identify with solidarity-based activity to the hostility of liberal decision-makers, without positing instrumentality. I must demonstrate a significant relationship between ideas about specific union actions that contain a class element, as they are represented in legal opinions, and attitudes towards the underlying ideas associated with class-based actions generally.

Demonstrating this connection is not easy. Even when hostile intentions are clearly present, as with the congressional majorities that passed the secondary boycott provisions of the Taft-Hartley and Landrum-Griffin amendments, it is difficult to claim that secondary activity—a form of solidarity activity—was consciously disfavored because its class nature posed a threat to capitalism in the sense that I have described. 77 On a conscious level, it is more likely that the conservative legislative majorities that voted to limit secondary activities were hostile to these activities because they were so effective against individual employers. After all, these legislative majorities, and especially the Taft-Hartley Congress, passed an array of restrictions on union actions that have nothing to do with solidarity-based activity. But what interests me is precisely the greater willingness of modern judicial liberals like Justice Brennan (and of the Wagner Act's liberal philosophy) to countenance one form of activity rather than another, in contrast to anti-labor conservatives in the judiciary and the Taft-Hartley Congress.

As the example of the secondary boycott provisions shows, and as I will further acknowledge in the discussions that follow, the neat separation I have made between horizontal and vertical activity is an analytical tool. In real life (as we sometimes call it), neither the results of union activities, nor the motivations of those who oppose those activities, are necessarily limited to a single dimension.

Nonetheless, there is something about the ideas associated with solidarity-based activity, apart from the fact that they have a greater potential to be translated into reality, that disposes contemporary liberal legal decision-

77. The secondary boycott provisions of the Act are discussed infra at part IV.
makers to treat less favorably class-wide actions, something absent from the ideas associated with a challenge to the employer's power at the workplace. A full description of this relationship would require a comprehensive examination of the social and ideological universe of legal decision-makers, and that is neither the point of this article nor within its scope. Here, I want only to posit a connection between existing legal doctrines and liberal attitudes towards the world view on which class-based actions rest.

Otherwise, one of two explanations would account for the hostility of the Court's liberals. First, it could be understood as directed solely against the specific actions in a particular case, motivated by hostility to all forms of union power, as the congressional hostility to secondary boycotts might be understood, without any need to examine underlying ideas. Again, however, the fact that liberals cannot be viewed simply as "anti-labor" in all contexts—that they interpret the law more favorably to unions than do conservatives in many situations—should be enough to indicate that there is something more than anti-union bias at work. The question remains: why do these sorts of activities gain so little protection from the same judges who dissent from anti-union decisions in other contexts?

Alternatively, the decisions could be explained by once again positing direct judicial hostility to the actions presented in the particular case, but now because of those actions' greater potential threat to the system—the instrumentalist argument. As I have indicated, this explanation is also unsatisfactory. In part this is because there is no evidence of judicial fear of a systemic threat; there is little reason to think that if such fear were present, it would be so well hidden. More important, any conscious hostility based on fear would require believing in an actual threat to the system. Such hysteria has been rare in the period under discussion, roughly the three and a half decades since Justice Brennan's appointment.

There is a good reason for this: nothing in this period has even remotely resembled the sort of class-wide actions that occurred in the period immediately preceding the passage of the Wagner Act. Indeed, both the class-wide, solidarity-based actions discussed here, and the hostile legal response to these actions, have been more of the nature of an echo of the class-wide actions of the 1930s. My argument is that these actions nonetheless rest on the same assumptions (though perhaps writ small) about the role that a union should play in society—as the leader of the working class—as did the actions of the thirties that presented a more plausible challenge to

democratic capitalism. Yet the recent solidarity-based actions treated here are more than the remnants, dying away, of the actions of the thirties. The assumptions on which they are based, a portion of an inchoate ideology, still maintain the potential to animate wider actions and still could become, in altered economic conditions, the full-blown ideology of class identification and class conflict.

From the perspective of those hostile to these actions, viewing them as simply an echo is an inappropriate metaphor. Rather, these actions are the relatively mild manifestations of a virus which, however, has shown its destructive power in the past. The current manifestations must be suppressed, of course, but so must the deeper assumptions—the virus itself. Liberal decision-makers need no active memory of the virulent form of the disease; it need never be invoked to strengthen the argument for suppression. The ideas themselves have come to be associated with the disease.

Court liberals disfavor solidarity-based actions, then, because such actions are associated with ideas that they dislike, both because these ideas are inconsistent with the premises of liberal political theory and because they are in turn associated, usually unconsciously, with actions that threaten the liberal system.80

While those adherents of classical liberal political theory, whom we today call conservatives, may share these views, solidarity-based actions do not constitute for them, as they do for contemporary liberals, an unacceptable expression of union power that is acceptable, even desirable, in other respects. To explain why the ideas involved in solidarity-based activity, more than those associated with vertical union activity, might invoke the hostility of liberal decision makers, it may help to reconsider what has already been said about them, but with the emphasis now on the perception of liberals rather than on that of the actors.

Part of the answer, as I have suggested, is that defending the need for collective bargaining can be seen not as a contradiction of liberal theory, but as a triumph of liberal reform. However it may trouble leftist critics of labor law,81 the inconsistencies that they claim (and that I agree) are inherent in the Wagner Act regime are likely to be seen by liberals as the vindication of the nonideological, pragmatic, and flexible nature of the American system, much as the whole of the New Deal can be seen as a particularly American search for "what works." The hagiography of Franklin Roosevelt and his policies stresses their practical flexibility and responsiveness to the

---

80. I acknowledge that this description is not capable of proof. Nevertheless, I believe this intuitive, systematically value-maintaining process is in fact how people think about all but the most obvious and immediate issues, how they decide what principles matter to them. Still, I believe the material in this article provides some evidence that in the case of state institutions such as the judiciary, the unconscious preferences and hostilities of the decision-makers will coincide, in the long term, with the interests of the existing social system. See TOMLINS, supra note 56, at xiii-xiv.

crises of American institutions. The Wagner Act, in this view, was a successful response to a distortion of liberal society caused by the overwhelming growth of big business and its abuse of its power.

Another aspect of the answer is that we are describing the attitudes of legal thinkers, whether judges or theorists. Viewing the Wagner Act as one aspect of the entire New Deal, as responding to economic dislocations caused by bigness, then the encouragement of collective bargaining can be understood as an economic, rather than a political, policy. Indeed, collective bargaining can be seen as furthering the liberal theory of separating private from public functions—even if state intervention is required to do so. It was precisely because the disparity between the economic power of business and the powerlessness of the individual worker was seen as destroying the economic well being of society, and therefore threatening its political survival, that the government was needed to equalize power in the economic sphere. In this sense, the Wagner Act can be understood as forcing the conflict of the parties back into the workplace, from which the employers' abuse of their economic power—and not the resulting resistance of workers in the Depression—had spread it. In sum, the intrusion of government power into the employment relationship, even the extension to the workplace of constitutional values of free association, were necessary to sever “labor disputes” from political and social conflicts with which they were increasingly merged.

Solidarity-based, or horizontal, actions can also often be viewed as economic; a secondary boycott is one example. Even then, however, since the union initiating the secondary boycott has no economic dispute with the secondary employer, the boycott contains an important political dimension. And in broader solidarity-based actions, such as regional solidarity strikes, the whole point is to force employers as a class to pressure the "primary" employer and often to force the state to intervene. In this context, the particular position of judges thus makes the "neutrality of the state" aspect of liberalism—the rule of law—especially important to defend. By threatening that neutrality, by forcing the state to take sides, solidarity-

82. "I experimented with gold and that was a flop. Why shouldn't I experiment a little with silver?" Hofstadter, supra note 52, at 316 (quoting Franklin Roosevelt).
83. Compare the antitrust laws.
85. Cf. Professor Atleson's explanation of the logic of governmental regulation of unions' internal governance:
When a private organization begins to take on the importance and power of public governments in the lives of its members...[t]he loss of individual freedom within private associations creates a threat to the freedom-producing goals of pluralism itself, and establishes the basis of governmental intervention in order to protect private democratic rights in the name of pluralism. The irony of this intervention should not obfuscate its inevitability.
James B. Atleson, A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights, 51 MINN. L. Rev. 403, 403-04 (1967).
86. This point is elaborated infra at part IV.
based actions challenge a judge’s conception of the role of law in society, and the role of the judge himself.

Historically, this conception of the law as neutral has been especially difficult to defend in labor law. One of the subsidiary effects of liberal labor legislation was to create a plausible distinction between the anti-labor hostility of individual actors and the neutrality of the law itself. The Norris-LaGuardia Act, by severely restricting the judiciary’s ability to enjoin labor disputes, and the Wagner Act, by creating a specialized federal agency to adjudicate those disputes in the first instance, both fostered the idea that the unfair legal treatment of labor was not systemic but personal; the problem was the judges themselves, and ultimately the “nine old men” whose reactionary views distorted the law and frustrated the government’s efforts to respond to the economic and resultant political crises. Changing the identity of the judges would resolve this problem.

So Justice Brennan could say, in sustaining federal injunctions against strikes some forty years after Congress had apparently ended federal judges’ jurisdiction to do so, that the fear of a hostile judiciary was an anachronism: the nine old men were dead and the Wagner Act and its amendments constitute a comprehensive regime for regulating the process by which labor and management engage in struggle; modern judges would not let their own views on the economic justice of union demands determine the legality of union actions.

But class-wide union activity, even on a relatively small scale, seems to be outside the regulated process because the premises on which that activity is based are different from the assumptions on which the regime is founded. Precisely because class-wide activity is not limited to a concern for the “wages, hours, and conditions of employment” of those engaging in the activity, it is difficult to situate it in a process designed to cabin the methods by which these concerns are resolved between an employer and its employees. Were the underlying issues in cases dealing with class-wide activity fully explored, they would tend to assume a distinctly pre-Wagner Act flavor. Rather than a problem of regulating a process by which limited goals may be attained, issues of class-wide activity would present the legal decision-maker with a confrontation between labor and capital in which the state, as represented by the legal system, is required to choose sides.

Legal restrictions on class-wide activity prevent this confrontation from appearing and protect the historic accommodation represented by the Wagner Act, an accommodation intended to resolve the tension between

87. See McLeod, supra note 14.
88. The Norris-LaGuardia Act, 47 Stat. 70 (1932), according to its cosponsor, was necessary because of “[d]isobedience of the law on the part of a few Federal judges,” who had “purposely misconstrued the Clayton Act.” 75 Cong. Rec. 5478 (1932) (Remarks of Rep. LaGuardia). LaGuardia’s reference obviously was meant to include members of the Supreme Court because it was they who had interpreted the Clayton Act.
political democracy and capitalism and to remove the threat to both. The remainder of this article examines some ways in which these restrictions appear in the cases.

II

"The Ranks of Labor"

The scope of the union's role in society is closely connected to the issue of whom it is permitted to speak for; the legitimacy of collective action depends on the extent of the relevant collective. This Part looks at how labor law determines the appropriate constituency by whose efforts, and for whose benefit, unions may act.

A. Selfishness, Solidarity, and Class

I indicated earlier that judicial hostility to class activity cannot be explained by saying that such collective activity must be based on self-interest to be legitimate. The horizontal dimension of collective activity, as described here, can be understood to be based as much on self-interest as activity along the vertical dimension. Seeing solidarity-based activity as an expression of self-interest forces a redefinition of the breadth of the collective, a reordering of common factors to determine which are central in establishing a community of interests.

Labor law places barriers on solidarity-motivated actions. It reflects a view of society based on individualism and competition, a world view consistent with the dominant institutions of society, rather than the collectivist and cooperative view inherent in labor organization. This would be true even if solidarity were seen exclusively as a form of worker altruism. In that case, it would still be accurate to say that legal doctrine directs unions towards an ideology alien to that which they would tend to develop absent the law's restrictions. But if solidarity is contrasted with self-interest, then legal restrictions on solidarity-based activity could not also be seen as directed against the idea of the central importance of a common class, as I believe they are. Indeed, that class-wide activity is a form of self-interest is precisely what labor law denies.

89. "[Unions are formed to escape the evils of individualism and individual competition and contract." ROBERT F. Hoxie, TRADE UNIONISM IN THE UNITED STATES 238 (2d ed. 1923), quoted in Tomlins, supra note 56, at 58; see also Fischl, supra note 65, at 850-52. See generally DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR (1987). Note that the prevailing "conservative" (that is, classical liberal) economic analysis of unions as labor monopolies is based on the same assumption.

90. The language used here is intentionally tentative: the law directs unions toward an ideology rather than imposing it on them; unions would "tend to" develop a different ideology. The ideology of contemporary American unions has not been created strictly by law, but neither is law irrelevant in its development.

91. This point indicates one of the major distinctions between my perspective and that of Professor Fischl. See supra note 65.
That these restrictions are directed at solidarity-based activity because it is class-based, rather than because it is "unselfish," is illustrated by how the relevant community is defined in the narrow context in which the issue arises doctrinally. The concept of "community of interests" to which I have alluded is used in labor law to define the "appropriate bargaining unit," that group of workers a majority of whom may appropriately decide whether to be represented by a union, and within which the minority's contrary desire will be overridden. This determination is to be made, according to the statute, to give employees the "fullest freedom" in exercising their statutory rights.92 These rights have always included the decision about which union to join, and implicitly (and centrally) whether to join a union at all.93 It is obvious that, at least in some cases, the choice of the appropriate "citizens" will decide which employees have the "fullest freedom" to exercise their rights. All the electricians, and no one but the electricians, may be seen as having a sufficient community of interests to justify their operation as an appropriate bargaining unit, even if they are only a few dozen among thousands of other employees in the same factory. But the electricians' decision to join a particular union may frustrate the desire of their fellow employees, who want the electricians in the same union as themselves. While this craft/industrial division is the classic case in American labor history, it is not doctrinally distinct from thousands of appropriate bargaining unit determinations that have been made by the Board: whether a particular department of a factory, separate from other departments, or the plant as a whole, or (occasionally) all the employees of an employer,94 have a sufficient community of interests that is sufficiently distinct from the interests of those who will be outside the bargaining unit.

Both the statute95 and decades of Board decisional law96 have shaped the criteria for determining what constitutes an appropriate bargaining unit. In general, the Board determines the appropriateness of a proposed bargaining unit on a case-by-case basis, applying a multi-factor test that considers such elements as similarities in the amount and method of payment, bene-

92. 29 U.S.C.A. § 159(b).
93. Section 7 of the original Wagner Act, codified at 29 U.S.C.A. § 157, guaranteed employees "the right to . . . bargain collectively through representatives of their own choosing." The Taft-Hartley amendments, 61 Stat. 136 (1947), added "the right to refrain" from the exercise of these rights.
94. See General Motors Corp., 120 N.L.R.B. 1215 (1958).
95. Section 9(b) of the NLRA provides:
   "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."
   29 U.S.C.A. § 159(b). The Taft-Hartley amendments, 61 Stat. 136 (1947), added three provisions limiting the Board's exercise of discretion within these broad guidelines, relating to professional employees, the ability of craft employees to be severed from a larger existing unit, and plant guards. Id.
96. See, e.g., Globe Mach. & Stamping Co., 3 N.L.R.B. 294 (1937); Mallinckrodt Chem. Works, 162 N.L.R.B. 387 (1966). Recently the Board, for the first time in its history, engaged in formal rule-making to determine the presumptively appropriate bargaining units in private hospitals.
fits, and hours; the kind of work performed and the skill and training required; and matters relating to the organization of the employer—the company’s functional integration, its management structure (especially in handling labor relations), geographic proximity, and whether employees are transferred between departments. The Board also considers the bargaining history of the enterprise, the extent of union organization, and employee desires.97

Now, whether the Board has given sufficient or excessive weight to any of these factors in a particular case is the stuff of unit determination hearings,98 and ultimately of decisions of the courts of appeals. In any bargaining unit that consists of at least two parts that might themselves plausibly constitute appropriate bargaining units, such as a plant-wide unit that includes craft workers, there are necessarily differences in interests. The decision that both groups constitute a single appropriate bargaining unit reflects the judgment that the common interests of those included, measured by the factors mentioned, are more important than any differences. In making this determination, the Board need not claim that the interests of the employees in one segment are being sacrificed for the greater good, that their inclusion in the larger unit, if it were made entirely by them, would reflect unselfishness and altruism on their part.99

The same would be true if the Board were to decide that certain other factors were the most important. Let me suggest an alternative set: that the members of the proposed unit all work for wages; that they not control decisions on capital investment, on what to produce, or, except in the most minor details, on how it is to be produced; and that they have no right to hire or fire other employees. Replacing the Board’s traditional test with these factors would imply that the similarities among workers that are important are those that set them apart from employers.

In fact, something very much like this analysis is regularly undertaken in labor law, but only within a narrower framework that imparts a different significance. By considering that analysis we can clarify the extent to which liberal labor law accommodates the concept of class while continuing to limit the societal role of unions.

97. See ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING 69 (1976). The bargaining unit need not be the “most” appropriate. Id. at 66.

98. Without being too cynical, it is fair to say that in these proceedings, the union generally insists that the appropriate bargaining unit is the largest one in which the union thinks it will receive a majority, and the employer generally contends that the appropriate unit should either exclude some group that is heavily pro-union or, more commonly nowadays, that it should include some group whose votes will threaten the union’s majority. See BERNARD MELTZER & STANLEY HENDERSON, LABOR LAW CASES, MATERIALS, AND PROBLEMS 380 (3d ed. 1985).

99. This is not to say that the inclusion is necessarily opposed by the employees within one segment; it is the employer that raises objections, and its solicitude for its employees’ desires is not self-evident. See Globe Mach. & Stamping Co., 3 N.L.R.B. 294 (1937); NLRB v. Underwood Mach. Co., 179 F.2d 118 (1st Cir. 1949).
B. Which Side Are You On?

In some situations the Board, with the approval of the Supreme Court, determines whether a particular employee has more in common with a group that has been defined as an appropriate bargaining unit, or whether she has more in common with the employer. In others, the Court has mandated that the Board decide whether a category of employees should be considered "managerial," and therefore unable to constitute a bargaining unit that is otherwise appropriate as measured by the Board's traditional factors. In both these situations, in other words, the Board effectively analyzes the class alignment of the employees involved.

When cases involving these situations have reached the Supreme Court, the Justices have been divided over who should be considered on the side of management and who should be considered within that class that Congress meant to protect under the labor laws—where the "protected class" is in fact the "working class." In the three major cases it has decided, the Court has split five to four. In general, what may be viewed as the Court's liberal wing has supported greater inclusion within the Act, but the differences between the liberals and conservatives on this issue are not the reason for examining the cases here. Nor is a full doctrinal analysis in order. Instead, I want to briefly discuss these cases, first, to show that the Court undertakes what I call a class analysis, and second, to consider how the implications that such an analysis entails have been limited.

The precursor to these cases was Packard Motor Car v. NLRB, where the Court approved the Board's certification of a union of foremen. Justice Douglas' dissent argued that, contrary to congressional intent, the decision tended to obliterate the line between labor and management and denied that these were "the basic opposing forces in industry.... The struggle for control or power between management and labor becomes secondary to a growing unity in their common demands on ownership." In direct response to the Packard decision, the Taft-Hartley amendments explicitly excluded "supervisors" from the definition of statutory employees, 29 U.S.C.A. § 152(3) ("The term employee... shall not include... any individual employed as a supervisor."). Section 2(11), 29 U.S.C.A. § 152(11) in turn defines the term "supervisor."
though the new definition said nothing about the broader category of "managerial" employees as such—that is, those who did not supervise other employees.

In *NLRB v. Bell Aerospace Co.*,106 a closely divided Court emphasized the reasoning of Justice Douglas' *Packard* dissent in holding that the Act excluded from coverage all managerial employees, even if their duties did not include supervising others or any other involvement in labor relations and there was thus no danger that allowing them to bargain collectively would subject them to a conflict of interest in carrying out their duties.107

In *NLRB v. Hendricks County Rural Electric Membership Corp.*,108 the issue was whether it was an unfair labor practice to fire a secretary who had access to confidential management information, for activities which, if engaged in by a statutory employee, would have been protected by the statute.109 Her duties did not involve access to any labor matters, and the Court, distinguishing *Bell Aerospace* on the basis that she was not a managerial employee, held that she was protected by the statute. The dissenters emphasized that the Taft-Hartley Congress had intended "to exclude from the coverage of the Act all individuals allied with management."110 They stressed that the purpose of excluding confidential employees was to prevent management's allies from being included "in the ranks of labor... the dividing line between management and labor... is fundamental to the industrial philosophy of the labor laws in this country."111

A similar disagreement emerged in *NLRB v. Yeshiva University*,112 where the Court held that the full-time faculty members of a private university, because they exercised control over academic matters, and to some degree over personnel decisions, were the "management" of the university, and therefore ineligible to form an appropriate bargaining unit.113 In *Yeshiva*, the interests of the university administration and the faculty were identical. The dissenters pointed out, however, that the modern university

107. Id. at 274-75. In fact, it is clear that Justice Douglas did not go so far in his *Packard* dissent: "[I]t is not the label which is important; it is whether the employees in question represent or act for management on labor policy matters." 330 U.S. at 500 (dissenting opinion) (emphasis added).
109. Another issue in the case involved the certification of a bargaining unit of employees who the employer claimed were "confidential," but concededly did not meet the Board's labor nexus test. 454 U.S. at 175-76.
110. *Hendricks County*, 454 U.S. at 193 (Powell, J., concurring in part and dissenting in part) (quoting Swift & Co., 115 N.L.R.B. 753, 753-54 (1956)) (emphasis added by the Court). However, one should not make too much of the confidential employee issue as a theoretical matter. The decision to treat confidential employees as appendages rather than as adversaries of the employer is intensely practical; in that sense, it is less like the "managerial" exception than it is like the statutory restrictions on unionization of plant guards, who are permitted to belong only to unions that admit no other employees to membership. See NLRA § 9(c)(3), 29 U.S.C.A. § 159(b)(3).
111. Id. at 172-73.
112. 444 U.S. 672 (1980).
113. Id. at 686-89.
is rather more hierarchical than the Court imagined, and that "the pivotal inquiry" in determining whether an employee is allied with management "is whether the employee in performing his duties represents his own interests or those of his employer." 114

In none of these cases was there dispute about the necessity of determining the Act's coverage through an analysis of interest alignment, though there was debate over the appropriate criteria to use. Nor do the divisions within the Court necessarily reflect any consistent doctrinal views about class alignment. 115 Rather, these cases are significant for my purpose because they accept analytical methods, and assumptions about class, that the Court implicitly denies in every other context.

In one sense, the analysis that the Court employs in these cases, and that the Board has used innumerable times, is hardly startling. It is not difficult to see that the interests of a vice president of General Motors, even if he has nothing to do with labor relations, are sufficiently different from—in fact adverse to—those of the assembly line workers that it would be unreasonable to include him in the bargaining unit. He is on the wrong side, his allegiance is to the wrong class. But the seeming naturalness of this view of an individual's relationship to labor and management should not obscure how unusual it is in labor law to think in terms of "the ranks of labor."

The language of these cases and the mode of analysis that that language reflects both lend support to and specify one of the themes developed in this article: the fact that the issues in these cases are analyzed according to different criteria than the Board's normal "community of interests" test indicates that in some contexts, it is legally acceptable to use different standards to choose the relevant community. The underlying assumption of the analysis in these cases, that class alignment determines whether particular

114. Id. at 695-97 (Brennan, J., dissenting). The dissent argued that, like other professional employees, the faculty exercised its powers in its own interest; unlike management, faculty members "are not hired to 'make operative' the policies and decisions of their employer. Nor are they retained on the condition that their interests will correspond to those of the university administration." Id. at 700 (Brennan, J., dissenting).

115. In general, the Board and the three Justices who supported inclusion in each case (Brennan, White, and Marshall) understood interest alignment to be based on the subjective desires of the employees for unionization; thus in Yeshiva Univ., Justice Brennan thought significant the fact that the faculty's desire to unionize indicated that they did not "perceive its interests to be aligned with management." 444 U.S. at 702 (Brennan, J., dissenting). The three members of the Court who consistently opposed inclusion (Chief Justice Burger and Justices Powell and Rehnquist) tended to look more at the functional aspects of the particular jobs. Although the Board's labor nexus test is a functional one, its purpose for the Brennan bloc was limited to eliminating only those individuals who, although subjectively "employees," nonetheless must be excluded because of the danger of an actual, narrowly understood, conflict of interest between union membership and their job duties.

The Justices' positions in these cases roughly approximate the liberal/conservative split in other areas of labor law—but only roughly. Justice Stewart, a conservative in the First Nat'l Maintenance line of cases, see part III.A, infra, joined the Bell Aerospace dissent; Justices Blackmun and Stevens sometimes sided with one group and sometimes with the other.
employees are entitled to bargain collectively, would, if applied in other contexts, lead to a different view about who may legitimately be "represented" by a union, and a different concept of what the union could legitimately do in that role.

In these cases, however, the resolution of the question (whether someone "belongs" within the working class) only peripherally implicates the issue of the legitimate scope of union actions in society, because the question is limited to deciding whether someone is an employee of her own employer. So even though the pro-union Justices would hold in each case that the individuals in question are within the "ranks of labor,"\textsuperscript{116} and therefore entitled to the protection of the Act in their conflicts with their employer, this determination would not shift the locus of those conflicts from within the boundaries of the employer's enterprise. The Court's differences thus parallel divisions over the degree of protection to afford unions along what I have termed the vertical dimension. Class is central to these cases—but a class perspective remains peripheral to the labor law regime.

The Board does not use this alignment of interests analysis instead of its multi-factor "community of interests" test to determine the breadth of an appropriate bargaining unit (that is, in my terms, its horizontal scope). It is used only to determine the "depth" (or, more accurately, the "height") of the bargaining unit; the class analysis is logically a threshold determination that the individuals involved are statutory employees.

I am not suggesting that an entity based on the factors I have mentioned should be certified by the Board as an appropriate bargaining unit, creating, for example, a unit consisting of all the employees in a particular city, regardless of employer or industry. Given the realities of collective bargaining, the creation of a class-wide unit as the one with which employers must deal is neither practical nor desirable;\textsuperscript{117} it may also be contrary to the statute.\textsuperscript{118} My point is only to suggest that such a unit determination

\begin{footnotes}
116. Justices Brennan, White and Marshall—as well as Justices Blackmun and Powell—did join Chief Justice Burger's opinion in NLRB v. Action Automotive, 469 U.S. 490 (1985), but in that case the exclusion benefited the union. The Court upheld the Board's exclusion from the bargaining unit of close relatives of the owners, without any showing that they had received special benefits that set them apart from the rest of the employees. The dissent argued that the bargaining unit determination "should be based on job characteristics and not on an employee's opinion about unions." \textit{Id.} at 499 (Stevens, J., dissenting).

117. \textit{See Kim Moody, An Injury To All: The Decline Of American Unionism} 196-206 (1988) (arguing that "general unionism" is a movement away from a coherent strategy to fight employers' attacks on labor). Of course, the "general unionism" that Moody criticizes exists within the context of a failure of American unions to see their interests in class-wide terms. In a different historical setting, a movement towards unionism that crosses industry boundaries would have a different meaning.

118. The largest entity mentioned in § 9(b) as a possibly appropriate unit is "the employer unit." 29 U.S.C.A. § 159(b). \textit{See supra} note 95. The exception to this, the multi-employer bargaining unit, is legal because it involves an association of employers; § 2(2)'s definition of "employer" includes "any person acting as an agent of an employer," 29 U.S.C.A. § 152(2); "person" is defined by § 2(1) as including associations, 29 U.S.C.A. § 152(1).
\end{footnotes}
would not, any more than the inclusion of a craft group in an industrial unit, necessarily sacrifice the interests of any of the included groups. Such a theoretical class-wide entity could be viewed as being entirely in the interests of its members, if the commonality in regard to the factors I have mentioned, or similar factors, is considered more important than the many differences that the constituent elements of this entity would also contain.

For the purposes of collective bargaining, it is apparent that the disparity of interests within such a unit outweighs the common elements. For those purposes, the Board’s factors make more sense than mine. But that conclusion does not necessarily apply, even in doctrinal terms, to different questions, such as whether a union may speak for retirees and strike in support of their interests. Nor does it mean that other forms of class-wide activity, such as organizing, sympathy strikes, and political action, are not the kind of “mutual aid or protection” that is central to an alternative conception of unionism.

The requirement of “community of interests,” of self-interest, as a doctrinal element of the bargaining unit determination and more broadly as an implied requirement for the legal protection of collective activity, is consistent with both a narrow and a broad view of the appropriate scope of union activity and the union’s role in society. The difference between a narrow and broad vision of this horizontal dimension is not the requirement of self-interest, but a fundamentally different political conception of what commonalities are important. The real issue is how the relevant community is to be defined.

III

THE UNION’S ROLE: THEMES FROM THREE CASES

The theme of limiting the social role of unions appears in the opinions and dissents of the Supreme Court’s liberal members in surprising contexts; I will examine three very different examples in this Part. In one case, Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., the theme is closely linked to the question of whether an employer’s unilateral change violates the duty to bargain; in a second, Communication Workers of America v. Beck, it is intermingled with quasi-constitutional problems about using the dues of represented employees who are not union members; and in a third, Buffalo Forge Co. v. United Steelworkers of America, it arises in the dissent as an additional policy justification for federal equity jurisdiction.

119. Section 7 of the NLRA, which is the statement of employees’ rights, includes the right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.” 29 U.S.C.A. § 157.
120. 404 U.S. 157 (1971).
Reading these cases for what they say about class-wide activity and the role of unions necessarily requires some degree of selection, and at least in some instances this may seem to overemphasize subsidiary aspects of an opinion. In *Pittsburgh Plate Glass*, however, the ideas examined here are necessary to the holding, even if that is not apparent. In *Beck*, the theme of the union's social role is not central but exists in the background and shapes the contours of the main argument; its relationship to that argument may reveal much about each. Finally, the *Buffalo Forge* dissent manifests hostility to class-wide activity that seems almost entirely irrelevant to the issue the case presents, and the fact that this activity is viewed as self-evidently undesirable is itself significant.

Because the theme of this article appears in these three cases in significantly different ways, the method by which I will analyze each\(^\text{123}\) will also differ, with decreasing emphasis on doctrinal considerations. My aim is to examine the importance of the theme in each context.

**A. Liberal Doctrine, Liberal Ideology: Pittsburgh Plate Glass**

In first describing the difference between union actions along the horizontal and vertical dimensions, I contrasted Justice Brennan's opinion in *Pittsburgh Plate Glass* with his dissent in *First National Maintenance Corp. v. NLRB*\(^\text{124}\). An examination of *Pittsburgh Plate Glass* will show both the doctrinal justifications and the ideological basis for the decision. The description of the Court's reasoning in *Pittsburgh Plate Glass* that follows is lengthy, and the analysis careful, in order to determine whether it is the doctrinal and statutory arguments the Court proffers, or underlying dislike of class-based union activity, that best explains the result. Certainly, the statutory argument was not so clear that the case could not have been decided the other way; the Board, after all, thought the opposite result was correct. Given this, the fact that Justice Brennan, whose name is virtually synonymous with the Court's liberal wing, was the author of the opinion rather than a dissenter as in *First National Maintenance*, legitimately presents the issue of the limitations of liberal labor law.

The question in *Pittsburgh Plate Glass* was whether the employer committed an unfair labor practice by unilaterally changing the medical benefits of retirees.\(^\text{125}\) It was undisputed that changing the benefits of current employees without first bargaining with the union would violate the employer's duty to bargain over "conditions of employment." The NLRB held that the same was true of changing the benefits of retirees, because retirees remained for these purposes "employees," or, alternatively, because

\(^{123}\) Or, if one prefers, "deconstruct"; my own view is that what follows is a series of *explications de texte*.


\(^{125}\) *Pittsburgh Plate Glass*, 404 U.S. at 160.
their conditions would "vitaly affect" those of the current employees—that is, the retirees' benefits were a condition of employment of the current employees. The Court rejected both rationales and approved the reversal of the Board's position.

Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . " Justice Brennan, claiming that "this is not a doubtful case," reasoned that "[t]he ordinary meaning of 'employee' does not include retired workers; retired employees have ceased to work for another for hire." To bolster this reliance on the "ordinary meaning" of the term, the opinion emphasized the legislative history of the Taft-Hartley amendments, which had changed the statutory definition of "employee" to exclude independent contractors. That history is replete with assertions that Congress had intended the term "employee" to have its ordinary meaning, as one who works for another for hire, and that the Board and the Court had improperly ignored this in NLRB v. Hearst Publications Inc. Yet Justice Brennan's application of this legislative history to a context other than the independent contractor/employee distinction is less persuasive in view of his concession that "employee" is not, in fact, always limited to one who works for another for hire.

The Court acknowledged that applicants for hire, workers who have quit or whose employer has gone out of business, or workers seeking to be referred by a union hiring hall, are also not "employees" according to the ordinary meaning, but are nonetheless covered by the Act. For example, an employer who rejects an applicant because she is a union member violates section 8(a)(3). However, "all of these cases involved people who . . . were members of the active work force available for hire and at least in that sense could be identified as 'employees.' "

It is difficult to believe the Court really meant that one's status as a member of the workforce is what distinguishes these cases from the situa-

---

126. Id.
127. Id. at 165 (Technically, the Court affirmed the decision of the Court of Appeals, which had refused to enforce the Board's order.)
128. 29 U.S.C.A. § 158(a)(5) provides:
   It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with
   the representative of his employees, subject to the provisions of section 159(a) of this title.
Section 159(a) is discussed further infra at note 147.
129. Pittsburgh Plate Glass, 404 U.S. at 168.
130. Id. at 166-68. The Legislative History specifically overrules NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947)), in which independent contractors were held to be employees.
132. Pittsburgh Plate Glass, 404 U.S. at 166.
134. Pittsburgh Plate Glass, 404 U.S. at 156.
tion the Court is attempting to resolve. If so, then the fact that an individual, though retired from Pittsburgh Plate Glass, was working or attempting to find work elsewhere would alter the result. But the Court would not require the employer to bargain with the union over the medical benefits of those retirees who have other jobs, who "at least in that sense could be identified as 'employees.'" It is not a job applicant's general availability for work that makes the employer liable for unfair labor practices committed against the applicant, but the fact that the employer is acting in a particular way, forbidden by the statute, towards that person.

But is the employer acting in a way forbidden by the Act towards the retirees? To say, as the Court does, that the employer cannot be because, as a matter of simple statutory definition, the retirees are not "employees," explains neither why the employer does not have a duty to bargain concerning the wages of "strangers," nor why it does commit an unfair labor practice when it discriminates against an applicant.

The Court must be interpreting the meaning of "employee" in light of the policy of the Act. The real distinction is between the protections against anti-union discrimination, which apply to all workers, and the duty to bargain with the union. As will become apparent, the Court is really saying that it would have been the same if, instead of attempting to bargain for its retired members, the union had attempted to bargain to protect the interests of other "strangers"—union members in a non-union workplace, or even the employees of other employers, all of whom clearly are employees under any definition in the Act.

The Court's explanation is even less convincing in view of the fact that retirees, like job applicants, do sometimes come within the statutory definition of employees. For example, section 302 of the amended statute prohibits payments by employers to union representatives, but section 302(c)(5) exempts payments to trust funds established "for the sole and exclusive

135. The Court's brief reference to the Act's policy, however, is not enlightening:

The Act . . . is concerned with the disruption to commerce that arises from interference with the organization and collective-bargaining rights of 'workers'—not those who have retired from the work force. The inequality of bargaining power that Congress sought to remedy was that of the 'working' man, and the labor disputes that it ordered to be subjected to collective bargaining were those of employers and their active employees. Nowhere in the history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective-bargaining obligations of the statute.

404 U.S. at 166. But the issues to be decided were precisely whether the collective bargaining rights of active workers included representing retirees, whether the goal of equalizing bargaining power is furthered by requiring the employer to bargain about retiree issues, and whether, if collective bargaining failed, the workers could strike over the issue.


137. The fact that this would also implicate the secondary boycott provisions of the Act makes this concern even more significant. See infra part IV.
benefit of the employees of such employer" for certain purposes, which include medical plans and the payment of pensions. As common sense dictates, retirees are included within the definition of "employees" under this section; if they were not, it would be illegal for an employer to contribute to a pension fund if retirees remained eligible to receive its benefits. Yet the Court dismissed the Board's argument, pointing out that the logic that compelled a reading of the statutory definition of "employees" under section 302 to include retirees did not apply to other contexts.

But surely this admission alone indicates that the Court's reliance on the "ordinary meaning" of the term is insufficient. In any case, the Board was not simply arguing that the statute requires that retirees sometimes be treated as employees; rather, the Board's point was that this occurred in a context related to the issue in question. The treatment of retirees as employees under section 302(c) means that unions are required to act as the retirees' representatives for purposes of administering a benefit plan; but under the Court's holding, unions would not be permitted to bargain over the benefits the retirees were to receive under the same plan. Apart from this anomaly, the Board warned that such a situation would also complicate welfare plan negotiations, since the union would be entitled to represent retirees on proposals characterized as involving the administration of the plan, but would be barred from representing those retirees if the same proposal was characterized as involving "renegotiation."

The Court's response was that "the union's role in the administration of the fund is of a far different order from its duties as collective bargaining agent," which is certainly true—but which means that the basis of the decision is the Court's view of the policy defining the character of the union's duties, rather than the definition of "employee."

This becomes clearer in the Court's second reason for deciding that the retirees' medical benefits are not a mandatory topic of bargaining. The Court held that the employer's obligation to bargain over "wages, hours, and conditions of employment" extends only to members of the bargaining unit and that retirees, whether or not they are employees in some general sense, are not—and cannot be—included in the bargaining unit.

The Court based the first part of this holding on its construction of the statute. While section 8(a)(5) makes it an unfair labor practice to refuse to bargain collectively, section 8(d) defines bargaining collectively to in-

139. 29 U.S.C.A. § 186(c)(5)(A), (B).
140. Pittsburgh Plate Glass, 404 U.S. at 169.
141. Id. at 171 n.11.
142. Id. at 170.
143. Id. at 172.
144. For the text of § 8(a)(5), see supra note 128.
clude conferring “in good faith with respect to wages, hours, and other terms and conditions of employment.”\(^\text{145}\) In addition, section 8(a)(5) is, by its terms, subject to the provisions of section 9(a).\(^\text{146}\) And section 9(a) provides that a union selected by the majority in an appropriate bargaining unit “shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”\(^\text{147}\)

Reading the duty to bargain of sections 8(a)(5) and 8(d) in tandem with the exclusivity provision of section 9(a), the Court held that the requirement to bargain over mandatory topics was meant to extend only to the wages, hours, and conditions of employment of members of the bargaining unit. This reading is not self-evident, however; it seems equally plausible that section 9(a) limits neither whom the union can bargain for nor the obligation of the employer under section 8(d) to do so. Rather, this portion of section 9(a) can be understood to limit only the scope of exclusivity: it prohibits both employers and employees from negotiating except through their exclusive representative, but only as to these subjects.\(^\text{148}\)

Be that as it may, the Court’s reading is also a plausible one, and since the retirees were not members of the bargaining unit as it had been defined by the Board, there is doctrinal justification for the Court’s holding that the employer had no duty to bargain over the retirees’ benefits on the basis of the Board’s first rationale—that the retirees remained “employees” for these purposes.\(^\text{149}\)

Since it seems more reasonable to argue that retirees’ benefits are not a mandatory topic because they are outside the bargaining unit than to argue that retirees simply are not “employees” at all, the Court’s elaborate efforts to argue the latter are somewhat puzzling. On the other hand, finding that the retirees are entirely outside the Act, like agricultural workers, would eliminate the need to rely on the Court’s view of the appropriate scope of the union’s role. For although there is a plausible statutory basis for hold-

\(^{145}\) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

\(^{146}\) See supra note 128.

\(^{147}\) 29 U.S.C.A. § 159(a). The importance of § 9(a) is that it establishes the principle that a union having the support of a majority of employees within an appropriate bargaining unit represents all the employees in that unit, including those who wish to be represented by another union, or by no union. Section 9(a) is the basis of binding all employees to the terms of a collective bargaining agreement.

\(^{148}\) See Archibald Cox & John T. Dunlop, Labor Decisions of the Supreme Court at the October Term, 1957 44 VA. L. REV. 1057 (1958); cf. NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959) (holding that “employee committees” are “labor organizations” within § 8(a)(2)).

\(^{149}\) This is assuming that the mandatory/permissive distinction itself is supported by the statute. See Cox & Dunlop, supra note 148, at 1083-86; Theodore J. St. Antoine, Legal Barriers to Worker Participation in Management Decision Making, 58 TUL. L. REV. 1301, 1305-07 (1984).
ing that the employer had no duty to bargain in this case because the retirees were outside the bargaining unit, as they plainly were, this would not have prevented the Board from including retirees in a future bargaining unit. For that, the Court had to hold not only that the retirees were not members of the bargaining unit, but that they could not be, that the Act prohibited their inclusion. The reasons advanced to support this argument are closely related to the reasons for rejecting the Board’s alternative holding that the retirees’ benefits were a condition of the active employees’ employment. And these reasons are much less firmly supported by the statute; they are, in fact, based on unarticulated assumptions concerning the role the union is to play in society. The relationship between such tacit assumptions and the bargaining unit determination has already been discussed;¹⁵⁰ this part of Pittsburgh Plate Glass illustrates that relationship.

According to the Court, a bargaining unit “‘must . . . effectuate the policy of the act, the policy of efficient collective bargaining.’”¹⁵¹ In fact, the statute mandates that the Board base its bargaining unit determination on a broader policy: “to assure to employees the fullest freedom in exercising the rights guaranteed” by the Act.¹⁵² Collective bargaining is only one of the guaranteed rights; another, which seems relevant to the issue, but which the Court does not mention, is the right to engage in concerted activity for mutual aid and protection.¹⁵³

This omission allows the Court to focus on a single aspect of commonality and to hold that “even if . . . active and retired employees have a common concern in assuring that the latter’s benefits remain adequate, they plainly do not share a community of interests broad enough to justify inclusion of the retirees in the bargaining unit.”¹⁵⁴ According to the Court, the retirees’ interests are limited to pension and benefit issues, while the active employees are concerned with wages, hours, and working conditions, and the possibility of conflicts of interest between these constituencies is too great. Indeed, the union might sometimes sacrifice the retirees’ interests during bargaining in order to make gains for the active employees.

This is an extraordinary rationale. The fear that a union would sell out its retirees to benefit its active workers is itself plausible, if speculative, but it cannot be made to justify the Court’s conclusion. First, as I have discussed in a different context, any bargaining unit that includes, for example, both skilled and unskilled employees presents this same danger.¹⁵⁵ The Court developed doctrines such as the union’s duty of fair representation to

¹⁵⁰ See supra part II.
¹⁵¹ Pittsburgh Plate Glass, 404 U.S. at 172 (quoting Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 165 (1941)).
¹⁵² 29 U.S.C.A. § 159(b). See supra note 95 (quoting the text).
¹⁵⁴ Pittsburgh Plate Glass, 404 U.S. at 173.
¹⁵⁵ See supra part II.
deal with this issue.\textsuperscript{156} More important, the concern that a union might not adequately represent its retirees in negotiating with the employer is hardly addressed by prohibiting the union from representing them at all, unless the employer consents. Indeed, since the union owes a duty to members of the bargaining unit but not to the retirees, any possible concession to secure benefits for the retirees at the expense of the current employees could conceivably constitute a breach of the union's duty to those current employees.\textsuperscript{157} That is, Justice Brennan's reasoning effectively mandates that the union ignore the interests of the retirees. It necessarily assumes that they are better off through individual bargaining than through union representation. This assumption is at odds with the whole rationale of the NLRA, a rationale that, in other contexts, Justice Brennan has strongly defended.

It might be argued that Justice Brennan's reasoning is simply an unavoidable consequence of the need to protect collective bargaining, rather than the real explanation for the decision. But even if "efficient collective bargaining" justifies excluding retirees from the bargaining unit,\textsuperscript{158} it does not justify the rejection of the Board's alternative holding—that the retirees' benefits affect the interests of the current employees sufficiently to be one of their "conditions of employment." Yet the same reasoning, divorced from the bargaining unit question, is at the heart of the Court's treatment of this issue as well. While agreeing with the Board that third party concerns could constitute an employment condition of the bargaining unit members, the Court "disagre[ed] with the Board's assessment of the significance of a change in retirees' benefits to the 'terms and conditions of employment' of active employees."\textsuperscript{159}

The Board's major argument\textsuperscript{160} was that the union's representation of retirees would lead to "[t]he mitigation of future uncertainty and the facilitation of agreement on active employees' retirement plans. . . . Under the Board's theory, active employees undertake to represent pensioners in order to protect their own retirement benefits."\textsuperscript{161} In rejecting this "theory," the Court's reasoning is closely related to its view that the common interests between the retirees and the active employees are insufficient to include them in the same bargaining unit:

157. The Court acknowledges only the converse: the duty of fair representation "does not require a union affirmatively to represent nonbargaining unit members or to take into account their interests in making bona fide economic decisions on behalf of those whom it does represent." Pittsburg Plate Glass, 404 U.S. at 181 n.20.
158. See supra note 151 and accompanying text.
159. Pittsburg Plate Glass, 404 U.S. at 179.
160. The Board also claimed that increasing the size of the insured group lowers costs per participant; the Court responded that this benefit was "speculative and insubstantial at best," since "including pensioners, who are likely to have higher medical expenses, may more than offset that effect." Pittsburg Plate Glass, 404 U.S. at 180.
161. Id.
Having once found it advantageous to bargain for improvements in pensioners' benefits, active workers are not forever thereafter bound to that view or obliged to negotiate in behalf of retirees again. To the contrary, they are free to decide, for example, that current income is preferable to greater certainty in their own retirement benefits or, indeed, to their retirement benefits altogether. By advancing pensioners' interests now, active employees, therefore, have no assurance that they will be the beneficiaries of similar representation when they retire. The insurance against future contingencies that they may buy in negotiating benefits for retirees is thus a hazardous and, therefore, improbable investment.  

Apart from the fact that the Court is engaging in the most extreme speculation about the future behavior of employees, for which it can present no empirical evidence, and that one would have supposed that deference to the Board's expertise in the realities of industrial practice would be especially appropriate here, the vision represented in this argument is indeed remarkable. Because the obligation of future employees to protect the benefits of current employees when those current employees retire is not a legally enforceable contract, that obligation is not only a "hazardous" but an "improbable" investment. Just as retirees cannot rely on the union's representation because the union may not sufficiently safeguard their interests, so current employees are foolish to protect the retirees in the expectation that they too will be protected in the future. Absent an enforceable contract, no tie of family, community, or class is a sufficient commonality. This is a vision of a Hobbesian world a long way from Woonsocket and Minneapolis.

But it is in fact not a description at all—it is a command. Foolishly or not, the active workers, through their union, were willing to rely on the behavior of future employees. The retirees, as far as the record indicates, overwhelmingly preferred to have the union represent them rather than to bargain individually with the employer.  

The Court is not really saying that the common interests of the active employees and the retirees are insufficient to allow them to want to act together, to protect each other, to view themselves as engaged in a common struggle. It is saying that the basis of this commonality is unacceptable, that the union must be permitted to "represent" only those who are firmly embedded inside the employer's boundaries—to the exclusion even of those "others" who have spent their working lives alongside them, who, indeed, may be their parents. They are "strangers," like the roving pickets from  

---

162. Id. at 180-81.
163. See supra note 24.
164. In contrast to a cost of living clause, to which the Board had compared it. Pittsburg Plate Glass, 404 U.S. at 181.
165. Of 190 retired employees, only 15 accepted the offer that the employer made to each individually. Id. at 162. Although this does not prove that the retirees wanted union representation, it is some evidence for it, and the only evidence the Court had.
another employer's dispute who might turn up to disrupt industrial peace by appealing to solidarity. The protections of the Act may extend to such persons in some circumstances—the applicant cannot be discriminated against, the retirees may have an action for breach of contract.\textsuperscript{166} But the union's role in regard to them is severely circumscribed.

It is not merely that the union cannot insist on bargaining about the retirees' benefits, a right of limited usefulness in any case. After all, even when a mandatory topic is involved, the employer may implement its proposal unilaterally after bargaining to impasse with the union.\textsuperscript{167} And it is also true, as the Court noted in a particularly disingenuous point, that the union remains free to raise permissive topics.\textsuperscript{168} The problem is that when the topic is permissive, the union is not free to use its economic power to enforce its demand. A strike to protect the retirees' health benefits would be an unfair labor practice.\textsuperscript{169} Condemning the use of collective power in this cause is both the result and the underlying rationale of \textit{Pittsburgh Plate Glass}.

If this is so, what then does the case "mean?" Comparing it to \textit{First National Maintenance} may help answer this question in several ways. On one level, the decision in \textit{Pittsburgh Plate Glass} did not seem nearly as important at the time it appeared as did the decision in \textit{First National Maintenance}, which impeded unions' ability to bargain over plant closings. In recent years, however, the importance of the specific holding of \textit{Pittsburgh Plate Glass} has increased dramatically. The relatively small cost of the retirees' medical care at issue in that case has grown enormously, both as the number of retirees has risen and as health care costs have exploded. The termination of health care plans for retirees has become a virtual epidemic in recent years.

From a doctrinal view, it could be argued that barring strikes over this issue violates the right of the current employees to engage in concerted

\begin{itemize}
\item \textsuperscript{166} \textit{Id.} at 181 n.20. The employer's unilateral change in \textit{Pittsburgh Plate Glass} occurred midway through a contract term; had the employer waited until the contract expired, this remedy would have been unavailable.
\item \textsuperscript{167} Although the employer's unilateral change occurred midterm, the Court also held that § 8(d)'s prohibition against such changes applied only to mandatory terms. Thus, while the retirees might have a breach of contract action, the employer's action was not an unfair labor practice. \textit{Id.} at 188.
\item \textsuperscript{168} "Nothing we hold today precludes permissive bargaining over the benefits of already retired employees." \textit{Id.} at 171 n.11.
\item \textsuperscript{169} As mentioned, the employer's actions in \textit{Pittsburgh Plate Glass} occurred midterm in a contract; most collective bargaining agreements contain no-strike clauses, and the question of the union's right to strike was not presented. But the case also governs the negotiation of a new agreement. \textit{Id.} at 162-63.
\end{itemize}

It is also true that a union or an employer can avoid the prohibition against insisting on permissive topics by including them in a package of demands that includes mandatory topics as well. \textit{See} David Feller, \textit{Response to the Structure of Post-War Labor Relations}, 11 N.Y.U. REV. L. & SOC. CHANGE 136 (1982-83). Thus a union can, if it is careful, strike over the health benefits of retirees and other permissive topics. I do not believe that this substantially alters the point I am making about the ideological meaning of the law; it proves only that the law can be broken.
activity for mutual aid and protection. But the same could be said of *First National Maintenance*, where the employer's decision to "partially close" a business was held not to be a mandatory topic because, although it affected the wages, hours, and conditions of employment of the bargaining unit employees, it was not a decision about those terms.\textsuperscript{170} Doctrinally, Justice Brennan's dissent in *First National Maintenance* and his opinion for the Court in *Pittsburgh Plate Glass* are not obviously inconsistent; the first concerns the issue of what are "conditions of employment," while the second ostensibly concerns the issue of whose conditions are involved. But this doctrinal distinction is difficult to maintain on the issue of whether the retirees' benefits "vitaly affect" the interests of the bargaining unit members. It is here that the doctrinal bases of both decisions meld into ideology.

In *First National Maintenance*, the conservatives on the Court, but not Justice Brennan, viewed the employer's decision as one of those basic business decisions that lies at "the core of entrepreneurial control."\textsuperscript{171} The importance of the case lay in its diminution of the union's power vis-a-vis the particular employer. The case revealed a real and important disagreement between the New Deal liberalism of the Wagner Act, expressed by Justice Brennan, and the unwillingness of the Court majority to find that Congress had intended to allow unions any influence in deciding these core questions. The view expressed in the dissent is consistent with the goals of the Wagner Act: to promote unionization, strengthen the bargaining power of unions, increase the share of wealth received by employees, and to limit, without entirely abolishing, the power of employers to run their businesses as they see fit.\textsuperscript{172}

The diminution of union power in *Pittsburgh Plate Glass* lies on a different dimension. Justice Brennan was willing to permit the employer's unilateral change, not because a decision of this sort is part of the prerogative of ownership, but because to hold otherwise would have allowed the union to represent the interests of workers outside the bargaining unit.

On an ideological level, the "teaching" of *Pittsburgh Plate Glass* is that a union may not legally act as if it represents a segment of society, beyond the employees in a particular enterprise, whose interests it believes are consistent with those of the workers the union "represents" in the legal sense. That both groups share interests antagonistic to the particular employer is not enough. And beyond this, as we shall see, is the condemnation of union actions that reflect a view of commonality based on shared interests that are antagonistic not to the particular employer, but to employers generally. Ideologically, *Pittsburgh Plate Glass* denies the legitimacy of

\textsuperscript{170} *First Nat'l Maintenance*, 452 U.S. at 686.


\textsuperscript{172} *First Nat'l Maintenance*, 452 U.S. at 688-91.
unions’ perceiving themselves and acting in a manner defined by the concept of antagonistic classes.

B. Constitutional Values and Collective Action: Beck

The ideological import of Pittsburgh Plate Glass is that the Court narrowed the range of people about whose concerns the union may legally speak and for whose benefit it may legally act. In Communications Workers of America v. Beck, the restrictions the Court imposed on the scope of union activity are almost entirely ideological. While Beck does not make any class-wide union activity illegal, it imposes a particular view of a union’s proper role, outside of which union activity is marginal and dubious. Beck defines the liberal view of what a union is supposed to do.

There is much to criticize in the decision, including its extraordinary method of statutory interpretation and its almost startling misreading of legislative history. I will discuss these here only insofar as necessary to demonstrate that the decision is grounded neither in the language nor the history of the NLRA. Underlying Beck is a tension between the liberal values of individualism, rising to quasi-constitutional dimensions, and the collectivist ethos of unionism, the Act’s accommodation to which the Court interprets as narrowly as possible. This tension surfaced in construing a statutory provision that protects individual choice, but partially subordinates that protection to the interests of the collective; the extent of the subordination is what Beck decides. It does so in the shadow of the First Amendment, though without ever relying on First Amendment doctrine. The discussion that follows will therefore consider constitutional values, broadly understood, but will make no attempt to analyze First Amendment doctrine outside labor law.

One of the central provisions of the Labor Act is section 8(a)(3), which prohibits an employer from discriminating against employees to discourage or encourage union membership. Clearly, any requirement that employees join a union to keep their jobs would violate this provision. However, the section allows an employer to agree to, and enforce, a “union shop clause,” a contractual requirement that employees must join the union as a condition of continued employment. An employee may not be fired for nonmembership in the union, however, if that nonmembership is caused by anything “other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or

174. See Beck, 487 U.S. at 778-79 (Blackmun, J., concurring in part and dissenting in part).
175. See id. at 773-75 (Blackmun, J., concurring in part and dissenting in part).
Thus an employee expelled by the union for legitimate reasons other than nonpayment of dues, such as strikebreaking, cannot thereby lose her job. Effectively, the union "membership" that may be required of an employee has been "whittled down to its financial core."

In *Beck*, the Court decided that when a dues-paying nonmember so requests, the union must not assess him full dues, but only that proportion that is used for purposes related to "collective bargaining, contract administration, or grievance adjustment," which the Court characterized as "representational" activities. The Court purported to base this conclusion on the language and intent of section 8(a)(3), some four decades after it was adopted in its present form. Support for this interpretation rests almost exclusively on the Court's 1961 decision in *Machinists v. Street*, which construed the equivalent section of the Railway Labor Act to similarly limit the use of objecting nonmembers' dues. But *Street*, also written by Justice Brennan, was based on constitutional concerns: the Court feared that federal authorization for contractual provisions allowing dissenting employees to be charged dues for union political activities they opposed would constitute state action violating the First Amendment. In *Beck*, the union claimed that the NLRA differed from the Railway Labor Act in this respect, and the Court neither reached the First Amendment issue, nor did it base its opinion on the need "to avoid the serious constitutional issues that
would otherwise be raised" by a contrary statutory interpretation.\textsuperscript{185} Rather, the Court claimed that "the absence of any constitutional concerns in this case would [not] warrant reading" section 8(a)(3) differently from the way Street had interpreted the "nearly identical language" of the Railway Labor Act.\textsuperscript{186}

In justifying a reading of the statute that would avoid questioning its constitutionality, the Street Court had reasoned that Congress, in amending the Railway Labor Act three years after the passage of section 8(a)(3), had been concerned with eliminating the problem of railway employees who received the benefits of union representation without paying their share of the costs, a problem of "free riding." The Court could thus attribute to Congress an intent to limit the collection of dues from objecting nonmembers to the proportion used for the representational activities from which those nonmembers benefitted, though "no one has suggested that the Court's statutory construction . . . could possibly be supported without the crutch of its fear of unconstitutionality."\textsuperscript{187}

In Beck, the Court further observed that the legislative history of the Railway Labor Act suggests that Congress had intended to model its union security provisions after section 8(a)(3). Since the Court had long since construed those provisions in Street, it followed that the same interpretation applied to section 8(a)(3).

This result ignored both the language and the legislative history of section 8(a)(3) itself. That provision refers to an employee tendering "the periodic dues . . . uniformly required" and requires that membership be available "on the same terms and conditions generally applicable to other members." Its legislative history is replete with statements that, while banning the closed shop,\textsuperscript{188} the law would continue to allow contractual clauses that required an employee "‘to pay dues to the union’ " and to "‘pay the same dues as other members of the union.’"\textsuperscript{189} And, of course, though the Taft-Hartley Act itself was perhaps the most controversial legislation of the period, fiercely opposed by the labor movement, there is no indication that


\textsuperscript{186} Beck, 487 U.S. at 762.

\textsuperscript{187} Machinists v. Street, 367 U.S. 740, 786 (1961) (Black, J., dissenting). Justice Black was emphatic:

Neither [the union security provisions] nor any other part of the [Railway Labor] Act contains any implication or even a hint that Congress wanted to limit the purposes for which a contracting union's dues should or could be spent. All the parties to this litigation have agreed from its beginning, and still agree, that there is no such limitation in the Act. The Court nevertheless, in order to avoid constitutional questions, interprets the Act itself as barring use of dues for political purposes.

Id. at 784.

\textsuperscript{188} See supra note 180.

\textsuperscript{189} See Beck, 487 U.S. at 772-73 (Blackmun, J., concurring in part and dissenting in part) (quoting 93 CONG. REC. 4886 (1947)).
Congress intended in section 8(a)(3) to curtail the use of union dues for political lobbying or any other purpose.\textsuperscript{190}

If \textit{Beck} is so clearly unsupported by both the statute and its legislative history, why did the majority hold as it did? Hostility to unions is not a convincing explanation, since the opinion was written by Justice Brennan, joined by Justices Marshall, White, and Stevens, as well as Chief Justice Rehnquist.\textsuperscript{191} Nor is the practical cost of \textit{Beck} a crippling one: the administrative burden of segregating "chargeable" from "non-chargeable" expenditures is serious, but not overwhelming,\textsuperscript{192} and the actual amount of dues likely to be lost is very little.\textsuperscript{193}

From the point of view of unions, \textit{Beck} is a form of harassment; from the point of view of groups like the National Right to Work Committee, it is a victory in the battle against "mandatory unionism" and to decrease unions' political influence.\textsuperscript{194} Assuming that Justice Brennan, at least, was not interested in harassing unions and did not share the political agenda of the right wing, and assuming further that the \textit{Beck} result, even if not as outrageous by the standards of normal statutory interpretation as I believe, was certainly not \textit{required} by the statute, nor was it the most plausible interpretation, the decision must have been animated by other considerations.

\textit{Beck} is not directly based on the First Amendment, but it makes sense only as an example of the Justices' infusing the values they find in the First Amendment into an area that they are nonetheless unwilling to decide is subject to the Constitution.\textsuperscript{195} For whatever reasons, \textit{Beck} is not a constitut-
tional case, although it is certainly what might be called a "constitutional values" decision. For even if we accept the Court's wholly fictitious attribution to Congress of an intention to limit section 8(a)(3) in this way, this does not explain Congress' reason for doing so. A desire to eliminate free riders would explain why Congress did not simply prohibit the union shop altogether, but it would not reveal what Congress thought was wrong with it in the first place. Restricting the dues of objecting nonmembers to the proportion used for "representational purposes," whether it was the intent of Congress or the policy imposed by the Court, can only be justified by a desire to limit the perceived infringement on expressive and associational rights beyond that which is inherent in imposing an exclusive bargaining agent on an unwilling minority and the consequent need to eliminate free riding.

That was the motive the Court imputed to Congress in Street and its progeny under the Railway Labor Act, and it is how the Court has analyzed the constitutionality of state statutes authorizing the union shop in public employment. Whether we ascribe the policy to Congress or to the

196. Although the constitutional issue was fairly before the Supreme Court. The district court's decision was based on the First Amendment, and a panel of the court of appeals "agreed that respondents stated a valid claim for relief under the First Amendment," but preferred to base its opinion on nonconstitutional grounds. One judge dissented on the ground that the union's conduct did not violate § 8(a)(3) and that there was no state action and therefore no need to construe the statute to avoid the constitutional issue. On rehearing en banc, four judges dissented on this basis. Beck, 487 U.S. at 740-41. Even if the state action issue could have been avoided by the Supreme Court majority, one would think that the dissenters, who found that § 8(a)(3) allowed an objecting nonmember to be charged full dues that could be used for all purposes, would have needed to deal with it. Yet, they too chose not to reach it. Id. at 763 n.1 (Blackmun, J., concurring in part and dissenting in part).

197. "In enacting [the union security provisions] of the RLA, Congress sought to protect the expressive freedom of dissenting employees while promoting collective representation." Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1957 (1991) (plurality opinion).

198. See Ellis v. Railway Clerks, 466 U.S. 435, 456 (1984) (union security agreements are themselves significant burden on First Amendment rights; proper inquiry is whether challenged expenses "involve[d] additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest.").

199. "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." Lehnert, 111 S. Ct. at 1959.

Technically, the state statute involved authorized only an "agency shop." See supra note 179. Whatever difference this might make in other contexts, it is not relevant to a challenge to the use of dues.
Court, the values underlying it are identical. That it was in fact the Court, and not Congress, that limited both section 8(a)(3) and the union security provisions of the Railway Labor Act to comport with its notion of constitutional values is not irrelevant, however. That the decision was written by the foremost symbol of liberal judicial activism, and is grounded on the same values of freedom of association and expression as the First Amendment, invites an examination of the relationship of these values to labor law.

If we assume for the moment that the Beck Court correctly held that Congress intended to prohibit agreements that require objecting nonmembers to pay dues beyond those necessary to prevent free riding, on what basis should that proportion be determined? In fact, this is the same as asking to what degree the national labor policy, especially exclusive representation, may justify infringements on absolute freedom of association. For if Congress intended to restrict individual freedom only insofar as necessary to ensure "that nonmembers who obtain the benefits of union representation can be made to pay for them," then it is impossible to separate one's view of the permissible degree of infringement from one's view of the appropriate scope of union activity. What are the benefits of union representation? Characterizing the union activity for which a nonmember may be compelled to pay as "representational" or "collective bargaining" activity does not help; these are simply conclusory terms for those activities that have been determined to be appropriate. Moreover, they are inconsistent with the rationale for the limitation, the concern for associational rights.

The actual holding of Beck is that section 8(a)(3) "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.' These duties, according to the Court, are limited to "collective bargaining, contract administration, or grievance adjustment." Now, why is a nonmember who pays his share of these costs no longer a free rider? If a union that represents the employees of a small machine shop finds that competition from non-union firms is making it impossible to win a wage increase, it might seem logical for it to attempt to organize the competitors. In doing so, it would seem to be bestowing a direct benefit on the nonmember employee of the already unionized bargaining unit, and his failure to pay dues in this behalf would appear to be a classic example of free riding. A Beck objector who works for General Motors may be excused from paying that proportion of his dues that fi-
rances an organizing drive directed at the parts suppliers to whom GM will increasingly be turning—at the cost of jobs for GM workers. But a \textit{Beck} objector would probably have to pay full dues for the organizing of a GM division in a different part of the country, in a different industry, that already pays the same labor costs as unionized plants.

While this problem may seem inevitable in any line drawing, it reflects something much more serious. Where did the restriction of “representational” activity to dealing with the employer come from in the first place? What possible effect can the identity of the employer have on the expressive or associational burden that the union shop already imposes? The Court’s distinction does not rest on any relationship between the union’s activity and even the immediate and narrowly understood welfare of the represented employees.

If the Court is not seeking to avoid associational and expressive burdens and is restricting involuntary dues to “representational” activities as a policy choice made for other reasons, then the Court’s desire to limit class-wide activity remains central to understanding \textit{Beck}, for the authorization of the union shop could then be understood as coextensive with the limited statutory functions of the union as exclusive bargaining agent. In other words, on this hypothesis, the cause and effect of the Court’s reasoning in \textit{Street} are reversed: the restriction on involuntary dues is a \textit{consequence} of the desire generally to limit the union’s function to “representational” activities. A union shop agreement, after all, is permitted only when a union “is the representative of the employees as provided in [section 9(a)] in the appropriate collective bargaining unit covered by the agreement.”\textsuperscript{203} In that sense, the dues restriction follows from the structure of the Act itself; and \textit{Beck}, on this reading, is doctrinally, as well as ideologically, related to \textit{Pittsburgh Plate Glass}.\textsuperscript{204}

This hypothesis would mean that the limitation on class-wide activity came from the anti-labor Taft-Hartley Congress, rather than from the pro-union Justices. However, even if Congress intended to restrict the use of objectors’ dues to “performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues,” the Court must still decide what looks at first like a question of line drawing but is, in fact, a major definitional problem. The cost of a union newspaper that reports on collective bargaining activities is chargeable; to the extent that it reports on, for example, political issues, it is not. Of course, the union newspaper is in neither case \textit{necessary} to “collective bargaining, contract administration, or grievance adjustment,” though in both cases it may be related to them.


\textsuperscript{204} \textit{See supra} part III.A.
In the union’s judgment, and the Court’s, a newspaper that informs the bargaining unit members about contract issues is a desirable means to carry out the union’s duties. But if a union believes that the best way to get a better contract in the objector’s bargaining unit is to organize a competing company, or that the best way to improve safety in that bargaining unit is to pressure the legislature to pass a new law, then the objector’s dues can be used neither to finance these activities nor to inform bargaining unit members about them. Ostensibly, this is because these activities are not closely enough related to the benefits which the objector receives and for which she may be made to pay. But that is the Court’s judgment, not the union’s. A union may believe, and we may agree, that an organizing drive directed at preserving a wage standard is manifestly more relevant to this purpose than a national union convention, the expenses of which are chargeable as an administrative cost of maintaining the structure of the union. In the absence of the concern for abridging the associational and expressive freedom of objectors, the Court’s determination of what is chargeable activity is entirely dependent on the societal value the Court ascribes to the particular activity, not on the benefit the activity might bring to the objector’s bargaining unit.

The same is true if Beck, like Street, is motivated by the desire to limit the burden on objectors’ expressive and associational rights, because the Court’s determinations are unrelated to the degree of the additional burden. Apart from the irrelevance to these concerns of the identity of the employer whose employees are being organized, the Court’s distinctions do not correspond to this rationale in a more general sense.

When a nonmember of the union is prevented from bargaining directly with his employer, even if he believes he can do better for himself than through collective bargaining, there is obviously a restriction on his freedom. When an objector is forced to accept the union’s bargaining program, though she would prefer that pensions rather than wages were emphasized, or when she wants the union to agree to cooperative programs with management that the union rejects, the burdens imposed necessarily follow from the principles of majority rule and exclusivity.205 And if these are accepted, the principle of requiring objectors to pay dues does not violate the First Amendment; this is true even for public employees, when state action is conceded.206 The additional burdens on First Amendment rights imposed by the requirement to pay dues for anything other than political activity are not apparent. Certainly the nonmember is being forced to contribute financially to goals he does not endorse, such as organizing other employers’

---

workers, but he also may not agree with collective bargaining, or with particular bargaining goals.

Perhaps the problem with Beck then is only that it goes too far, and should have been limited to union political activity. It is plausible that the burden on First Amendment freedoms caused by forcing an employee to contribute financially to lobbying for the passage of a law with which he does not agree, or the election of a candidate whom he opposes, is greater than that required by exclusivity and the union shop; that burden may even be qualitatively different. But this hierarchy of associational rights reinforces the tendency to limit class-wide activity and restrict unions, as far as possible, to the boundaries of the firm.

I have already mentioned the example of lobbying for workplace safety legislation, but much recent union political activity, such as that directed against deregulation of industries like trucking and telephone, is similar. An objector may disagree with the union's attempt to force the employer to agree to contract language concerning safety, or to enforce existing contract provisions; her disagreement may be based on her belief that such provisions are inefficient, that they make her company—and her country—uncompetitive internationally, are bad for society. Yet, she must still pay dues to support these efforts. But she need not pay dues to support legislation to the same effect, though her reasons for opposing it are identical. The difference, for purposes of the First Amendment, must be based on the idea that the individual's speech or associational rights are greater when the purpose of the association is to affect the whole society. As the Court put it in denying the use of objector's funds for lobbying by a public employees' union:

> The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion.

However conventional these statements are in a First Amendment context, they also reflect important assumptions about unions when applied to labor law. The Court's view is based, at least in part, on disagreement with the idea that it is as legitimate a role for the union to function outside the gates of the firm, through organizing, sympathetic actions with other unions, and political activity, as it is for it to bargain a contract.

---

207. Although in the constitutional context the Court has viewed such involuntary contributions as a form of "compelled speech," see Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1960-61 (1991), it seems more accurate to discuss the First Amendment interest implicated as an associational right, though this does not affect the analysis.

208. Ferris Faculty Ass'n, 111 S. Ct. at 1960 (plurality opinion) (citations omitted).
The Court cannot justify the distinction it makes by limiting the use of compulsory dues to those union functions that are mandated by the statute. The Court has rejected this test under a constitutional analysis for public employees, in part because it would make the constitutionality of the additional burden depend on the extent of the legislation. And insofar as this standard might be applicable to the NLRA on non-constitutional grounds, it cannot be used to draw the line that the Court has created in *Beck*, since section seven expressly gives employees the right to engage in concerted activity for purposes of "mutual aid and protection" other than collective bargaining.

Nor can the distinction be made on the grounds that compulsory support of collective bargaining, unlike support of union political action, is not "compelled speech," that it does not make the objector "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." For the objector's dues can be used to publish the union newspa-

---

209. *Id.* at 1962-63.

210. "Employees shall have the right . . . to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C.A. § 157.

*Eastex* is one of the extremely rare modern Supreme Court cases whose thrust, at least in part, contradicts the major arguments of this article. *See infra* note 231. The Court's approval of the concerted activity in question, however, is given grudgingly: the Court took "[w]hat had appeared to be a solidaristic appeal on behalf of the principles of the labor movement and transformed [it] in *Eastex* into a calculated appeal to the pocketbook—and in this guise [it] was protected." Estlund, *supra* note 176, at 928; *see also* Fischl, *supra* note 65, at 796-98; Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 Tex. L. Rev. 1, 7 (1981).

It should also be pointed out that the Board, with the approval of the courts of appeal, had for forty years construed "mutual aid and protection" to extend beyond the employer-employee relationship, see 437 U.S. at 564 n.13. *See generally* Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286 (1981). Perhaps more important to the Court, the protected activity in question, although dealing with issues outside the employer-employee relationship, was directed at members of the bargaining unit, and did not involve the use of collective power on behalf of those issues. As the Court said in *Eastex*:

even when concerted activity comes within the scope of the "mutual aid or protection" clause, the forms such activity permissibly may take may well depend on the object of the activity. "The argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within 'mutual aid or protection' is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing.

per and to disseminate the union's position in other ways, but only concerning some subjects, and only to some audiences. Under the Court's analysis, the objector may be forced to be associated with views about collective bargaining aimed at convincing his fellow employees, but not the public or the rest of the labor movement. This analysis assumes that the burden placed on the objector's First Amendment rights by the union's dissemination of its position varies with the identity of the audience: just as the identity of the employer determines the legitimacy of using dues in organizing, so apparently it also marks the frontier within which "compelled speech" is acceptable.

The logic of the Court's distinctions is difficult to reconcile with a concern for the rights of the objector. Instead, limiting the scope of the union's function to the boundaries of the firm is an indirect manifestation of the Court's view of the illegitimacy of class-wide activity. It is a kind of prophylactic rule to protect against the danger of solidarity.

However, Beck also restricts the subject matter for which compulsory dues may be used. The objector cannot be associated with views about safety legislation or who should be a state senator, even when aimed solely at convincing members of her own bargaining unit. One way to explain this reasoning is that the choice of a state senator is somehow more "ideological," and therefore closer to the core concerns of the First Amendment, than are the questions of whether a worker is fired, medical benefits maintained, or a plant closed.211

Perhaps this is so, since the ability to engage in political activity is arguably necessary to safeguard all other rights. And whether or not this limitation is consistent with constitutional values, it is consistent with the accommodation represented by the Wagner Act. That Beck is insupportable by the language of the Labor Act hardly matters. While the union may legally and constitutionally use objectors' dues in disputes with the individual employer, it may not use them to generalize the conflict to other employers or to put itself forward as a voice for social change. Unions may continue to attempt to play a role beyond the workplace, of course, as can any private organization. But part of the ideological meaning of Beck is that, as with any other private organization, the union's activity in these areas, unlike in its "representational" functions, is not determined by majority rule but by unanimity—anyone can opt out.212

The character of the

211. "Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible." Ferris Faculty Ass'n, 111 S. Ct. at 1960 (plurality opinion) (citations omitted).

212. Indeed, in this respect the Court has treated unions less favorably than other private organizations which, unlike unions, may by contract restrict the ability of their members to resign. See generally Pattern Makers' League of N. Am., AFL-CIO v. N.L.R.B., 473 U.S. 95 (1985).
union is altered, made less a collective and more an aggregation of individuals, when it attempts to act in the wider society.

If *Beck* were the only obstacle imposed by law, its essentially symbolic disapproval of such efforts would have little effect. But when symbols are pervasive, and reinforce doctrines that carry important substantive consequences, they may have a significant impact. Much of labor law is directed at restricting the union's role to the confines of the workplace, to matters that are understood as private rather than public, to limiting the scope of the community in whose name the union may act. Within this legal structure, the ideological message of *Beck* plays its part.

C. The Strike With No Value: Buffalo Forge

In *Buffalo Forge v. Steelworkers*, Justice Stevens, joined by Justices Brennan, Marshall, and Powell, dissented from the Court's holding that the Norris-LaGuardia Act did not permit a federal court to enjoin a sympathy strike because the dispute was not subject to arbitration. *Buffalo Forge* only incidentally concerns solidarity; the case is primarily about injunctions and arbitration. Yet the Court's doctrinal analysis depends entirely on the fact that the strike (the subject of the decision) was a solidarity-based action. This is what distinguishes the case from earlier decisions, and is why the court did not allow the strike to be enjoined. Justice Stevens' dissent rejected the importance of this distinction and stressed the policy arguments that would allow an injunction to issue. I will examine one aspect of those policy arguments here.

Statutory interpretation and legislative history play little role in *Buffalo Forge*, but this is not surprising; the case is part of a line of "federal common law" interpretations of section 301 of the Taft-Hartley Act, which makes collective bargaining agreements enforceable in the federal courts, without regard to diversity or the amount in controversy. Because interpreting the provision as purely jurisdictional might have rendered it a violation of Article III of the Constitution, the Court held in *Textile Workers v. Lincoln Mills* that the substantive law to be applied in suits for breach of a collective bargaining agreement was federal law, "which the courts must

---


214. Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C.A. § 185(a). Section 301(b), 29 U.S.C.A. § 185(b) provides that an employer and union shall be bound by the acts of their agents, that a union can sue or be sued as an entity, and that money judgments are enforceable only against the union as an entity. Section 301(c), 29 U.S.C.A. § 185(c) concerns personal jurisdiction, and § 301(d), 29 U.S.C.A. § 185(d) deals with service of process.

Section 301(e), 29 U.S.C.A. § 185(e) defines "agent" for purposes of a § 301 suit; significantly, it is a modification—the only one in § 301—of a portion of the Norris-LaGuardia Act.
fashion from the policy of our national labor laws. 215 The law of section 301 has, ever since, been a common law created by the Supreme Court, based on its view of appropriate national labor policy.

Perhaps the most extreme example of this common law method was *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,216 the direct progenitor of the *Buffalo Forge* dissent. In *Boys Markets*, a union struck in breach of its collective bargaining agreement, and would have been liable for damages in a section 301 suit. The question was whether the strike could also be enjoined; the problem was that the Norris-LaGuardia Act, passed in 1932, had stripped the federal courts of jurisdiction to enjoin strikes.217 There is no reasonable basis to argue that when Congress passed section 301 it intended to modify this prohibition.218 Nonetheless, in *Boys Markets* the Court held that whenever a strike occurred over an issue that the collective bargaining agreement made subject to binding arbitration, the policy of Norris-LaGuardia had to be "accommodated" to the policy favoring arbitration that the Court had found in section 301.219 Since the union's promise not to strike was the *quid pro quo* for the employer's promise to arbitrate,220 and "an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike,"221 denying injunctive relief would have "devastating implications for the enforceability of arbitration agreements . . . "222 The Court therefore held that, despite Norris-LaGuardia, a federal court could enjoin a strike over an arbitrable dispute, provided

---

217. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment.
218. Although discussion of *Boys Markets* itself would take us too far afield, the evidence presented on this point in *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962), which was overruled by *Boys Markets*, is overwhelming; see also supra note 214.
219. "Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition against strikes, the arbitration agreement being the 'quid pro quo' for the agreement not to strike." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 n.4 (1960) (citing *Textile Workers*, 353 U.S. at 455).
220. The Court soon held that even in the absence of a no strike clause, the union's promise to arbitrate a dispute was an implied promise not to strike over it, also enforceable by injunction. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 382 (1974) (citing *Boys Mkt.*, 398 U.S. at 248).
221. *Boys Mkts.*, 398 U.S. at 248. Of course, the fact that in many strikes an injunction effectively settles the matter was precisely the reason that Congress passed the Norris-LaGuardia Act. Note the interesting use of the word "illegal"; a strike in breach of contract is equated to an unfair labor practice, an alternative that Congress expressly rejected. *See Lincoln Mills*, 353 U.S. at 452.
both that normal equitable standards were met and that an order to arbitrate also issued.

In *Buffalo Forge*, the strike involved the refusal to cross a legal picket line. (Although the picket line was that of a sister local, the result would have been the same if the pickets had been by members of a different union.) There was a no strike clause in the contract, although whether it covered sympathy strikes was disputed: that question, it was conceded, was itself subject to the decision of an arbitrator. The underlying dispute, however, which involved employees who were not covered by the collective bargaining agreement, was obviously not resolvable by arbitration. The employer, and the Court’s dissenting opinion, maintained that an injunction should issue pending the arbitrator’s decision as to whether the strike was in fact a violation of the contract. The Court rejected this argument; the logic of *Boys Markets* was that the union’s no strike promise was the *quid pro quo* for the employer’s promise to arbitrate disputes over contract interpretation. Only in a situation where both these promises had been made, or where a no strike promise could be inferred from the mutual promise to make arbitration the sole method of dispute resolution, could the policy favoring arbitration possess sufficient force to compel the “accommodation” of the Norris-LaGuardia prohibition. According to the Court, the mere fact that a strike was arguably in breach of contract was not enough to invoke the *Boys Markets* exception to the Norris-LaGuardia Act.

Among the many criticisms of the holding in Justice Stevens’ dissent, one is particularly relevant to the theme of this article. Since it is recog-

---

223. If the arbitrator subsequently ruled in favor of the employer, and ordered the strike to cease, the federal courts would, under well established § 301 doctrine, enforce the arbitration award, under pain of contempt. The dissent viewed this as a fatal hole in the Court’s logic, since Norris-LaGuardia would not prevent equitable relief, even though the underlying dispute still would not have been, nor could have been, resolved by arbitration.

Without getting too far from the subject, it seems to me that it is one thing to enforce a promise to arbitrate or an arbitration award, and an entirely different matter to enjoin a strike. The first was not “part and parcel of the abuses against which the Act was aimed.” *Lincoln Mills*, 353 U.S. at 458. On the other hand, preventing the federal judiciary from stopping strikes by injunctions was the principal purpose of the Norris-LaGuardia Act, 47 Stat. 70 (1932). It is simply sophistry to maintain, as the Court did in *Boys Markets*, 398 U.S. at 242 (and as the dissent repeated in *Buffalo Forge*, 428 U.S. at 415 and n.5) that because the purpose of the antistrike injunction was to enforce a promise to arbitrate, the policy of Norris-LaGuardia did not apply. The real basis for the “accommodation” of Norris-LaGuardia is a policy determination by the Justices that Norris-LaGuardia is obsolete. *See Boys Mkt.*, 398 U.S. at 250-53; *Buffalo Forge*, 428 U.S. at 416-17 (dissenting opinion).

224. As was the case in *Gateway Coal*. *See supra* note 20.

225. One anomaly mentioned by Justice Stevens is rather underemphasized, considering that in *Boys Mkt.* it was ostensibly the reason that the Court found it necessary to overrule its decision in *Sinclair Ref. Co.* v. Atkinson, 370 U.S. 195 (1962), only 8 years earlier. Because state courts were not bound by the Norris-LaGuardia Act, they could enjoin strikes. However, under the “common law” of § 301, any breach of a collective bargaining agreement arises under federal law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). The Court therefore held, in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), that an action for breach of a collective agreement could be removed by the defendant union to a federal court, whose jurisdiction to
nized that, as a practical matter, a strike can rarely be resumed even after a temporary injunction is no longer in force, the possibility of an erroneous injunction is a serious concern. In contrast to the situation in other strikes, however, the dissent maintained that "[a] rule that authorizes postponement of a sympathy strike pending an arbitrator’s clarification of the no strike clause will not critically impair the vital interests of the striking local even if the right to strike is upheld." The basis for this statement is the dissent’s view of both what constitutes “vital interests” and in whose interests the union may act:

[A] sympathy strike does not directly further the economic interests of the members of the striking local or contribute to the resolution of any dispute between that local, or its members, and the employer. On the contrary, it is the source of a new dispute which, if the strike goes forward, will impose costs on the strikers, the employer, and the public without prospect of any direct benefit to any of these parties.

Since the strikers cannot make immediate gains for themselves, enjoining the strike, even if the injunction is issued erroneously, does not impair their vital interests.

This reasoning can be understood only as an expression of ideology, because it lacks doctrinal underpinnings. Consider that a recognitional strike, whose aim is to force the employer to recognize the union and bargain with it, also does not lead to immediate, material gains for the strikers; they will receive higher wages, or fairer procedures, only after a contract is negotiated. Strikers lose their pay and risk their jobs for that future prospect. No one has suggested that this justifies an injunction. And when

enjoin strikes before Boys Mkts. was effectively nonexistent under Norris-LaGuardia. Realistically, this would mean that state courts would lose their injunctive remedy—for its use would inevitably lead to removal. This seemed to contradict the congressional purpose behind § 301, which was to expand jurisdiction over collective bargaining enforcement actions to federal courts, and not to restrict state court jurisdiction. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). Yet Buffalo Forge, as James Atleson has pointed out, now allowed this very situation to exist, though only in the case of sympathy strikes. James B. Atleson, The Circle of Boys Markets: A Comment on Judicial Inventiveness, 7 INDUS. REL. L.J. 88 (1985).

226. See Buffalo Forge, 428 U.S. at 428 n.24 (Stevens, J., dissenting).
227. Id. at 429 (Stevens, J., dissenting).
228. Id.
229. The dissent later added that a judge should not issue an injunction unless there is convincing evidence that the no strike clause applies (although the dissent acknowledged that an arbitrator may later disagree with this finding). Id. at 431 n.27.
230. That this prospect is by no means certain can be seen in Buffalo Forge itself. The picketing union had been certified several months earlier, and was still seeking its first contract. 428 U.S. at 400. The Court rejected similar suggestions in two cases after Buffalo Forge. In Jacksonville Bulk Terminals, Inc. v. International Longshoreman’s Ass’n, 457 U.S. 702 (1982), the Court, with Justice Marshall writing, held that the Norris-LaGuardia Act’s broad definition of “labor dispute” prevented a federal court from enjoining a refusal by longshoremen, protesting Soviet intervention in Afghanistan, to load ships bound for the Soviet Union; there was no requirement that the strike further the strikers’ economic self interest. In Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429 (1987), a case involving employees subject to the Railway Labor Act, the Court held that Norris-LaGuardia did not permit an employer to obtain an injunction even against a secondary boycott.
thousands of workers strike to protest the firing of a single employee, it is hard to see what immediate material gain they expect for themselves. They strike both because they know their turn may come next, and out of a sense of justice; that is, they strike in solidarity. But that cannot be the basis of an injunction against them.\textsuperscript{232}

But this aspect of the dissent has little to do with doctrine; it is a policy argument based on hostility to any union actions whose goals lie outside the bargaining unit. While the dissent describes a sympathy strike as "the source of a new dispute," it is in fact the application of power from a new source in an existing dispute—and that is what is wrong with it. It is the exercise of economic power by the strikers on behalf of "outsiders." We have seen this theme in Pittsburgh Plate Glass; we shall see it again in the secondary boycott cases.\textsuperscript{233}

It would be a mistake to exaggerate the importance of hostility to solidarity-based activity in explaining the Buffalo Forge dissent, to read it as expressing attitudes fundamentally different from Boys Markets and Gateway Coal.\textsuperscript{234} These cases can be explained, after all, by the Court's extraordinary preference for arbitration and its clear distaste for strikes. Nonetheless, I think it is justified to say that the Buffalo Forge dissent expresses something more than do those cases. For while it is true that the hostility the dissent displays towards solidarity-based activity is simply another policy argument, and by no means the most important, that is what makes it so revealing of the dissenters' attitudes. For the dissent, that a sympathy strike is without value is a proposition that need only be stated to be accepted. The reasons given rest on assumptions about the proper mea-

\textsuperscript{232} Justice Brennan, writing for a unanimous Court, rejected the argument that the availability of an injunction should depend on whether the union's activity furthers its economic interests, because that test "requires courts to second-guess which activities are truly in the union's interest." 481 U.S. at 442. Nevertheless, it is one of the contentions of this article that the Supreme Court has regularly imposed its own view of what union interests are legitimate. Thus, like Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), see supra note 210, these cases may seem to contradict the arguments made here. However, these cases involved only the issue of the Courts' injunctive powers and were, in my view, compelled by the language and history of the Norris-LaGuardia Act. The clarity of that language and history is what makes the argument raised by Justice Stevens in Buffalo Forge all the more remarkable.

232. In fact, the quoted passage actually serves to bolster the majority's doctrinal arguments. The low social value of sympathy strikes may be a good reason for Congress to ban them, but it cannot strengthen the narrower argument that section 301 requires that they be treated less favorably than grievance strikes. In developing the "common law" of § 301 from the national labor policy over the years, one of the major justifications advanced by the Court for the policy favoring arbitration is the Labor Act's statement that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." NLRA § 203(d), 29 U.S.C.A. § 173(d) (emphasis added). Plainly, this statement cannot support even a preference for arbitration in a sympathy strike, let alone the overriding of the Norris-LaGuardia Act's clear policy against injunctions. Thus, from either a doctrinal or an advocacy point of view, it seems unwise for the dissent to stress the lack of any dispute between the strikers and their employer.

233. See infra part IV.

sure of social worth that are manifested in doctrinal guise in cases like Pittsburgh Plate Glass; in the Buffalo Forge dissent, there is no attempt to clothe dislike of these actions in statutory language or history. The irony of the Buffalo Forge dissent lies in its readiness to allow these ideological preferences to determine the reach of the Norris-LaGuardia Act, a law passed precisely because Congress distrusted the judiciary's ability not to inject its own values into labor law.

IV
SECONDARY BOYCOTTS: THE PRIMACY OF CLASS

A. Congressional Intent and Analytical Limitations

The statutory provisions that most directly concern union activities transcending the boundaries of the employer's enterprise are those that address "secondary" strikes and boycotts, provisions that were added to the original Wagner Act by the Taft-Hartley amendments in 1947 and the Landrum-Griffin amendments in 1959. It would seem that examining Supreme Court cases interpreting these provisions, and analyzing the resulting doctrinal developments, would be an effective way to evaluate the various themes of this article: that the legal protection of collective action becomes increasingly enfeebled along its horizontal dimension, that the main reason for this is the implicit centrality to these actions of the concept of class and that these are consistent with the modern liberal accommodation exemplified by the Wagner Act.

Unfortunately, the Court's secondary boycott decisions, while consistent with my arguments, provide only indirect substantiation of these claims, because, in their central thrust, they are also consistent with other explanations—most significantly with compliance with clear congressional intent. Insofar as I claim that the attempt to limit class-wide activities is a prominent, perhaps dominant, theme of American labor law, these statutory prohibitions bolster the argument. But insofar as I argue that this theme is part of the accommodation represented by the Wagner Act and will therefore be pressed by liberal justices, who in other areas differ from the conservatives, the clear congressional intent renders the evidence of the secondary boycott cases less persuasive.

Nevertheless, I can still demonstrate that, as the liberal members of the court have applied labor law to the secondary boycott cases, their support for protection of collective activity, insofar as it has been greater than that of the conservatives, has been limited to the vertical dimension. The conservative/liberal split in this area thus corresponds to the split between opponents and supporters of the broad purpose of the Wagner Act itself:

235. For simplicity, I use the terms "secondary boycott" and "secondary activity" when referring to both secondary boycotts and secondary strikes. I will use the latter term when the reference applies only to strikes.
conservatives against any advantage to unions, liberals for advantage within the bounds of the enterprise.

Of course, opposing secondary action because it is effective against the original employer\footnote{236} is not inconsistent with the targeting of class-wide activity. The effectiveness of secondary activity is at least part of the point of banning it, and it can be argued that employers, and legislators who support them, do not oppose class-wide activity merely out of theoretical aversion. However, while subsuming hostility toward secondary activity to hostility toward powerful unions may sufficiently explain why Congress passed, and how the Court's conservatives interpreted, these provisions, it does not adequately explain those differences that do exist between the liberal and conservative wings of the Court in this area. Nor can this view account for the differences in how liberals have treated vertical and horizontal activity in other areas of labor law, with which their treatment of secondary activity, given the constraints of the statutory language, is consistent.

More fundamentally, to say that the liberal wing of the Court has been less protective of secondary activity than of vertical activity because secondary activity is highly effective is simply to restate the problem of intention that I discussed earlier.\footnote{237} The liberal/conservative split in labor law concerns different understandings of the necessary accommodations within classical liberal theory to ensure the well-being of democratic capitalism. From that perspective, the effectiveness of union actions is very much to the point in determining the degree of protection they will be accorded. The secondary boycott prohibitions of the Taft-Hartley and Landrum-Griffin amendments reflect a desire to restrain union power that was seen as too great for individual employers to withstand. But the Wagner Act, and the Court's liberals, reflect a view that is willing to sacrifice the immediate interests of individual employers because of systemic considerations. Neither the pro-union view of the Wagner Act nor the anti-union view of the later amendments is narrowly instrumental, and the decisions reflecting these views are mediated by concepts such as individual rights, equal treatment before the law, and the right to associate, as well as freedom of contract, the right to own a business, hire labor, and make a profit. The decision-makers may be result-oriented in the immediate case, but their view of the appropriate results is inevitably determined by their deeper beliefs in these concepts.\footnote{238}

Because the core prohibitions on secondary activity cannot confirm the contentions made here, I will emphasize those doctrines that have evolved

\footnote{236}{See supra text accompanying note 77.}
\footnote{237}{Id.}
\footnote{238}{Gary Minda, The Law and Metaphor of Boycott, 41 BUFF. L. REV. 807 (1993), examines the metaphoric constructs through which decision makers arrive at their results. Accepting Professor Minda's analysis, however, does not explain why particular metaphors are developed. Compare id. at 888, discussing the picketing/handbilling distinction in labor cases, with discussion infra at part IV.D.}
in areas where the statute’s requirements are less clear, or where constitutional considerations have allowed more scope to statutory interpretation. I will attempt to place the overall scheme of the secondary boycott prohibitions, as the liberals have interpreted it, within the context of the concern about class-wide activity.239

When Congress passed the provisions to ban secondary boycotts, one frequently mentioned reason was that secondary boycotts impede an employee’s right to choose whether to unionize and which union to join.240 The resulting conflict between employee free choice and union power could present a liberal judge, who might favor both individual employee rights and strong unions, with a hard choice, and it would be difficult to criticize a resolution of that conflict in favor of employee choice as being based on a general hostility to unionism.241 However, this danger is only present in organizing situations.242 In almost any strike by a recognized union, either for economic demands or to protest the primary employer’s unfair labor

239. For a discussion of other attempts to explain the Court’s secondary boycott doctrines, see Minda, supra note 238, at 849-63.

240. One of the purposes of the secondary boycott, historically, was its effectiveness in organizing. The most famous example of this was the Teamsters’ success in organizing over-the-road truck drivers. See generally Farrell Dobbs, Teamster Power (1973); Donald Garnel, The Rise of Teamster Power in the West (1972). The employees of a unionized trucking company in one city would refuse to interchange their freight with a non-union employer in another city; as a result, the unionized company would cease doing business with the other company until it recognized the union. Because an unorganized employer could be forced to recognize and bargain with a union through the pressure exerted by the employees of other employers, in theory without regard to the wishes of its own employees, this tactic could be seen as affecting the rights of employees to choose not to unionize, or to choose a different union.

241. That a concern for employee free choice may be part of the motivation of liberal justices towards some secondary boycott situations is consistent with the thesis of this article. See supra part III.B, discussing Communications Workers v. Beck, 487 U.S. 735 (1988).

242. Even in the case of organizational and recognitional objectives by the employees of the primary employer, the fear of imposing a union on unwilling workers through the union’s secondary pressure could be addressed without entirely banning secondary pressure. A secondary boycott or-picket line would not be an unfair labor practice where the primary union had demonstrated the support of a majority of employees in the appropriate bargaining unit, such as by obtaining signed authorization cards. The only employees on whom a union could be “imposed” would then be the minority in the primary unit—but that imposition is required in all circumstances by the Act.

Thus, the rule of Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974), need not even ever be disturbed: an employer could still decline to voluntarily recognize the union and refuse to bargain unless the union petitioned for and won a board election. But the employer who chose to resist would have to withstand not only the economic power of its own employees, but also the economic power of workers employed by other employers, such as the suppliers and customers of the primary employer. The employees of these secondary employers would be legally entitled to strike in support of the workers seeking recognition.

Secondary strikes of this sort put enormous pressure on the primary employer’s allies to stop doing business with it until it complies with the desire of the majority of its employees to bargain collectively. The appropriate constituency for purposes of expressing choice about unionization would not need to be altered, but the appropriate scope of those permitted to act collectively to enforce that constituency’s choice would be enormously expanded.
practices, the union’s extension of its picketing or boycott to secondary employers creates no danger of imposing a union on any bargaining unit that doesn’t want one. What it does do is vastly increase the economic power of a striking union that can convince secondary employees to support it.

A second possible explanation for the secondary boycott doctrine is also unsatisfactory. The statutory prohibitions against secondary activity, like the limitations on the choice of an appropriate bargaining unit, are clearly not based on a requirement that union activity be narrowly self-interested to be considered legitimate; in most cases, the striking union’s attempt to gain others’ support is based on its own immediate interests.

Nor is the illegality of secondary activity judged solely by its motive, in the sense of the aim the boycott or strike is intended to accomplish. Though the statute requires a prohibited “object”—forcing any person to cease handling the products of another or to cease doing business with him—this is not sufficient, as we shall see. It is not illegal if the dispute stays within the enterprise, even if the employees of other employers are

243. There are situations in which the striking union’s demands, ostensibly concerning their own working conditions, may be interpreted as an attempt to force the unionization of the employees of other employers, though not as directly as the Teamster efforts of the 1930s. See supra note 240. The concern over employee free choice might therefore require that cases such as NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951), be decided similarly. See infra notes 273-74 and accompanying text.

244. See supra note 95 and accompanying text.

245. For example, let us assume two different unions representing the employees of two entirely separate employers, one of whom supplies parts for the other’s manufacturing business. Union A is engaged in a legal strike over economic demands with the manufacturer; union B has no current dispute with its own employer, the parts supplier, over any terms of employment. It would be an unfair labor practice for union B to call a strike for the purpose of forcing its employer to cease supplying parts to the manufacturer. NLRA § 8(b)(4)(B), 29 U.S.C.A. § 158(b)(4)(B).

From the point of view of union B and its members, such a strike would be solely to support the demands of union A, and so this proscription is consistent with a requirement of immediate self-interest. However, it would also be an unfair labor practice for union A to attempt to convince the employees of the parts supplier to go on strike for the same purpose. This would be true independently of union B’s actions, and indeed, even if the employees of the parts supplier were not unionized. From the point of view of the striking members of union A, their attempt to put economic pressure on their own employer by using the power of his supplier’s employees is entirely consistent with their self-interest, in the most narrow and immediate sense.

Nor is it possible to ascribe the prohibition on union A’s seeking to induce a sympathy strike simply to a policy of preventing the inducement of an unfair labor practice. If the employees of the parts supplier were not unionized, their decision to go on strike would not itself be an unfair labor practice, since § 8(b) can be violated only by a “labor organization or its agents.” 29 U.S.C.A. § 158(b).

As Justice Brennan noted approvingly: “Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union.” Houston Insulation Contractors Ass’n v. NLRB, 386 U.S. 664, 668 (1967) (quoting United Ass’n of Journeymen, Local 106 (Columbia-Southern Chemical Corporation), 110 N.L.R.B. 206, 209 (1954).

246. See infra note 309 and accompanying text (discussing the work retention/work acquisition doctrine); and note 344 and accompanying text (discussing consumer boycotts).
thereby involved. It may not be illegal if the pressure against the second employer is applied by consumers, even if at the behest of the original strikers. And as the liberals (but not the conservatives) have interpreted the statute, an unfair labor practice has not been committed solely because the dispute has been spread beyond the boundaries of the enterprise where it originated, or, under some circumstances, if the employer with whom the union has a dispute is forced to cease doing business with other employers as a consequence of the pressure of its own employees.

What, then, are the characteristics of secondary activity that render it illegal? The secondary boycott, as liberals have interpreted it, should be illegal only under two circumstances: first, if forcing any person to cease handling the products of another or to cease doing business with him, is accomplished by pressure applied by the second employer's own workers, whom the original strikers have enlisted in their support (or if there is a threat of this occurring); or, second, if the aim of the original strikers is to alter the relationship between the second employer and its workers.

Considered schematically, the secondary activity that the liberal wing of the Court believes is outlawed is activity whose underlying assumption is an alternative conception of commonality—a view of the relevant community based on the centrality of class.

B. Identifying the Actors: Two Early Cases

When workers engaged in a conflict with their employer seek to enlist the support of other workers, it is not illegal so long as the struggle remains within the confines of the original employer's firm. This is the basic distinction between characterizing as primary or secondary those union actions, such as picketing, that may come to involve the employees of employers who are not originally involved in the dispute. It is not always easy to discern in practice, and much of the Supreme Court's secondary boycott jurisprudence is an attempt to clarify this distinction in various contexts. Thus, in an early case, NLRB v. International Rice Milling Co., the Court went to some lengths to interpret the statute so as not to reach, and hence prohibit, what it viewed as primary picketing.

In Rice Milling, members of the Teamsters union, seeking recognition of the union, picketed a rice mill and tried to prevent a truck owned by a

247. See infra note 253 and accompanying text (discussing the primary/secondary distinction).
248. See infra note 344 and accompanying text (discussing consumer boycotts).
249. See infra note 330 and accompanying text (discussing product picketing).
250. See infra note 309 and accompanying text (discussing product boycotts).
251. See infra note 231 and accompanying text.
different business, a customer of the mill, from entering to pick up rice.\textsuperscript{254} The Court found that the union’s actions encouraged employees of a neutral employer to refuse to perform services for their employer in the course of their employment, something that the statute forbade.\textsuperscript{255} Moreover, the Court assumed that the union’s aim was to force the neutral employer to cease doing business with the mill and to pressure the mill to recognize the union, the two “objects” condemned by the secondary boycott provisions of the Taft-Hartley amendments.\textsuperscript{256} Nevertheless, the Court held that there was no violation of these provisions, because the statute then required union inducement or encouragement of “concerted” activity by the employees of the neutral employer.\textsuperscript{257} In this case, the Court found, the union’s action amounted only to encouragement of individual action:\textsuperscript{258} encouraging a refusal to work for the neutral employer only insofar as the neutral’s employee happened to approach a picket line amounted to inducement of an individual, rather than of a concerted, refusal to work.\textsuperscript{259}

In reality, \textit{Rice Milling} is not based on this narrow and rather strained reading of “concert,” since it seems clear that the result would have been the same if several of the customer’s trucks had appeared at the mill at the same time and the drivers had conferred before deciding not to cross.\textsuperscript{260} Instead, the decision is really based on the fact that “[t]here were no inducements or encouragements applied elsewhere than on the picket line…. The picketing was directed at [the mill’s] employees and at their employer in a manner traditional in labor disputes.”\textsuperscript{261} In effect, the Court is saying that the danger against which the secondary boycott provisions were aimed is not implicated by inducing or encouraging employees to refuse to cross a picket line located at the premises of the employer with whom the union has a dispute.\textsuperscript{262} The Court reconciles this with the words of the statute by

\begin{itemize}
\item 254. Id. at 669.
\item 255. Id. at 670.
\item 256. The secondary boycott provisions, incorporated in the NLRA, 29 U.S.C.A. § 158(b)(4)(B), require that the objective be “forcing or requiring … [any employer or other] person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person.”
\item 257. Id. at 671.
\item 258. Id.
\item 259. Id.
\item 260. Even an individual employee who refuses to cross the legal picket line of another employer is now held to be engaging in concerted activity.
\item 261. 341 U.S. at 671.
\item 262. More precisely, the fact that the picketing occurred in front of the mill “is significant, although not necessarily conclusive,” \textit{Rice Milling}, 341 U.S. at 671, because it strongly indicates that the pressure exerted on other employers through their employees is only incidental. This can lead to problems, however, when two employers share a worksite. See Sailors’ Union of the Pacific & Moore Dry Dock Co., 92 N.L.R.B. 547 (1950); International Union of Elec., Radio & Mach. Workers, Local 761 v. NLRB (General Elec., Co.), 366 U.S. 667 (1961); Building & Constr. Trades Council of New Orleans (Markwell & Hartz, Inc.), 155 N.L.R.B. 319 (1965).
\end{itemize}
characterizing the union’s actions as inducing or encouraging “individual” refusals. 263

*Rice Milling* is consistent both with the view that the secondary boycott is illegal because of its potency as a union organizing weapon, and that it is illegal because of the specific character of that potency, the boycott’s appeal to class solidarity across company borders. The primary picket line that turns away other workers can certainly be effective, and the appeal is necessarily to some degree a horizontal one, but in neither case is the effect on other employers likely to be considerable: the focus of the dispute remains within the boundaries of the enterprise. In passing the Landrum-Griffin amendments, Congress confirmed that such an appeal to other workers, confined to the original employer’s workplace, is legal. 264 Congress removed the “concerted” refusal loophole from the statute, 265 but added a proviso protecting “primary” strikes and picketing to make it clear that *Rice Milling* remained good law. 266

On the same day as *Rice Milling*, the Court decided *NLRB v. Denver Building and Construction Trades Council*, 267 which involved another core concern of the secondary boycott prohibitions, the use of collective action by one group of workers to change the relationship between a different group of workers and their employer. In *Denver Building*, the unionized employees of a general contractor and subcontractors on a construction job refused to work unless the general contractor removed the non-union employees of one subcontractor from the site. The Court characterized this as a demand that the general contractor cease doing business with the non-union subcontractor, and therefore an illegal secondary strike. Since the demand to remove the non-union employees was illegal only because the subcontractor was a separate legal entity—“fortuitous business arrangements that have no significance so far as the evils of the secondary boycott are concerned,” Justice Douglas complained in dissent 268—the result in *Denver Building* was not foreordained. The Court could have held, as the dissent argued, that the refusal to work alongside non-union employees was a traditional union demand that Congress had not intended to outlaw, and


265. The language now prohibits inducing or encouraging “any individual” to strike or to refuse “in the course of his employment to handle goods or perform services.” NLRA § 8(b)(4)(i), 29 U.S.C.A. § 158(b)(4)(i).

266. “Provided, that nothing in clause (B) shall make unlawful, where not otherwise unlawful, any primary strike or primary picketing,” 29 U.S.C.A. § 158(b)(4)(B). See H.R. CONF. REP. No. 1147, 86th Cong., 1st Sess. 38 (1959), in I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 942 (1985) (“the changes in section 8 (b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute”).


268. Id. at 693 (Douglas, J., dissenting).
that the secondary boycott prohibition was intended only to ban union actions that spread beyond the physical workplace:

The union was not out to destroy the contractor because of his antiunion attitude. The union was not pursuing the contractor to other jobs. . . . "[T]he union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it. . . ." I would . . . read the restrictions of § 8(b)(4) to reach the case where an industrial dispute spreads from one job to another front.269

But however open to interpretation this aspect of the secondary boycott prohibition was at the time, the legislative history of the subsequent Landrum-Griffin amendments makes it clear that the rule of Denver Building remained the law.270

Between them, Rice Milling and Denver Building may be understood as indicating that the distinction between primary and secondary activity depends on whether the union's action is aimed at achieving gains from the employer against whom the action is directed, or whether it is intended to make gains against another employer. But these cases are also consistent with what I earlier described as the two circumstances in which the liberal wing of the Court would hold a secondary boycott illegal: when the original strikers' gains are accomplished by means of pressure applied by the second employer's workers, and when the aim of the original strikers is to alter the relationship between the second employer and its workers.

In Rice Milling, the fact that other employers were affected by the primary picket line when their employees did not cross it changed neither the focus of the union's actions nor the identity of the main actors; the actions of the customers' employees were peripheral and incidental, or as the Court called it, "individual."271 The result would have been the opposite if the customers' employees had themselves struck to support the Rice Milling strike.

In Denver Building, on the other hand, although the union's demand could have been understood as directed at the struck employers, as the dissent maintained, it could also be seen as attempting to force the non-union subcontractor to unionize by putting economic pressure on other employers. The Court saw the strike's target as an employer for whom the strikers did not work, but the Court's understanding can support a different, or additional, emphasis: it was the relationship of the non-union workers to their employer that the strikers were seeking to alter. Thus, the union's action in Denver Building could plausibly be seen as the equivalent of the successful Teamster organizing drives on which Congress would focus so much disap-

269. Id. at 692-93 (Douglas, J., dissenting) (quoting Douds v. Metropolitan Federation, 75 F. Supp. 672, 677 (S.D.N.Y. 1948)).
270. See Connell Construction Co., Inc. v. Plumbers Local Union No. 100, 421 U.S. 616, 629 n.8 (1975) (describing failure of attempts to change § 8(b)(4) to exempt construction industry).
The dissent viewed the separate contract with a subcontractor as a “fortuitous business arrangement,” but the physical proximity of the union and non-union workers could also be described as fortuitous, and irrelevant to Congress’ concern to prevent workers’ pressure from being used across enterprise lines to spread unionization.

Thus, although the lesson of these two cases is usually presented solely in terms of which employer is targeted, the issue is also which workers are engaging in the activity. In Rice Milling and Denver Building, it is difficult to discern the analytical difference between these two ways of viewing the same collective action. Indeed, in the situations presented by these two cases, the difference between these approaches does not affect the outcome, and may seem only one of semantics.

In these cases, deciding against whom the actions of a specific group of workers are directed, deciding the identity of the targeted employer, will necessarily determine the relationship of the employer to the workers engaging in the action. In some other contexts, however, the distinction between these views can explain the difference between the liberal and conservative attitudes in later secondary boycott cases.

Although the two cases, decided before but effectively ratified by the Landrum-Griffin amendments, define the general contours of the primary/secondary distinction, the specific application of that distinction still leaves room for judicial interpretation. If my characterization is accurate that the greater protection of union activity by liberal Justices disappears along its horizontal dimension, then subsequent cases should reveal differences between the liberal and conservative wings of the Court that hinge on the significance of whose employees are engaged in collective actions. We would expect that the liberal interpretation would allow a union to extend its economic pressure so long as that pressure is applied by the employees of the primary employer, even if the consequences of that pressure severely affect other employers; the liberals should draw the primary/secondary line at the point where other workers, the employees of secondary employers, are themselves significantly engaged. We would expect the conserva-

---

272. See supra notes 7-8, 240 and accompanying text; NLRB v. Servette, Inc., 377 U.S. 46, 55 & n.13 (1964) (describing congressional intent in Landrum-Griffin amendments to close secondary boycott loopholes that allowed continued use of these methods by Teamsters Union, and citing legislative history).

273. Denver Bldg., 341 U.S. at 675, 693.

274. Thus Denver Bldg. is also consistent with a desire to weaken unions generally and (unusually) with a desire to protect the free choice of non-union employees. See supra notes 240-41 and accompanying text.

275. Or at the point that the aim of the union activity is to alter the relationship of the second employer to its employees. The congressional ratification of Denver Bldg. forecloses any interpretation of the secondary boycott provisions that would authorize union activity with that aim, and the liberals’ failure to protect it can therefore not be used to support my argument. The liberals’ willingness to protect union activity up to this point, and the conservatives’ unwillingness, only inferentially supports my argument.
tives, on the other hand, to characterize as secondary any union action that has a severe effect on other employers, regardless of who applies the pressure.

C. Keeping the Work and the Conflict at Home: Work Retention and Work Acquisition

These expectations are confirmed in the Court's cases dealing with "hot cargo" clauses in collective bargaining agreements, contractual provisions by which the employer agrees that the employees will (or may) refuse to handle goods that are declared "unfair" by the union, such as the products of struck employers, or, more broadly, any goods that are produced by non-union workers. Until outlawed by section 8(e) of the Landrum-Griffin amendments, these clauses were a means of evading the existing secondary boycott provisions of the Act, since neither an original agreement by the employer, presumably in return for union concessions in other areas, nor an employer's voluntary compliance in not handling the unfair goods, could be seen as "forcing or requiring" the employer to do so.

Despite the language of section 8(e), which would literally outlaw an agreement that the employees had a right, say, to refuse to handle noxious chemicals, the Court held in National Woodwork that this section was meant to close the loophole in the earlier secondary boycott prohibitions, and thus applied only to secondary activity. The Court was closely divided, however, over whether the particular agreement in question constituted primary or secondary activity.

276. Section 8(e) makes it an unfair labor practice for a union and employer to:

enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person . . . .

29 U.S.C.A. § 158(e). There are limited exceptions concerning the construction industry and the apparel and clothing industry. In addition, the amendments made "forcing or requiring any employer . . . to enter into any agreement which is prohibited by" § 8(e) one of the prohibited "objects" of § 8(b)(4)(A).


278. The Supreme Court's hostility to hot cargo clauses predates the Landrum-Griffin amendments, as is evident in the Sand Door case. There, the Court held that any union action to enforce the (legal) hot cargo agreement, even an instruction to the employees not to handle the goods on the assumption that the employer planned to abide by its contractual obligation, violated what is now § 8(b)(4)(B). Nonetheless, Congress was concerned that legal hot cargo agreements allowed "the possibility of damage actions against employers for breaches of 'hot cargo' clauses, [and created] a situation in which such clauses might be employed to exert subtle pressures upon employers to engage in 'voluntary' boycotts." National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 634 (1967).

279. See supra note 276 and accompanying text (laying out the text of § 8(e)).

280. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 634 (1967). Although the Court was split 5-4 as to whether the boycott in that case was primary or secondary, all the Justices agreed that § 8(e) was to be interpreted to forbid only those contractual provisions that, if enforced by a strike, would violate § 8(b)(4)(B). See id. at 660 (Stewart, J., dissenting).
The primary employer in *National Woodwork* was a contractor on a housing project subject to a clause in the collective bargaining agreement with the Carpenter’s Union that barred the use of pre-machined doors. When the contractor obtained doors from a manufacturer, the union ordered the carpenters to refuse to hang them, and the manufacturer’s association filed unfair labor practice charges. Although the “will not handle” clause clearly was an agreement to cease using the products of another employer, and in fact to cease doing business with pre-machined door manufacturers, Justice Brennan’s opinion for the Court held that since the union’s aim was preservation of the work performed by the contracting employer’s own employees, this union boycott constituted primary activity and was therefore legal. The fact that the boycotting employees had no dispute with the boycotted employer (the door manufacturer) would not in itself have been sufficient to render the clause legal. Rather, “[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees.” Neither the product boycott itself nor the “will not handle” clause were illegal, provided that their aim was to benefit the boycotting workers “or other employees of the primary employer.”

While this may seem like a requirement of self-interest, this is clearly not the test. A boycott for the benefit of other employees of the same firm, whether they are in a different union or no union at all, would be legal, even if it disadvantaged the boycotting workers. Conversely, and crucially, a boycott aimed at preserving the jobs of members of the same union who work for a different employer would definitely be illegal. The Court recognized this in distinguishing the situation in both *National Woodwork* and its companion case, *Houston Contractors*, from the sort of boycott that ex-

---

281. *Id.* at 628, 644–46. The original complaint charged violations of both § 8(e) and § 8(b)(4)(B), and the NLRB dismissed both. The court of appeals agreed with the Board that the union’s conduct as to the contractor constituted primary activity, but reversed the Board’s dismissal of the § 8(e) charge. The Supreme Court granted certiorari on both issues, and upheld the Board’s position.


283. *Id.* (emphasis added).

284. In the companion case to *National Woodwork*, *Houston Insulation Contractors Ass’n v. NLRB*, 386 U.S. 664 (1967), the Court held legal a union’s refusal to install pre-cut asbestos fittings, even though the work was normally done by members of a different local, at a different location—but employed by their own employer. *Id.* at 666–67. 669. The court of appeals had reached the opposite conclusion precisely because the members of the boycotting local had no economic stake in the enforcement of the hot cargo clause. *Id.* at 668. The Supreme Court found this irrelevant to the primary/secondary distinction. *Id.* at 669. There is no reason to believe the result would have been different if the boycotting local’s acceptance of the work would have resulted in more work for its own members.

Although one might think that a boycott disadvantaging the boycotters would be unlikely, consider a contractual provision that bars overtime while any employee is laid off; more broadly, consider the events in Woonsocket described in the Prologue.

285. *Id.*


In *Allen Bradley*, Local 3 of the IBEW had agreed with both construction contractors and electrical fixture manufacturers in New York to refuse to install any fixtures brought in from manufacturers outside the city: "The contractors obligated themselves to confine their purchases to local manufacturers, who in turn obligated themselves to confine their New York City sales to contractors employing members of the local." While the *Allen Bradley* Court held that the union's agreement with employers removed its immunity from the antitrust laws, the Court also said that had the union acted alone, its actions would have been legal.

The legislative history made it clear that Congress had intended to outlaw an *Allen Bradley*-type boycott in the Taft-Hartley amendments, and the dissenting Justices in *National Woodwork* argued that both that case and *Houston Contractors* presented precisely the sort of product boycott that Congress had in mind. The majority, however, distinguished the boycotts on three grounds. First, rather than being aimed at pressuring the boycotting workers' own employers, the object of the *Allen Bradley* boycott "was to secure benefits for the New York City electrical manufacturers and their employees." Second, the Court claimed that the legislative history showed that what the Taft-Hartley Congress objected to in *Allen Bradley* was the attempt to influence the labor relations of outside employers by boycotting fixtures made by non-union employees or by members of other unions. Finally, the Court reasoned that unlike the boycott in *Allen Bradley*, which had reached out to monopolize jobs that had never been performed by members of Local 3, the boycotts in the later cases were aimed at work preservation; they were being used as a shield rather than as a sword.

As to this third distinction, it is difficult to refute the criticism from the dissent: "[T]he Court is unable to cite anything in *Allen Bradley*, or in the Taft-Hartley Act and its legislative history, to support a distinction in the applicability of section 8(b)(4) based on the origin of the job opportunities sought to be preserved by a product boycott. The Court creates its sword and shield distinction out of thin air." In reality, the Court's third reason, the distinction between "work preservation" and "work acquisition," actu-

---

286. 325 U.S. 797 (1945).
287. *National Woodwork*, 386 U.S. at 628 (citing facts of *Allen-Bradley*).
289. *See National Woodwork*, 386 U.S. at 629-30; *id.* at 649 (Harlan, J., concurring); *id.* at 655 (Stewart, J., dissenting).
290. *Id.* at 656-57 (Stewart, J., dissenting).
291. *Id.* at 629.
292. *Id.* at 630.
293. *Id.*
294. *Id.* at 657 (Stewart, J., dissenting).
ally serves to indicate whether the boycott is consistent with the first two reasons. For in *Allen Bradley*, regardless of whether the manufacturing jobs were to go to members of Local 3 or some other union, that result was to be accomplished by the collective action of workers of other employers, the construction contractors.

That the firm's boundary marks the limit of acceptable collective action is confirmed by the reasoning in *Houston Insulation Contractors Ass'n v. NLRB*, where the Court described *National Woodwork* as holding that "collective activity by employees of the primary employer, the object of which is to affect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity." Since, in *Houston Contractors*, the Board, supported by substantial evidence, had found that the object of the boycotters, employees of Armstrong, "was to influence Armstrong in a dispute with Armstrong employees, and not for its effect elsewhere," the boycott was primary and legal.

The dissenters, in contrast, would have held that any product boycott was illegal, regardless of whether it was aimed at altering the relationship between the secondary employers and their employees. The particular evils of the product boycott, to which Justice Stewart pointed as Congress' motive in outlawing it, were not related to its horizontal implications. Rather, Congress' concerns were to limit the union's ability to restrict the employer's unilateral power over the choice of what products to purchase and with whom to do business:

> Unlike most strikes and boycotts, which are temporary tactical maneuvers in a particular labor dispute, work preservation product boycotts are likely to be permanent, and the restraint on the free flow of goods in commerce is direct and pervasive, not limited to goods manufactured by a particular employer with whom the union may have a given dispute.

Unlike the holding that an employer's decision to subcontract work was a mandatory subject of bargaining and could not be undertaken unilaterally—which, according to Justice Brennan's opinion for the Court, implicitly legitimized a work preservation clause—the product boycott in *National Woodwork* affected the "employer's decision as to the products he wishes to buy," a decision that "has traditionally been regarded as one within management's discretion."

For Justice Stewart, then, the problem with a product boycott is not that it crosses the border of the enterprise, but that it gives the union excessive influence in management decisions. For Justice Brennan, on the other hand, extending the union's ability to affect those decisions is desirable, so

---

295. *Id.* at 668.
296. *Id.* at 664, 668.
297. *Id.* at 656 (Stewart, J., dissenting).
298. *Id.* at 642 (citing Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964)).
299. *Id.* at 663 (Stewart, J., dissenting).
long as the expansion of union power remains within the domain of the individual employer. We have seen this difference, and the limits of liberal protection, in the mandatory/permissive distinction.\textsuperscript{300} For now, it is important to understand one of the implications of the work preservation/work acquisition doctrine as the Court has developed it: the union’s role in society is to be determined from the perspective of the employer. If the evil of an \textit{Allen Bradley}-type boycott is that the boycotters were attempting to secure work for members of their own union from other employers, how much worse it would have been if their purpose had been to benefit the “workers of New York,” or “all union workers”—if they had aimed to use their collective power to alter the labor landscape of society.\textsuperscript{301}

The key to the distinction between work preservation and work acquisition in Justice Brennan’s view was whether the boycotting union was attempting to influence the labor relations of another employer, and this is confirmed by his dissent in \textit{NLRB v. Pipefitters}.\textsuperscript{302} The union on a construction site, pursuant to the terms of its collective bargaining agreement, refused to handle climate control units whose internal piping had been installed at the factory.\textsuperscript{303} The Board had found this an illegal secondary boycott because the employer of the boycotting workers, the subcontractor, did not have the “right to control” the allocation of this work: the climate control units containing internal piping had been specified by the general contractor and the piping had been installed by the employees of the manufacturer.\textsuperscript{304}

The Board reasoned that although the contractual provision was a valid agreement whose purpose was to preserve work that the boycotting workers had traditionally done, they were nevertheless exerting pressure on the subcontractor “with an object of either forcing a change in [the general contractor’s] manner of doing business or forcing [the subcontractor] to terminate its subcontract with” the general contractor.\textsuperscript{305} The Court agreed:

\textsuperscript{300} See discussion \textit{supra} at part III.A. While the juxtaposition of Justices Brennan and Stewart accurately reflects the liberal/conservative split in the labor law context, describing the \textit{National Woodwork} dissenters as anti-union would be imprecise. Joining Justice Stewart in dissent were Justices Black, Douglas and Clark. Among other things, Justice Douglas wrote the dissent in \textit{Denver Bldg.}, see \textit{supra} note 273 and accompanying text, and Justice Black dissented from the Court’s decision in \textit{Boys Mkts., Inc. v. Retail Clerks}, Local 770, 398 U.S. 235 (1970). See discussion \textit{supra} at part III.C.

\textsuperscript{301} While, this implies that the Court’s liberal wing would have joined in condemning an \textit{Allen Bradley}-type boycott even if Congress had not made such condemnation inevitable, this can only be inferred from the liberals’ handling of horizontal activity in other contexts.

\textsuperscript{302} 429 U.S. 507 (1977). The dissent was joined only by Justices Marshall and Stewart, the latter solely on the basis of \textit{stare decisis}. Justice Stewart agreed with Justice Brennan that the Court’s decision was “patently precluded” by \textit{National Woodwork}, from which Justice Stewart himself had dissented, 429 U.S. at 543 (Stewart, J., dissenting).

\textsuperscript{303} \textit{Pipefitters}, 429 U.S. at 512-13.

\textsuperscript{304} \textit{Id.} at 513-14.

\textsuperscript{305} \textit{Id.} at 514 (quoting \textit{Enterprise Ass’n of Steam Pipefitters}, 204 N.L.R.B. 760 (1973)).
The distinction between primary and secondary activity does not always turn on which group of employees the union seeks to benefit. There are circumstances under which the union's conduct is secondary when one of its purposes is to influence directly the conduct of an employer other than the struck employer. In these situations, a union's efforts to influence the conduct of the nonstruck employer are not rendered primary simply because it seeks to benefit the employees of the struck employer.\footnote{306}{Pipefitters, 429 U.S. at 528-29 n.16.}

In Justice Brennan's view, however, the effect on another employer, unless it alters labor relations, is irrelevant. A work preservation agreement, or collective action by the employer's own employees either to obtain such a clause or to enforce it, is primary if its purpose "is to secure benefits for that employer's own employees"; such an agreement is illegal, however, "if the object is to affect the policies of some other employer toward his employees."\footnote{307}{Id. at 535 (Brennan, J., dissenting) (emphasis added).}

In making this distinction, Justice Brennan was referring to the Allen Bradley-type boycott: if "the union only enforced the agreement against prefabricated products manufactured by nonunion companies, and not against others, the object of the pressure would not be primary (enforcing the work-preservation agreement), but secondary (influencing the labor policy of the manufacturer)."\footnote{308}{Id. at 542 n.9 (Brennan, J., dissenting).}

This conception of the primary/secondary distinction as applied to a product boycott was illustrated in two cases involving the agreement between the longshoremen's union and their employers over the use of containerized shipping.\footnote{309}{NLRB v. International Longshoremen's Ass'n, 447 U.S. 490 (1980) [hereinafter \textit{ILA I}]; NLRB v. International Longshoremen's Ass'n, 473 U.S. 61 (1985) [hereinafter \textit{ILA II}].} This agreement, the "Rules on Containers," did not call for a full boycott of cargo containers. Instead it provided complex rules that in certain circumstances required longshoremen to unload and reload the containers even if they had already been loaded by the employees of employers engaged in trucking or warehouse businesses, or, alternatively, it required the longshore employers to pay substantial "liquidated damages" to the union.\footnote{310}{\textit{ILA I}, 447 U.S. at 498-500.} Predictably, this meant that the longshore employers would not contract with the trucking and warehousing companies under these circumstances.

The Board initially held that the longshoremen's union was seeking to acquire work, the off-pier loading and unloading of cargo, that it had never done, and the Rules therefore constituted an illegal hot cargo clause.\footnote{311}{\textit{ILA I}, 447 U.S. at 498-500.} In \textit{ILA I}, Justice Marshall, writing for a five-four majority of the Court, held that the Board's definition of the work in controversy was erroneous as a matter of law.\footnote{312}{Id. at 502.} The Board should have focused on the work of the con-

\begin{itemize}
\item \footnote{306}{Pipefitters, 429 U.S. at 528-29 n.16.}
\item \footnote{307}{Id. at 535 (Brennan, J., dissenting) (emphasis added).}
\item \footnote{308}{Id. at 542 n.9 (Brennan, J., dissenting).}
\item \footnote{310}{\textit{ILA I}, 447 U.S. at 498-500.}
\item \footnote{311}{Id. at 502.}
\item \footnote{312}{Id. at 512.}
\end{itemize}
tracting employees, not on the work of the employees of other employers. The loss of work to other employees caused by the work preservation agreement, “no matter how severe,” was irrelevant unless the union’s purpose was “to affect the employment relations of the neutral employer.” The Court remanded the case to the Board to determine, under the proper analysis, whether the Rules were a work preservation agreement, and if so, whether the contracting employers had the “right to control” the work in question.314

Chief Justice Burger, in dissent, argued that the Rules were “valid insofar as they regulate what happens to containers—as distinguished from their contents—while they are on the pier; but [they] are invalid insofar as they attempt . . . to regulate what happens to containers once they have left the pier.”315 The Chief Justice reasoned that as applied in these circumstances, the Rules were “an invidious form of ‘featherbedding’ to block full implementation of technological progress,”316 a consideration that was clearly irrelevant to Justice Marshall’s analysis.317 As Justice Brennan had said in National Woodwork, and would repeat in ILA II, “The featherbedding arguments are addressed to the wrong branch of government.”318

On remand, the Board found that the longshore employers did have a right to control the allocation of work, since they owned or leased the containers involved, but nonetheless found that some aspects of the Rules were invalid as applied because they sought to give longshoremen work that had been eliminated by the new technology of containerization and were therefore aimed at acquiring work now done by others. The Court rejected this in ILA II, holding that once the Board found that the union’s objective was to preserve longshore work, regardless of whether the work was now unnecessary or duplicative, and that the employer had the right to control this work, “further inquiry into the effects of the Rules” on other employers or other employees was inconsistent with National Woodwork and ILA I.319

Justice Rehnquist’s dissent stressed that the Rules literally fell within the terms of section 8(e).320 This argument, however, is undercut by his acknowledgment that “many labor-management ‘agreements’ will entail some secondary effects on the employer’s business relations that Congress

---

313. ILA I, 447 U.S. at 507 n.22.
314. Id.
315. Id. at 525 (Burger, C.J., dissenting). The dissent was joined by Justices Stewart, Rehnquist, and Stevens.
316. Id. at 526-27 (Burger, C.J., dissenting).
317. The Rules clearly did not require “featherbedding” within the legal meaning of that term, which is an unfair labor practice under § 8(b)(6). 29 U.S.C.A. § 158(b)(6). See ILA II, 473 U.S. at 82 n.22.
319. ILA II, 473 U.S. at 82.
320. Id. at 87 (Rehnquist, J., dissenting).
would not have intended to proscribe."321 This was not such an exception, however, because absent congressional prohibition, "unions are free to exercise their considerable power, through concerted action, to manipulate the allocation of resources in our economy—even to the point where in the name of 'work preservation' a union could literally halt technological advance."322 Thus, unions could expand the labor dispute to those "neutral" employers who participate in the employer's markets. In the context of technological change, the union's agreement may put the third party out of business before it ever begins. That is the "secondary" activity with which Congress was concerned.323

Justice Rehnquist's view of prohibited secondary activity, like Justice Stewart's in National Woodwork, focuses on the economic effect on another employer, while Justice Brennan's is focused on whether union pressure is being applied vertically or horizontally. What is absent from the union's action in the two ILA cases, where "one segment of labor seeks to take work away from another segment,"324 is any attempt to enlist the support of workers outside the bargaining unit. The work preservation/work acquisition distinction is a way of describing this issue that masks the social reality: the Rules on Containers were held legal because, despite their effect on other employers and employees, indeed because of those effects, they had no tendency to generalize the dispute between this discrete group of workers, the longshoremen, and their own employers into a conflict of longshoremen and other workers against their employers. The Rules on Containers presented no danger of solidarity.

D. Consumer Boycotts: Workers, Signals, and the First Amendment

The conservatives' emphasis on the economic effect on the second employer as determining whether a collective action is secondary appears again in the context of union-initiated consumer boycotts. In these cases, the Court has drawn distinctions between appeals to workers and appeals to consumers, between handbilling and picketing, and between appeals for a boycott of a struck product and an appeal not to patronize a business that deals in the struck product. While each of these distinctions is motivated in part by congressional intent and in part by considerations of constitutional rights, each also reflects views of the legitimacy of collective action that are consistent with limiting the social role of unions.

321. Id. at 91 (Rehnquist, J., dissenting). The dissent was joined by Chief Justice Burger and Justice O'Connor, who had replaced Justice Stewart on the Court. Justice Stevens, who had joined the dissent in ILA 1, was now part of the majority.
322. Id. at 87 (Rehnquist, J., dissenting).
323. Id. at 91 (Rehnquist, J., dissenting).
324. ILA 1, 447 U.S. at 526 n.1 (Burger, C.J., dissenting).
If a union is on strike against one employer, it is illegal for it to picket another employer, for example a retailer who sells a product made by the struck company, in order to "induce or encourage" the retailer’s employees to strike or refuse to handle the struck product. This situation was distinguished in Rice Milling, and it is one of the classic forms of the secondary boycott. There is no doubt that the original Taft-Hartley secondary boycott prohibitions were meant to outlaw it, and that the Landrum-Griffin amendments reinforced this prohibition by closing the hot cargo clause loophole.

In other situations, however, the intent of Congress is less clear—or at least there are some grounds to claim so. In two cases, the Supreme Court dealt with a union’s picketing of a retailer that was not intended to, and did not, affect the retailer’s employees, but only its customers. Clearly, one aim of such picketing is that the retailer “cease using, selling . . . or otherwise dealing in the products of . . . or to cease doing business” with the struck employer; but in so doing, does the picketing “threaten, coerce, or restrain” the retailer, as the statute also specifies? The legislative history is clear that the Landrum-Griffin amendments were meant to stop picketing intended to convince consumers not to patronize the retailer.

However, the Court held in NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits) that if the union picket line was aimed solely at convincing consumers not to purchase the struck product, rather than at convincing them not to patronize the retailer entirely, then the picket line was legal. A union’s appeal to consumers not to buy a struck product, Justice Brennan wrote, “is closely confined to the primary dispute,” though it expands the site to the secondary employer’s premises. In contrast, when the union appeals to consumers to cease patronizing the retailer, the union “creates a separate dispute with the secondary employer.” In the first case, the retailer’s decision to buy less of the struck product, or even to cease dealing with the struck employer, is a direct consequence of decreased consumer demand, and is not the sort of pressure against which Congress intended to shield neutral businesses.

Justice Harlan’s dissent in Tree Fruits persuasively argued that Congress made no distinction between “struck product” and “do not patronize” boycotts accomplished through picketing: it intended to bar both. One

326. See supra note 252-65 and accompanying text.
327. See supra note 265 and accompanying text.
331. Id. at 72.
332. Id. at 72.
333. Id. at 71-72.
334. Id. at 82-92 (Harlan, J., dissenting).
reason for Justice Brennan's interpretation of the statute was a "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment."\textsuperscript{335} The importance of this concern is reinforced by Justice Black's concurrence; he agreed with Justice Harlan's reading of the statute—and concluded that the ban on picketing to induce a consumer boycott was unconstitutional.\textsuperscript{336}

In \textit{Tree Fruits}, the product in question was Washington state apples, and the retailers were supermarkets that sold thousands of other products. In \textit{NLRB v. Retail Store Employees Union, Local 1001, Retail Clerks International Ass'n (Safeco)},\textsuperscript{337} however, the Court held illegal a "struck product" boycott against a retailer whose primary or sole business is selling that product. Justice Powell's opinion for the Court went on to say that when picketing is directed "against a product representing a major portion of a neutral's business, but significantly less than that represented by a single dominant product . . . [t]he critical question is whether the union's appeal is reasonably likely to threaten the neutral party with ruin or substantial loss," a question to be determined by the Board in each case.\textsuperscript{338}

It was Justice Brennan's turn to dissent,\textsuperscript{339} and he reiterated his belief that the statute allowed unions to inflict economic harm on the secondary employer "insofar as it entwines its economic fate with that of the primary employer by carrying the latter's goods. To be sure, the secondary site may be a battleground; but the secondary retailer, in its own right, is not enlisted as a combatant.\textsuperscript{340}

Once again, the product boycott cases are consistent with viewing the differences between the Court's liberals and conservatives over secondary boycotts as centering on whether illegality is determined by the horizontal dimension of collective activity or by the economic effect on an employer. Once again, however, these differences can also be explained in other ways. For example, Justice Powell's concern for the economic wellbeing of the secondary employer is strongly reminiscent of the Court's opinion in \textit{NLRB}
v. Pipefitters,341 and of the dissents in the two ILA cases.342 On the other hand, Justice Powell was faced with the need to distinguish Tree Fruits; he could not simply say that all product boycotts, even if they caused no serious harm to the secondary employer, are illegal. Conversely, Justice Brennan’s agreement that consumer boycotts of the “do not patronize” variety are illegal is, at least on its surface, inconsistent with a desire to protect vertical activity and draw the line only when the union attempts to engage in its cause the employees of the retailer. But the intent of Congress in that situation was too clear; the Landrum-Griffin amendments’ addition of a prohibition which expanded the existing ban on inducing or encouraging strikes and refusals to handle goods by employees, could not be totally ignored.343

In a less obvious way, however, Justice Brennan’s position on the consumer boycott cases in general, and on drawing the line at the product boycott specifically, is consistent with the basic concern of the liberal distinction between protecting horizontal and vertical activity: limiting the union’s role in society. In order to explain this, it is necessary to turn to another context in which the Court has considered consumer boycotts: when the union urges a full “do not patronize” secondary boycott, but by means other than picketing.

In two cases, the Court was faced with a union’s attempt to convince consumers, through handbills, not to shop at a mall.344 A non-union contractor was building a new department store in the mall, but neither the mall owner nor the other stores in the mall had any control over this. The union leaflets argued that paying substandard wages “diminishes the working person’s ability to purchase with earned, rather than borrowed dollars, [and] . . . undercut[s] the wage standard of the entire community.”345 The leaflets questioned whether the mall owners intended to compensate working people for this decreased purchasing power in a period of inflation by encouraging the mall’s stores to cut prices and lower their profits.346

---

342. See supra notes 315-18 and 320-23.
343. NLRA § 8(b)(4)(i), 29 U.S.C.A. § 158(b)(4)(i), prohibits encouraging or inducing a strike or a refusal by employees to handle goods in the course of their employment for a prohibited object; NLRA § 8(b)(4)(ii), 29 U.S.C.A. § 158(b)(4)(ii), added by the Landrum-Griffin amendments, 73 Stat. 519 (1959), extends this to any interference, restraint, or coercion, regardless of whether it leads to actions by the employees of the secondary employer.
344. Edward J. DeBartolo Corp. v. NLRB (DeBartolo I), 463 U.S. 147 (1983); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II), 485 U.S. 568 (1988). In DeBartolo I, the Board had found that the union’s activity was protected by the “publicity proviso” of § 8(b)(4), which allows “publicity other than picketing” that truthfully advises the public that the products of a producer with whom the union has a dispute are being distributed by the picketed business. The Court found that there was no producer/distributor relationship in this situation and remanded to the Board to determine if the union’s action violated 8(b)(4)(ii)(B) in the first place.
346. Id.
The consumer boycott was clearly aimed at putting economic pressure on the other stores and on the mall owner, for the purpose of getting them, in turn, to pressure the department store to stop using a non-union contractor. This is about as "secondary" as one gets; it seems to present all the dangers of spreading a discrete conflict and entangling "neutral" employers in a dispute not their own—dangers that the secondary boycott prohibitions were presumably meant to eliminate. Yet in DeBartolo II, the Supreme Court unanimously held that there was no violation of section 8(b)(4)(ii)(B). The Court expressed serious doubts about the constitutionality of an interpretation that would allow banning peaceful handbilling, especially handbilling that, as here, certainly looked like political speech. Such an interpretation would have made it an enjoinable unfair labor practice for the union to place newspaper or radio ads to the same effect, or indeed, to urge its own members at a union meeting not to patronize the mall. The Court therefore invoked the doctrine of NLRB v. Catholic Bishop of Chicago to avoid the constitutional issue, and held that the handbilling did not "threaten or coerce" anyone within the meaning of the statute.

But how can this result be squared with Safeco, where because the "product picketing" was effectively an appeal for a full consumer boycott, the union's actions were illegal? Even Justice Brennan, despite his opposition to the Safeco holding, agreed that a full “do not patronize” boycott was banned by the statute. The union in DeBartolo openly appealed to consumers not to patronize the entire mall, and both the increased economic pressure on the "neutral" employers and the degree to which "the secondary retailer, in its own right, is . . . enlisted as a combatant" are the same in each situation.

The distinction is simply that the DeBartolo union’s handbilling was unaccompanied by picketing. While this is not the place to discuss the full range of the Court’s First Amendment labor decisions and their grudging

347. Id. at 574. Justices O’Connor and Scalia concurred in the result without an opinion; Justice Kennedy did not participate.
348. Id. at 576.
349. Id. at 583.
350. Id. at 575 ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501 (1979)).
352. As Justice Brennan pointed out in Tree Fruits, a "do not patronize" boycott can put far more pressure on the secondary employer than can a product boycott. Tree Fruits, 377 U.S. at 72. If 25% of consumers heed the union’s product boycott appeal, the retailer loses 25% of his sales of Washington state apples; if 25% of consumers heed a "do not patronize" appeal, the retailer loses 25% of all its sales. Even though the retailer could continue to sell apples at 75% of their previous volume, it is likely to discontinue purchases of the struck product to protect sales of other products. Id. at 72 n.20.
353. Safeco, 447 U.S. at 621 (Brennan, J., dissenting).
treatment of picketing as expressive conduct.\textsuperscript{354} I want to describe the aspect of that doctrine that relates to the themes of this article.\textsuperscript{355} Picketing includes both patrolling—"standing or marching back and forth or round and round"—and speech—"arguments, usually on a placard, made to persuade other people to take the picketers' side of a controversy."\textsuperscript{356} As even Justice Black acknowledged, "patrolling is, of course, conduct, not speech, and therefore is not directly protected by the First Amendment."\textsuperscript{357} The "very presence of a picket line may induce action . . . quite irrespective of the nature of the ideas being disseminated."\textsuperscript{358} In fact, according to Justice Stevens, that is why picketing is so much more effective than handbilling: handbills "depend entirely on the persuasive force of the idea," whereas picketing is simply "an automatic response to a signal, rather than a reasoned response to an idea."\textsuperscript{359} This "signal" versus "reason" dichotomy can be found throughout the cases.\textsuperscript{360} The only other basis for restricting picketing is that it sometimes involves coercion in the narrow sense: people may be physically afraid to cross.\textsuperscript{361} Whatever the truth of this claim when applied to mass picketing, it does not provide a basis for distinguishing the union's conduct of sending two picketers to each store in \textit{Tree Fruits}, which would have been illegal if the pickets had urged consumers not to patronize the supermarkets, from the stationary handbillers in \textit{DeBartolo}. The fact of "patrolling" only matters on the basis that picketing is a "signal."

But what can this possibly mean? Surely picketing is not a "signal" in the sense that the ringing of a bell was a signal to Pavlov's dogs to salivate. The refusal to cross a picket line is not an instinct: it is a chosen political response. It is certainly true that many people, especially union members, will refuse to cross a picket line regardless of the specific issues involved. But I know of no one—and the Court and the Board, I guarantee, have


\textsuperscript{355} It may be argued that this selective emphasis distorts the meaning of the doctrine, since many of the Court's restrictive readings of the First Amendment in regard to picketing occurred in the context of what I describe as vertical activity. See \textit{supra} sources cited at note 354. However, I believe the opposite is true. My argument here is that the logic of the picketing/speech distinction is based, at least in part, on class versus general appeal; in that sense, even when applied to vertical collective action, it displays hostility to appeals based on class solidarity.

\textsuperscript{356} \textit{Tree Fruits}, 377 U.S. at 77 (Black, J., concurring).

\textsuperscript{357} \textit{Id.} at 77 (Black, J., concurring).

\textsuperscript{358} Bakery & Pastry Drivers & Helpers, Local 802 v. Wohl, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring) (quoted in \textit{Safeco}, 447 U.S. at 619 (Stevens, J., concurring)).

\textsuperscript{359} \textit{Safeco}, 447 U.S. at 619 (Stevens, J., concurring).

\textsuperscript{360} See Minda, \textit{supra} note 238, at 890.

\textsuperscript{361} See, e.g., Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941). But there are many instances where this is not claimed, and many more where it is asserted without any evidence.
never found anyone—who refuses to cross any picket line regardless of the content of the signal it conveys when physical safety is not a concern. The staunchest union supporter would cross a picket line of the National Right to Work Committee demanding the end of "mandatory unionism." People who would never cross a picket line in front of a factory will cross picket lines at the federal courthouse protesting American foreign policy; they will decide whether to enter a picketed abortion clinic depending on their views about abortion.

The picket lines that are "automatically" not crossed are chosen, but not on the basis the Court would like. The decision is indeed based on a "signal," but a signal that communicates an important message: that there exists a conflict between workers and management, usually that it involves a legitimate union, and that the workers are asking for support. What is being signalled is in fact a serious political view, and the response reflects political agreement: you don't cross a workers' picket line (i.e., a fellow worker's line), though you can cross a line of kooks or college kids. The reason you don't cross is not because the workers are right to demand an increase in pensions, but because they have asked you not to, in solidarity. The message is: "don't cross if you're on our side"—not on our side concerning the details of the dispute, not on our side because of agreement with the specific union demands, but on our side because we are workers and our opponents are bosses.

Handbilling, on the other hand, may involve the same appeal, but it often comes closer to saying: "don't cross if you agree with the specifics of our dispute." One of the distinctions between honoring a picket line and turning back because of reading a leaflet, then, is that one is an appeal to class agreement rather than issue agreement. There is no justification for characterizing one as more "reasoned" than the other. The portrayal of agreement for reasons of class solidarity as based on less communicative or political aspects of the message than is agreement not to cross because one favors higher pensions is not a description of what actually happens.\(^3\)\(^6\) It is a judgment on the merits of the ideas being expressed; at bottom, the picketing as signalling analysis is a manifestation of dislike for the idea of class.

The way in which the Court used the signal/reason distinction for First Amendment purposes in deciding *DeBartolo II*, however, creates an unsolvable tension between the values embodied by the First Amendment and the attempt to limit class-based union power. The statute protects "publicity other than picketing" that is truthful and informs the public that a struck product is being distributed by the business against which the publicity is directed—unless that publicity causes employees of that business to engage

---

\(^3\)\(^6\) Indeed, as far as the distinction between "commercial" and "political" speech is concerned, it is an appeal to class agreement that appears more "political," more clearly deserving First Amendment protection. See Estlund, supra note 176.
in a strike or a refusal to handle the struck product. This publicity proviso was motivated by Congress' First Amendment concerns about the secondary boycott ban, but DeBartolo I held that the publicity proviso did not apply, because of the lack of a producer/distributor relationship. But the handbilling was still legal, according to DeBartolo II, because there was no coercion. What would happen if DeBartolo-style handbilling, or, to make the situation even clearer, newspaper ads placed by the primary union, led to a strike or boycott of the struck product by the employees of the retailer, or by truckers making deliveries or pickups? Since the publicity proviso refers to the "effect" of the publicity, whether the union intended these consequences would be irrelevant, and the proviso would not shield the handbilling or the advertisements.

The Court had avoided the constitutional issue in DeBartolo II by holding that there was no "coercion" because there was no picketing. But section 8(b)(4)(i) does not require coercion: the union need only "induce or encourage" other employees to strike or refuse to handle goods in the course of their employment to be guilty of an unfair labor practice. But, the expressive character of the handbilling or ads would not have changed at all. There would have been no "signal" to the employees, even as the Court understands it; instead, the employees' actions would have occurred as a result of reading the handbills or the newspaper ads and then making what the Court, to be consistent, would have to acknowledge was a reasoned decision to support the handbilling union. On this basis, any appeal to boycott a secondary retailer, except by picketing, would be legal, even if it led to a strike against the secondary employer. Indeed, under a First Amendment analysis, it is not clear why this should not be true even if the handbilling union explicitly called for a secondary strike, provided that

365. See supra note 343 and accompanying text.
366. Even assuming that if the unions who represented both the retailer's employees and the truckers called for these actions they could themselves still be held to violate NLRA § 8(b)(4)(i), 29 U.S.C.A. § 158(b)(4)(i), there would be no violation if the employees' actions were not encouraged by their own unions. 29 U.S.C.A. § 158(b) ("[I]t shall be an unfair labor practice for a labor organization or its agents . . . ."). The same would be true if the employees of the secondary employers were not unionized.
367. The union in DeBartolo I, seeking the protection of the publicity proviso, included in its handbills the message that "[w]e are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries." DeBartolo I, 463 U.S. at 150 n.3.

The union in Tree Fruits, which engaged in picketing rather than handbilling, went to great lengths to prevent employees of the supermarkets or of other employers, such as truckers making deliveries, from honoring the lines. The store managers were informed in writing before the picketing began that the pickets would patrol only customer entrances, and that they were not to interfere with supermarket employees' work or with pickups and deliveries. As an additional precaution, the picketing began after the stores opened and ceased before they closed each day. Tree Fruits, 377 U.S. at 61. There is no
the call was based on class solidarity rather than on economic benefit. For the paradox is that under the labor laws, collective action is more likely to be protected the more narrowly it focuses on the economic grievances of a discrete group of employees against their individual employer, while under the First Amendment, protection is greater the more generalized and political the dispute.

We may confidently predict that the Court will continue to apply the labor law standard, rather than the constitutional standard, to secondary strikes, even if the strikes are brought about through “reasoned” appeals rather than through “signals,” and even if the appeals are based on agreement with an entire political world view. The consumer boycott cases are ideologically, if not doctrinally, distinguishable. The liberals’ greater willingness to protect consumer picketing in *Tree Fruits* and *Safeco*, like the entire Court’s willingness to protect consumer handbilling in *DeBartolo II*, does not directly implicate the question of class solidarity. Indeed, in one sense, an appeal to consumers as consumers may be the opposite—while it does say “support us,” it does not say “we are all in this together, we are all one class.” This is not true in any absolute sense. In different social circumstances, union appeals for broad consumer action might have a very different meaning: if unions were viewed as leading a working class struggle, and this struggle were viewed as the principal force for changing society, attempts to lead the “public” would take on a character that is altogether absent in the contexts in which these appeals arise in the cases discussed here. That is what happened in Toledo in 1934. In today’s context, an appeal to consumers as consumers, strictly distinguished from an appeal to workers, reinforces the denial of the centrality of class, and makes labor, not the leader of a broad social coalition, but one interest group among many.

The Supreme Court’s liberals, and indeed in some contexts its conservatives, must subordinate congressional disapproval of union appeals for consumer boycotts to the danger of stifling free expression. But as soon as the appeal shifts to workers as workers—that is, as soon as it is an appeal to

---


369. Estlund, supra note 176, at 933. Professor Estlund uses the disparity between protecting the speech of private sector employees under the NLRA and protecting that of public employees under the First Amendment as the starting point for an incisive critique of labor law’s treatment of the concept of “mutual aid and protection.”

them to use collective action to support other workers in a common cause—then the nature of the danger shifts.

From the perspective of labor law, the great danger of the secondary boycott is precisely its tendency to generalize every struggle. This danger is the most extreme when secondary employees seem to have no stake whatever in the outcome of the dispute, because in that situation, what seems like altruism has another meaning. When the secondary employees "seem" to have no stake in winning the dispute—when their own "wages, hours, and conditions of employment" will not be foreseeably affected by the outcome, and yet when these secondary employees are willing to give up pay by striking, to endure management retaliation if they lose, and even to risk losing their jobs to replacements—then it seems more accurate to say that they do feel they have an enormous stake in the battle. They are willing to support the original strikers because both groups view themselves as ranged on the same side in a more general dispute, a dispute in which their own employer, like the employer of the primary strikers, is on the other side.

This understanding of commonality, the denial of which is a central tenet of American labor law and of the secondary boycott doctrines in particular, is profoundly political. It is no accident that these doctrines should be so difficult to reconcile with First Amendment values, which seek to protect political democracy by safeguarding the right to speak and organize around one's ideas of what is best for the community. Applying First Amendment values to collective activity invariably conflicts with the need to protect the compromise on which liberal labor law is based: the protection of collective activity, while confining it, insofar as possible, to the boundaries of the enterprise by viewing it as "economic." The First Amendment, the embodiment of liberal values, threatens the linchpin of the modern liberal system, the New Deal's uneasy accommodation of capitalism and political democracy.

CONCLUSION

The accommodation represented by the Wagner Act was perhaps the New Deal's most enduring example of "a major change that avoided a threat to the system itself"; its effects are still with us. The initial benefits that it provided to unions are not as clear today. The failure of the law in the last several decades to protect workers' desires to unionize is widely acknowledged. The redistributive function of the Act no longer works. But even the gains it did provide came at a price. Whether, in the long run, the accommodation was worth the cost can only be adequately judged by

371. See supra note 47 and accompanying text.
assessing what it has entailed. This article has attempted to indicate some of those consequences, practical and ideological. As I said in the Introduction, liberal labor law, faithful to the Wagner Act's premises, aims at particularizing rather than generalizing workers' struggles; it directs them towards their relationship to their employer, rather than to the relationship of their class to employers and to work; it privatizes and depoliticizes those struggles.

The Wagner Act stands as one of the great monuments of the modern liberal vision of society. One question that this article raises is whether, even restored to its original vigor, liberal labor law is compatible with the ideology of unionism; for "[a]s the law in spirit is individualistic, . . . and as the unions are formed to escape the evils of individualism and individual competition . . . the law cannot help being in spirit inimical to unionism."373 This article has examined the law's hostility to union activity that seeks to expand the union's role beyond the confines of the employer, that seeks to define the collective for whom the union is entitled to speak in broad terms, that seeks to act on behalf of the working class. That these issues have arisen in so wide a variety of contexts demonstrates that unionism itself, though weakened and channelled, implicitly contests the liberal vision. If this is so, are the promises of the Wagner Act not only unfulfilled but, within the terms of the political and economic structure which it sought to reform and preserve, unfulfillable?

373. As the law in spirit is individualistic, as it makes the freedom and sacredness of individual contract the touchstone of absolute justice, and as the unions are formed to escape the evils of individualism and individual competition and contract, and all the union acts in positive support of these purposes do involve coercion, the law cannot help being in spirit inimical to unionism. Unionism is in its very essence a lawless thing, in its very purpose and spirit a challenge to law.

Hoxie, supra note 89, at 238.