Labor and the Warren Court

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From an exhaustive, insightful analysis of the scores of complex labor law decisions of the Warren Court, the author distills here the essence of that Court's profound impact upon the direction of national labor policy. Himself a participant in many of these landmark cases, the author shows how the Warren Court preserved the Wagner Act philosophies of strong unionism and vigorous support of the principle of collective bargaining notwithstanding the antilunion potential of subsequent legislation.

It would be intellectual megalomania not to concede that the Warren Court, like Marshall's, may for a time have been an institution seized of a great vision, that it may have glimpsed the future, and gained it.¹

INTRODUCTION

In the early years of this century we watched the gathering storm of the labor wars, and the ultimate legitimization of employee combination.² We saw legislative protection of employee organizational rights, curtailment of judicial intervention in labor disputes, and endorsement of collective bargaining as a system of industrial self-government. The Norris-La Guardia Act of 1932³ and the Wagner Act of 1935⁴ envisaged equalization of bargaining power, worker betterment, and a framework for labor peace. The Acts invigorated the labor movement. The statutes formed the bedrock of labor's charter of freedom.

The Wagner Act embodied congressional recognition of the reality of modern industrialism, viewed against the long and bitter history of

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³ For an outstanding, incisive exegesis of the rise of the labor movement and evolution of labor relations laws see A. COX, CASES ON LABOR LAW 8-152 (4th ed. 1958).
industrial unrest, that unionism was essential for equality of bargaining power between employees and employer.

Toward mid-century the pendulum swung in response to perceived excesses of union power. The Taft-Hartley Act of 1947 protected employee rights to refrain from unionism, limited union control over the employment relationship, and curtailed labor's strike and boycott weapons. The Landrum-Griffin Act of 1959 further restricted labor's picketing and boycott activities, and regulated internal union affairs.

By mid-century the essential statutory framework for labor relations had been laid. Much building remained. In the October Term, 1953, Earl Warren became Chief Justice of the Supreme Court of the United States. During the next sixteen years the Warren Court placed its indelible imprimatur upon national labor policy. Bernard Schwartz would later observe: "It was a period in which the Supreme Court furiously generated precedent after legal precedent that would touch more American lives, then and later, more directly than any other institution or series of events in the twentieth century save the Great Depression."

Recent signals from the present Court and the Reagan Administration National Labor Relations Board ("NLRB") indicate that some of the work of the Warren Court in the area of labor relations may be changed. Perhaps, then, it is time to examine the dynamic contribution of the Warren Court from a thirty year perspective.

I

THE UNION ORGANIZATIONAL PROCESS

Early congressional emphasis was upon protection of the nascent labor movement. The Norris-La Guardia Act of 1932 sharply curtailed pro-management judicial interference in labor disputes. The Wagner Act

outlawed some of the more egregious antiunion tactics, and affirmatively protected employee organizational and bargaining activities. The congressional pendulum swung thereafter in response to perceived excesses of union power. The Taft-Hartley Act outlawed certain union interference with the employment relationship, curtailed the strike and boycott weapons, and affirmatively protected employee rights to refrain from organizational and bargaining activities. Renewed congressional emphasis was also placed upon resolution of industrial disputes through the peaceful and orderly (1) collective bargaining process and (2) NLRB administrative process.

Substantial conflict over the appropriate balance between the interests of labor unions and management marked the passage of the Taft-Hartley Act. The Act was passed over the veto of President Truman who condemned the law as an antiunion measure. NLRB General Counsel Gerhard Van Arkel resigned in protest over the Act.

The emergent statute reflected the underlying conflict and compromise. The statutory language was opaque, ambiguous and overbroad. Taft-Hartley's impact upon national labor policy and the direction of trade unionism turned in large measure upon statutory interpretation. Landmark cases involving these fundamental questions came before the Warren Court.

A. Fundamental Rights

It should be emphasized at the start that the bulwark erected by the Warren Court extended beyond union activity. The Warren Court granted certiorari in a simple walkout case to issue one of the most important pronouncements concerning the fundamental rights of workers to band together for mutual aid and protection. In NLRB v. Washington Aluminum Co., the employees, who were not represented by or seeking to organize a union, had complained for some time about the lack of adequate heating facilities and the cold and miserable conditions in the uninsulated machine shop during the winter. On the morning of the walkout, the furnace was inoperable and the shop was so cold that an

icicle had formed in a drain pipe of a spot welder and the employees were walking about huddled up and shaking. The foreman told one employee, "If those fellows had any guts at all, they would go home." Seven employees then walked out. As one employee testified, the employees had said, "[W]e had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way." A company rule required that any employee leaving work first obtain the foreman's permission; none of the seven sought such permission before leaving. The seven employees were discharged.

The Board found that the walkout was a concerted activity in protest against the employer's failure to supply adequate heat in their place of employment and that it was thus protected by section 7 of the Act. Section 7 guarantees to employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Board ordered the employees reinstated. The court of appeals set aside the Board's order because none of the employees had, immediately prior to the walkout, made any specific request that the employer rectify the objectionable conditions in the plant. Because the company was afforded no opportunity to avoid the work stoppage by granting a concession to a demand of the employees, the court held that the employees' walkout was not a protected concerted activity.

The Supreme Court found the walkout protected and reversed the court of appeals. Unlike the lower court, the Warren Court heeded labor history. Prior to the 1930's, the courts held employee concerted action to be tortious and enjoinable conspiracies whenever they deemed the particular means or objectives unlawful. The standard of lawfulness was the judge's view of the desirability or undesirability of the activity. Congress enacted the Norris-La Guardia Act to eliminate such

18. Id. at 11.
19. Id. at 12.
20. Id.
21. Id. at 12-13.
22. Id. at 13.
23. 291 F.2d 869, 877 (4th Cir. 1961).
24. 370 U.S. at 18.
26. As Justice Brandeis related:
   [Concerted employee conduct] became actionable when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful. It was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that due to this dependence upon the individual opinion of judges great confusion existed as to what purposes were lawful and what unlawful;
subjective judgments from federal court disposition of matters involving labor disputes. The guarantee of the right to engage in concerted activities provided by section 7 of the NLRA was intended further to insulate employees from the common law conspiracy doctrine.\textsuperscript{27}

Giving effect to this labor history in *Washington Aluminum*, the Court stressed the breadth of section 7 protection and cautioned against interpretation of the section in a "restricted fashion."\textsuperscript{28} The courts and the Board are not to scrutinize peaceful activities which are concerted in fact, and in which (1) the objective of the activity does not contravene the provisions or basic policies of the Act, or the provisions of a related federal statute, or (2) the means utilized to obtain a lawful objective were not indefensible by all recognized standards of conduct.\textsuperscript{29} In this case, the Court said:

> [C]oncerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.\textsuperscript{30}

Moreover, no specific pre-walkout demand was required. Concerted activities are protected "whether they take place before, after, or at the same time such a demand is made."\textsuperscript{31} The fact that the company may have been trying to correct the problem, and that the walkout may have been unnecessary or unwise, did not detract from the Act's protection, for "the reasonableness of workers' decisions to engage in concerted activity is irrelevant..."\textsuperscript{32}

**B. Union Organizing**

Section 7 of the Wagner Act guaranteed employee rights to engage in organizational and bargaining activities.\textsuperscript{33} The Taft-Hartley Act ad-
ded a guaranteed right to refrain from such activities. Further, section 8(b)(1)(A) of Taft-Hartley made it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of their section 7 rights. The uncertain specter of this prohibition was to haunt unions for years.

Informed by core notions of free speech and assembly, as well as labor history, modern federal labor policy supported union and employee rights to communicate concerning labor organization and disputes. Free and robust discussion regarding industrial conditions, unions, and the advantages and disadvantages of joining them was encouraged. Intelligent employee free choice presupposed accessibility to relevant information.

Peaceful labor picketing had enjoyed especial solicitude. In NLRB v. Drivers Local Union No. 639 (Curtis Brothers), the Warren Court squelched the NLRB's effort to utilize the new Taft-Hartley section 8(b)(1)(A) as a blunderbuss against legitimate union activity. In Curtis Brothers, in one of the most blatantly overreaching decisions in its entire history, the Board held that peaceful organizational and recognitional picketing by a minority union constituted restraint or coercion of employees in violation of section 8(b)(1)(A). In the Board's view, the object of such picketing was to force the employer to recognize a union not chosen by a majority of employees and thereby to deprive employees of their section 7 rights to join or more particularly to refrain from joining a union. The Board found that inherent in the economic pressure applied against the employer by the picketing was a threat to the employees' job security, and that this threat tainted peaceful picketing as unlawful restraint or coercion.

The Court, however, held that section 8(b)(1)(A) did not have the

34. Id.
35. Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(b)(1)(A) (1982).
36. The right of employees to engage in free discussion of labor disputes and unionization is a bedrock principle of constitutional dimensions:

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

39. 362 U.S. at 281; 119 N.L.R.B. at 238.
broad and general sweep advanced by the Board, but rather was designed to reach only extreme union tactics. Sifting through the legislative history, the Court found that the primary need shown was to protect individual workers from union organizational tactics entailing violence, duress or reprisal, and that the statutory provisions should be confined to elimination of such repressive tactics. Speaking for the Court, Justice Brennan stated that section 8(b)(1)(A) was "a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes."

The Warren Court thus delivered a significant declaration of support for organizational appeals to union solidarity. In another case, Justice Brennan articulated the proposition for the Warren Court as follows: "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions."

C. Communication Rights of Unions and the Election Process

In further support of nascent appeals to solidarity, the Warren Court made clear that in appropriate circumstances property rights must yield to organizational rights. An earlier Supreme Court had held that employer restrictions on employee solicitation during nonworking time and on distribution of literature during nonworking time in nonworking areas were unlawful absent special circumstances making the rule necessary to maintain production or discipline. However, what of the nonemployee union organizer—the person uniquely situated to make the case?

In NLRB v. Babcock & Wilcox Co., the Warren Court extended communication rights on employer premises to nonemployee union or-

40. The Court's decision was influenced by the enactment in 1959 of § 8(b)(7) (29 U.S.C. § 158(b)(7) (1982)). Section 8(b)(7) bars a union from picketing for recognition or organization in certain circumstances. Subsection (A) bars organizational or recognitional picketing when the employer has lawfully recognized another union and questions concerning representation cannot appropriately be raised. Subsection (B) bars such picketing when a valid Board election has been held within the preceding 12 months. Subsection (C) provides that when picketing for recognition or organization is not barred by subsections (A) or (B), such picketing may not exceed 30 days unless a representation petition is filed within that period. If no such petition is filed, picketing beyond 30 days is an unfair labor practice. Filing a timely petition stays the limitation and the picketing may continue pending the outcome of the petition.

41. 362 U.S. at 290.
43. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945).
44. 351 U.S. 105 (1956).
ganizers. While restrictions on nonemployee union organizer access to employer property are generally valid absent discriminatory application, said the Court, such restrictions are invalid where alternate channels of communication are unavailable. The employer may not validly post its property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will not enable the union to reach the employees with its message. The federal government both grants organizational rights and preserves property rights, and accommodation must be effected with as little destruction of one as it consistent with maintenance of the other. "[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." 

The Court in *NLRB v. United Steelworkers (Nutone Inc. and Avondale Mills)*, was not, however, prepared to hold generally that an employer must make company facilities and employee time available for pro-union solicitation, even if the employer simultaneously engages in coercive antiunion solicitation. A different result might obtain, suggested the Court, when particular plant location, facilities and resources put the union at a serious disadvantage in securing alternative channels of communication.

The Court did hold in *NLRB v. Wyman-Gordon Co.*, that once a Board representation election is scheduled, the employer must make available for union use a list of names and addresses of eligible voters. Such a disclosure requirement encourages "an informed employee electorate" and gives unions the "right of access to employees that management already possesses."

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47. 351 U.S. at 112. Where employee work locations and living facilities are relatively isolated union access to employer property may be required. See *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 230 (1949) (company town).


49. *Id.* at 364.

50. 394 U.S. 759, 763 (1969). Within seven days after regional director approval of a consent-election agreement, or after regional director or Board direction of election, the employer must file with the regional director an election eligibility list, containing the names and addresses of all eligible voters. The regional director is then to make the list available to all parties. Failure to comply with the *Excelsior* requirement (established in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966)) is ground for setting aside the election upon proper objection.

D. Employers' Rights in Elections

The Court reaffirmed the proposition that an employer is generally free to express its views to the employees on labor matters, but in *NLRB v. Gissel Packing Co.*, cautioned employers concerning the line between expression and coercion. Implementing first amendment free speech protections, the Act provides that absent threat of reprisal or force or promise of benefit the expression of views, argument or opinion shall not constitute or be evidence of an unfair labor practice. Whether or not employer expression is illegal thus turns upon the presence of threats of reprisal or force or promises of benefit. This assessment must consider the particular labor relations setting, and entails balancing employer free expression against employee free association. Such balancing, said the Court, "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."

Absent coercion the employer may thus express antiunion views including predictions about the potential adverse consequences of unionism. Predictions of dire consequences comprise much of the typical employer's campaign, and the crucial, difficult question addressed by the Court involves the difference between predictions and threats. The employer may express its reasonable beliefs concerning those likely economic consequences of unionism which are beyond the employer's control; it may not make threats of economic reprisal to be effected solely at its own volition. The distinction between permissible prediction and proscribed threat turns upon legitimate, objective fact. The employer was therefore not free to express the sincere belief that unionization would cause the plant to close absent proof (improbable) of that eventuality. Chief Justice Warren articulated the guiding principle as follows:

"An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of
objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such [is] without the protection of the First Amendment.59

The Court rejected the employer's argument that the line between prediction and threat was impermissibly vague. The employer has control over and knows best the particular employment relationship, and can assess the probable impact of any utterances. With due regard for problems of vagueness, said the Court, the employer has ample room for meaningful expression without engaging in "brinksmanship" or conscious overstatement likely to mislead.60

E. Employers' Unfair Acts

Employer destruction of union solidarity at the organizational stage is frequently a relatively simple matter. Such tactics as selective discharges of leading union adherents, threats of plant closure or other retaliation, grants or promises of wage increases or benefit improvements, will generally destroy a fledgling union drive and any majority status provisionally attained. Despite the putative equalization wrought by the labor laws, workers know and fear the immediate power of their employer and the harsh realities of the marketplace.

The fact that destructive tactics may constitute unfair labor practices under the NLRA is of little moment. NLRB remedial orders of cease and desist, reinstatement and backpay hardly deter an employer bent on avoiding unionism. Compliance costs pale before the financial and operational costs of unionism. Moreover, compliance can be delayed by years of litigation, again at costs far cheaper than those of an organized shop. Further, to the extent destructive tactics may result in an election being set aside as unfair, employers have the superior track record in rerun elections.61 In short, the prohibitions of the NLRA are often ineffectual if not ludicrous.

To protect employee combination and solidarity in the face of these realities the Warren Court again placed its hand on the union side of the scale. In Gissel,62 the Court held that the NLRB may issue a bargaining

59. Id. (citation omitted).
60. Id. at 620.
order when independent unfair labor practices make holding a fair election impossible or improbable.\textsuperscript{63} Where the union attains a majority, and the employer commits unfair labor practices which tend to undermine majority strength and impede the election process,\textsuperscript{64} the Board may order the employer to recognize and bargain with the union. The Court rejected employer contentions that union authorization cards are inherently unreliable, and held that absent independent evidence of invalidity (e.g., fraud), authorization cards may be used as valid indications of a union’s majority and to support a bargaining order.\textsuperscript{65} The Court thereby took a giant step toward preserving and effectuating majority free choice and deterring unfair labor practices.

Time will tell whether the Court took an even bigger step. In a very ambiguous passage the Court may have held further that in exceptional cases marked by outrageous and pervasive unfair labor practices, the Board can issue a bargaining order even if the union never attained a majority.\textsuperscript{66} The suggestion that a nonmajority union may become exclusive agent is rather revolutionary. Dominant, fundamental principles of national labor policy—employee free choice and majority rule, deterrence of unfair labor practices—collide in the suggestion. Successive Boards have vacillated over the scope of the \textit{Gissel} charter,\textsuperscript{67} and authoritative resolution of the issue remains for a future Supreme Court.

Heavyhanded tactics are merely one means for destruction of union organization. Bribery may be effective where force is not. Tactics such as an immediate wage increase in response to union organizational activity place the union in the unenviable position of protesting an improvement.

In \textit{NLRB v. Exchange Parts Co.},\textsuperscript{68} the employer granted economic benefits (additional holiday, increased overtime and vacation benefits) to its employees during the course of a union organizational campaign and immediately prior to a Board-ordered representation election for the purpose of inducing the employees to reject the union in the election. The

\textsuperscript{64} 395 U.S. at 618. In Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974), the Court held that absent unfair labor practices impairing the election process, an employer does not violate \S 8(a)(5) by refusing to accept evidence of majority status other than a Board election. Absent such unfair labor practices, not only may the employer withhold recognition unless and until the union is certified by the Board, but also the union has the burden of invoking the Board processes.
\textsuperscript{65} 395 U.S. at 597.
\textsuperscript{66} \textit{Id.} at 613-14.
\textsuperscript{68} 375 U.S. 405 (1964).
employer argued that since the grant was unconditional no unlawful restraint existed.\footnote{Id. at 407-08.} The Court found that the Act proscribes not only intrusive threats and promises but also immediately favorable conduct designed and reasonably calculated to intrude upon freedom of choice.\footnote{Id. at 409, 410.} Demonstrating once again the Warren Court's insight into industrial reality, Justice Harlan observed that:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.\footnote{Id. at 409.}

Continuing to weave its protective web, the Warren Court made clear that employer good faith does not justify intrusions upon union organizational efforts. In \textit{NLRB v. Burnup & Sims, Inc.},\footnote{379 U.S. 21 (1964).} the Court held that the employer violated the Act by discharging employees known to have engaged in protected activity even though the employer was motivated by a good faith but mistaken belief that the employees engaged in misconduct during the protected activity.\footnote{Id. at 23.} The employer had discharged two union activist employees upon being advised that they threatened to use dynamite to get the union in if the union did not acquire the requisite union membership authorizations. The charges against the employees were in fact not true, but the employer honestly believed that they were. The Court found the employer's motive irrelevant, and the honest belief no defense.\footnote{Id. at 21-22.} "Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith."\footnote{Id. at 23.}

\textbf{F. Sweetheart Contracts and Shutdowns}

Belief in the union movement and in a vigorous collective bargaining system did not lead the Court to compromise fundamental principles of employee free choice and majority rule. Sweetheart contracts were not the goal. In \textit{International Ladies' Garment Workers' Union v. NLRB},\footnote{366 U.S. 731 (1961).} the Court held that there was "no clearer abridgment" of employee rights to bargain collectively through their chosen representative or to
refrain therefrom than imposition of a minority union upon employees.\textsuperscript{77}

Nor were puppet company unions an acceptable alternative to the independent unions envisaged by the Court. The Act proscribed employer domination of or assistance to labor organizations, and defined labor organizations as organizations or committees created for "dealing with" employers concerning employment relationship matters (e.g., grievances, wages).\textsuperscript{78} The Court in \textit{NLRB v. Cabot Carbon Co.}\textsuperscript{79} interpreted the definition broadly so as to reach a wide variety of company organizations, and rejected the contention that the broad term "dealing with" was synonymous with the more limited term "bargaining with."\textsuperscript{80} Whether or not a particular employee organization or committee negotiated collective bargaining contracts or otherwise engaged in traditional bargaining was not determinative. The determinative factor was group existence to deal with employers concerning such matters as grievances, wages, hours, and employment conditions. "Dealing with" is not rendered merely recommendatory because the employer retains the power of final decision.\textsuperscript{81} Management always has the final decision. The principal distinction between independent and company-dominated unions, said the Court, "lies in the unfettered power of the former to insist upon its requests."\textsuperscript{82}

Employer strategems to avoid unions and collective bargaining were consistently thwarted by the Warren Court. Indeed, nothing less than entrepreneurial suicide was tolerated. The Court acknowledged in \textit{Textile Workers Union v. Darlington Manufacturing Co.}\textsuperscript{83} that an employer has an absolute right to terminate its entire business for any reason in-

\textsuperscript{77} \textit{Id.} at 737. In rejecting the parties' good faith belief in the union's majority status as a defense, the Court stated:
To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives. We find nothing in the statutory language prescribing \textit{scienter} as an element of the unfair labor practices here involved. The act made unlawful by § 8(a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.
\textit{Id.} at 738-39.


Domination, involving the so-called "company union," is generally found where organization of a labor organization is directly instigated and encouraged, or directly participated in, by supervisory or managerial employees, and the employer provides financial or other direct support to the organization. See \textit{NLRB v. Pennsylvania Greyhound Lines, Inc.}, 303 U.S. 261, 268-69 (1938).

\textsuperscript{79} 360 U.S. 203 (1959).

\textsuperscript{80} \textit{Id.} at 211.

\textsuperscript{81} \textit{Id.} at 211-12.

\textsuperscript{82} \textit{Id.} at 214.

\textsuperscript{83} 380 U.S. 263 (1965).
cluding an antiunion reason. Anything less was unacceptable, cautioned the Court, making clear that antiunion-motivated partial closings in multifacility enterprises were illegal. "[A] discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees of much the same kind as that found to exist in the 'runaway shop' and 'temporary closing' cases."

G. Litigation Delays

The antiunion campaign does not necessarily abate upon a union election victory and resultant Board certification as exclusive bargaining representative. Various ploys remain available to forestall bargaining and erode union solidarity. Delay through litigation over election conduct and mechanics is an employer favorite.

The ultimate question is whether the election is a dependable expression of the employees' free choice of bargaining representative. The Board must therefore also establish the procedures and safeguards necessary to ensure that fair and free choice. The nature, complexity and volume of the detailed decisions made during the course of an election proceeding thus provide a cornucopia of potential issues for judicial review. Litigation of these issues can consume years, during which time union solidarity will generally disintegrate.

The Warren Court recognized that delay in determining the employee representative with whom the employer must bargain encourages

84. Id. at 270.
85. Id. at 274, 275. The Court thus found that a partial closing is illegal if motivated by a purpose to chill unionism in the remaining facilities, and if the employer could reasonably have foreseen such effect. The Court articulated the test as follows:

If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.

Id. at 275-76. The Darlington Mill, which was closed, was one of 27 textile mills owned and controlled by Deering Milliken and Company and the Milliken family. Concluding that the Board had explored purpose and foreseeability only as to the impact on the Darlington employees, the Court remanded the case to the Board for application of the foregoing test. On remand, the Board found that the plant was closed for the purpose of deterring union organization at other establishments in which the Millikens had dominant interests. Darlington Mfg. Co., 165 N.L.R.B. 1074 (1967), enforced, 397 F.2d 760 (4th Cir. 1968), cert. denied, 393 U.S. 1023 (1969).

86. 380 U.S. at 274-75.
87. Such issues might be whether a party's campaign misrepresentation precluded free choice; whether a supervisor's presence at the polls made the election unfair; whether alteration of the Board's sample ballot was misleading; or whether late opening of the polls disenfranchised some voters.
industrial unrest. Consequently, speedy resolution of representation questions was encouraged. The Court made unequivocally clear its disapproval of time-consuming litigation delays over trivial claims. In *NLRB v. Mattison Machine Works*, the court of appeals set aside a union's election victory because the notice of election and ballots referred to the employer as "Mattison Machine Manufacturing Company" rather than the correct name "Mattison Machine Works." The court of appeals agreed with the employer's unsubstantiated assertion that the irregularity may have caused certain employees to refrain from voting.

The Supreme Court in a *per curiam* decision peremptorily reversed. To set aside the election because of a "minor and unconfusing mistake in the employer's corporate name, was plain error." Further, absent proof by the employer of prejudicial election unfairness, "such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order."

The Court thus clarified several matters. Congress delegated to the Board the ultimate question of whether an election is a dependable expression of the employees' free choice of bargaining representative. The Board has wide discretion in establishing appropriate election procedures and safeguards. The function of a reviewing court with respect to such matters is confined to guarding against arbitrary or capricious action by the Board, *i.e.*, the Board's action is not to be disturbed unless it is unreasonable. In short, employee free choice is to be honored promptly.

**H. Extent of the Bargaining Unit**

Union exclusive representative status is predicated upon majority choice in an appropriate bargaining unit (*i.e.*, plant, department, craft). The extent of organizational efforts and chance of success are affected greatly by unit size: the larger the unit the more difficult the task. To

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90. Id. at 348-49.
91. 365 U.S. at 123.
92. Id. at 124.
94. Section 9(a) provides that a representative selected for bargaining purposes "by the majority of the employees in a unit appropriate for such purposes" shall be the "exclusive" representative of all employees "in such unit" for collective bargaining purposes. 29 U.S.C. § 159(a) (1982). Section 9(b) provides that "[T]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, 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. § 159(b) (1982).
preclude fragmentation and representation based upon organizational success, Congress provided in 1947 that the extent to which the employees have organized shall not be controlling in determining the appropriate unit.\textsuperscript{96} The impact of this legislation was reduced by the Warren Court. The Court made clear that it is not fatal to the appropriateness of a unit that it may happen to coincide with the extent of organization; rather, extent of organization may legitimately be a factor so long as it is not controlling.\textsuperscript{97} If the unit is otherwise appropriate—that is, if it is defensible upon the various objective factors long accepted as proper for determining the appropriateness of a bargaining unit\textsuperscript{98}—it is not rendered inappropriate merely because it happens to coincide with the extent to which the union has organized or, indeed, because the Board may have considered extent of organization as a factor in reaching its determination.\textsuperscript{99}

\textbf{I. Post-Election Issues}

The Warren Court recognized the typical union vulnerability in new bargaining relationships, and ruled that once born, solidity must be given room to grow. In \textit{Brooks v. NLRB},\textsuperscript{100} the union won an NLRB representation election and was certified as exclusive bargaining representative. One week after the election, and the day before the certifica-

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\textsuperscript{96} 29 U.S.C. § 159(g)(5) (1982).

\textsuperscript{97} NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 441-42 (1965). It has long been recognized that the Board has wide discretion in the choice of a bargaining unit, that more than one unit may reasonably be found appropriate in a given case, and that the Board's determination that a particular unit is appropriate is not to be set aside unless it is arbitrary or capricious. See Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947).

\textsuperscript{98} The touchstone of appropriate unit determinations is employee community of interest. The general principle is that only those employees with substantial mutuality of interest in wages, hours, and working conditions, as indicated by the type of work they perform, should be grouped in a single unit.

Primary criteria in this determination include the extent and type of union organization and history of collective bargaining for the employees involved or other employees of the same employer or other employers in the same industry; the duties, skills, wages, hours, benefits and working conditions of the employees; extent of common supervision; frequency of contact with other employees; degree of interchange and functional integration with other employees; area practice and patterns of bargaining; the relationship between the proposed unit and the employer's organization, management, and operation of his business, including the geographical location of the facilities involved; and the desires of the employees. See Metropolitan Life Ins. Co. v. NLRB, 328 F.2d 820, 824-26 (3d Cir. 1964), vacated, 380 U.S. 523 (1965).


\textsuperscript{100} 348 U.S. 96 (1954).
tion, a majority of the employees advised the employer that they no longer wished to be represented by the union. The Court found that the employer's subsequent refusal to bargain was unlawful despite the union's *de facto* loss of majority status. The Court agreed with the Board and held that absent unusual circumstances an employer is required to honor a certification for a reasonable period, normally one year. During that year the union enjoys an irrebuttable presumption of continuing majority status. The union must be given sufficient time to fulfill its bargaining mandate, said the Court, and should not be under misplaced pressure to produce immediate results or suffer dismissal. Nor should employers be encouraged to erode union strength by dilatory or other subtle undermining tactics.

The Court in *NLRB v. Katz* further buttressed the citadel of solidarity by reaffirming the analogous principle that a union's representational role, once rightfully established, is not terminated where majority status is lost or dissipated by employer unfair labor practices or employee turnover. In *Katz*, the employer argued that the Board's remedial bargaining order should not be enforced five years after the illegal conduct and six years after the union's certification, where the employees had subsequently repudiated the union. Alternatively, the employer argued that a new election should be held. In a footnote, the Court rejected both contentions and upheld the bargaining order. Litigation delays are unfortunate, indicated the Court, but may not be utilized by recalcitrant employers to defeat the collective bargaining obligation. Indeed, in *NLRB v. Warren Co.*, the Court upheld an adjudication of civil contempt of an employer who refused to comply with a bargaining order because the union allegedly lost its majority status due to personnel turnover.

II

THE COLLECTIVE BARGAINING PROCESS

The Warren Court's positivism concerning the spirit and promise of the bargaining process was to dominate the labor milieu for years. Recent times under the Burger Court and Reagan NLRB have evinced retreat from the broad principles though not the specific holdings of the
The current emphasis, entailing a conservative cost-benefit analysis, is upon unrestrained management freedom. The Warren Court emphasis, entailing a broader vision of cost-benefit analysis, was upon worker participation in business decisions impacting upon their lives.

The labor wars taught us that workers require a voice in their employment destiny. Totalitarian management, even where beneficent, breeds turmoil. The refusal of employers to confer and negotiate with union representatives of their employees was a major cause of the violent strikes and industrial unrest which wracked the nation in the early years of this century. Congress sought a remedy in collective bargaining as a system of industrial self-government.

The Wagner Act made it an unfair labor practice for an employer to refuse to bargain collectively with the representative freely chosen by a majority of the employees. The 1947 amendments (Taft-Hartley Act) defined the bargaining obligation as the duty to confer in good faith concerning wages, hours, and other terms and conditions of employment, and extended the duty to unions.

A. Mandatory Subjects of Bargaining

Meaningful effectuation of collective bargaining was inextricably interwoven with delineation of obligatory bargaining subjects. As a threshold matter the Warren Court made clear in NLRB v. Wooster Divi-

110. E.g., First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674-88 (1981). Although the Court allowed a termination tactic on technical grounds, it distinguished Fibreboard without overruling it. Id. at 688.

111. Recently, in First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), the Court held that the employer had no duty to bargain with the union over its decision to close a part of its business, but that the employer was required to bargain about the effects of its decision. The employer terminated its contract to provide maintenance work for a nursing home and discharged those employees who worked for it at the home without bargaining with the union concerning either the decision to terminate the contract or the effects of that change on unit employees. The decision, therefore, was not a mandatory bargaining subject.


sion of Borg-Warner\textsuperscript{115} that subjects within the statutory concept of "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining about which an employer and union must bargain and upon which either party may insist to the point of impasse.\textsuperscript{116} Conversely, parties are not required to bargain about and may not condition agreement upon subjects outside the statutory phrase, \textit{i.e.}, permissive or illegal subjects.

In Borg-Warner, the employer conditioned acceptance of a contract upon (1) a clause requiring a secret ballot vote by union and nonunion employees on the employer's last offer before the union could strike, and (2) a recognition clause excluding the local union's parent organization which had been certified as bargaining representative. The Court held that while the recognition and ballot clauses were lawful subjects upon which the parties might voluntarily agree, the clauses were not subjects of compulsory negotiation.\textsuperscript{117} In the Court's view, the ballot clause related to an internal union matter, an advisory employee vote, and settled no term or condition of employment. Unlike a no-strike clause prohibiting employees from striking during the life of the contract and thereby regulating relations between the employer and employees, the ballot clause dealt only with relations between the employees and union.\textsuperscript{118} Similarly, the recognition clause settled no employment matter but rather excluded the certified representative.\textsuperscript{119}

Under the mandatory-permissive-illegal differentiation endorsed by the Court, final agreement could not be delayed or avoided by interjection of extraneous issues. The Court held that conditioning agreement upon permissive subjects constituted an unlawful refusal to bargain about mandatory subjects.\textsuperscript{120} The Court thus deftly exposed and preempted a host of dilatory and evasive tactics designed to obstruct a viable collective bargaining process.

The Court further protected the collective bargaining process by its preliminary outline of the mandatory subject classification. Presaging serious problems of delimitation, the Court indicated that at a minimum the subject must settle (or involve) some term or condition of employment between the employer and the employees.\textsuperscript{121} Conditioning agreement upon non-term or conditional third-party matters was unlawful. The ballot clause concerned only union-employee relations, and not only

\textsuperscript{115} 356 U.S. 342 (1958).
\textsuperscript{116} \textit{Id.} at 349. See Cox \& Dunlop, \textit{Regulation of Collective Bargaining by the National Labor Relations Board}, 63 \textit{Harv. L. Rev.} 389 (1950); Modjeska, \textit{Guess Who's Coming to the Bargaining Table?}, 39 \textit{Ohio St. L.J.} 415 (1978).
\textsuperscript{117} 356 U.S. at 349-50.
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.} at 350.
\textsuperscript{120} \textit{Id.} at 349.
\textsuperscript{121} \textit{Id.}
weakened the independence of the chosen representative but enabled the employer to bypass that representative. Such diminution of the collective bargaining system contemplated by the statute was not to be allowed.

Defining the concept of mandatory subjects of bargaining was pivotal in the development of a collective bargaining system. From the outset it was clear that the statutory phrase "wages, hours, and other terms and conditions of employment" encompassed the routine, traditional aspects of the employment relationship, e.g., overtime pay, insurance benefits, transfers, grievance and arbitration procedures, and retirement plans. The serious question concerned the extent to which bargaining was required over more basic entrepreneurial decisions such as subcontracting bargaining unit work, total or partial plant closing, sale, relocation, reorganization, and consolidation. Whether or not to direct such topics to the bargaining table was a fundamental and controversial issue.

The Warren Court confronted this issue in *Fibreboard Paper Products Corp. v. NLRB*,122 and, by giving an expansive reading to the mandatory subject concept, opened certain traditional "management prerogatives" to union (worker) participation.123 In *Fibreboard*, upon expiration of the collective bargaining agreement the employer contracted out bargaining unit maintenance work for economic reasons without first bargaining with the union. The maintenance work continued to be performed in the plant with employees of the independent contractor instead of the employer's employees who were discharged. The Court held that this type of contracting-out, which replaced bargaining unit employees with employees of an independent contractor for the same work under similar employment conditions, was a mandatory subject of bargaining.124

The Court found that the contracting-out and resultant employee terminations were well within the statutory phrase "terms and conditions of employment."125 To denote contracting-out as a mandatory subject, said the Court, promotes "the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."126 The Court held that upon finding that the employer had refused to bargain about a mandatory subject, the Board was empowered to order the employer to (1) reinstate the former operation, (2) reinstate

124. Management was hardly enthralled with the Court's decision. E.g., O'Connell, The Duty to Bargain: Effect of Recent Decisions, 1965 LAB. REL. Y.B. (BNA) 138;Management View on Fibreboard, GE Holdings, 1965 LAB. REL. Y.B. (BNA) 150 (remarks of Francis A. O'Connell, Jr.).
126. Id. at 211.
the former employees with backpay, and (3) fulfill its bargaining obligations.\(^\text{127}\)

During the Wagner Act debates on the duty to bargain, Senator Walsh, Chairman of the Senate Committee on Education and Labor, stated:

> When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.\(^\text{128}\)

The Warren Court eschewed this minimal interpretation of the statutory bargaining duty. Painting with a broad brush, the Court sought to include a wide range of labor-management problems in the collective bargaining process, and thus to ensure the union's (and the law's) role not only inside the door but at the table.

The Court endorsed the proposition that the peaceful settlement of industrial disputes could be achieved by subjecting labor-management controversies to the mediatory influence of negotiation. Where the subject concerns the employment relationship and is amenable to the collective bargaining process as a pragmatic matter, the Court was optimistic about the chances of negotiation achieving a peaceful accommodation of the conflicting interests. While the potential for successful negotiation might well be small in particular instances, said the Court, "national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."\(^\text{129}\)

The Warren Court further buttressed the mandatory bargaining concept. In \textit{NLRB v. Katz},\(^\text{130}\) for example, the Court held that an employer violates its bargaining duty by unilaterally changing employment conditions under negotiation and prior to bargaining impasse, regardless of the employer's subjective good faith.\(^\text{131}\) The employer, without notifying or consulting the union, placed into effect new wage rates substantially exceeding any previously offered the union, changed its sick leave policy and granted merit increases so numerous as to amount to a general wage increase, at a time when the union was seeking to negotiate upon

\(^{127}\) \textit{Id.} at 215, 216.

\(^{128}\) 79 \textit{Cong. Rec.} 7660 (1935). Some years later Prof. Archibald Cox observed that "the law has crossed the threshold into the conference room and now looks over the negotiator's shoulder," and queried whether "the next step [is] to take a seat at the bargaining table?" Cox, \textit{The Duty to Bargain in Good Faith}, 71 \textit{Harv. L. Rev.} 1401, 1403 (1958).

\(^{129}\) \textit{Id.} at 214.

\(^{130}\) 369 U.S. 736 (1962).

those subjects and before the existence of an impasse.\textsuperscript{132}

To countenance such unilateral action absent a showing of bad faith would open the door to facile circumvention of the duty to bargain. Albeit desirous of or resigned to an ultimate contract and manifesting robust good faith at the bargaining table, the employer would nevertheless simultaneously be free to implement selective changes. The Court closed the door on this possibility. A refusal to meet and confer about a mandatory subject is a refusal to negotiate in fact, said the Court, and there is no occasion to consider the issue of good faith.\textsuperscript{133}

In the Court's view, an employer's unilateral change in employment conditions under negotiation constitutes an evasion of the mandatory bargaining duty, frustrating the statutory objective in the same way as an outright refusal would. Absent contract restrictions, unilateral changes in mandatory subjects may be instituted by the employer only after notice, consultation, and an impasse in bargaining. Even then the changes must be consistent with prior offers made to the union.

Further strengthening the generalized bargaining duty, the Court in \textit{NLRB v. Truitt Manufacturing Co.},\textsuperscript{134} made clear that the duty to bargain includes the obligation to furnish the other party with pertinent and relevant bargaining information. The union generally comes to the bargaining table a stranger uninformed of the details of the employer's policies and practices. During the organizational and representation determination period the union will have learned fragmentary information from individual employees. Even an incumbent union entering renewal negotiations lacks the comprehensive, accurate data available to management. Without the facts the union is at the employer's mercy.

The Warren Court took steps to eliminate this bargaining handicap. In \textit{Truitt}, the Court held that an employer's refusal to furnish relevant financial data in support of a claim of inability to pay higher wages constituted bad faith bargaining.\textsuperscript{135} Because the matter had become relevant to the negotiations, the employer was required to furnish reasonable proof of its asserted inability to grant any wage increase. The Act requires every reasonable effort to make and maintain bargaining agreements. Relevant claims must therefore be substantiated. Speaking for the Court in \textit{Truitt}, Justice Black stated:

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough

\textsuperscript{132} 369 U.S. at 741.
\textsuperscript{133} \textit{Id.} at 743.
\textsuperscript{134} 351 U.S. 149 (1956).
to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.\textsuperscript{136}

In pursuit of a viable collective bargaining system the Warren Court thus sought to eliminate unnecessary hazards. Recognizing the realities of the bargaining table and the industrial world, the Court condemned dilatory and evasive tactics, take-it-or-leave-it strategies, and sham bargaining. Serious bargaining was required. The Court was to make clear, however, that hard bargaining is not inconsistent with good faith bargaining.

The Act does not compel agreement, only a sincere effort to reach agreement. The Act requires good faith bargaining but does not require a party to agree to a proposal or to make a concession.\textsuperscript{137} The Warren Court believed that freedom of contract is a bedrock principle of the Act, and that governmental overregulation of the process, substance and content of labor negotiations is the antithesis of collective bargaining in a free society. Thus, in \textit{NLRB v. Insurance Agents' International Union},\textsuperscript{138} Justice Brennan articulated the Court's philosophy as follows: "Our labor policy is not presently erected on a foundation of government control of the results of negotiations."\textsuperscript{139} The Warren Court would concentrate on the ground rules, not on the outcome of the contest.

In \textit{Insurance Agents}, the union bargained in good faith at the table but simultaneously sponsored concerted on-the-job harassing activities designed to put economic pressure on the employer to accede to the union's bargaining demands. The union's harassing tactics included member agents' periodic refusals to solicit new business or comply with company reporting procedures, refusals to participate in a monthly policyholders' campaign, reporting late, leaving early, refusing to perform customary office duties, engaging in "sit-in-mornings," absenting themselves from special company business conferences, picketing and distributing leaflets outside company offices, distributing leaflets to policyholders and soliciting policyholders' signatures on petitions, and presenting the petitions to the company while simultaneously engaging in mass demonstrations.\textsuperscript{140}

The NLRB found that since the individual agents' conduct was not protected by the Act against employer discipline or discharge, the union's reliance upon such harassing tactics during negotiations consti-

\begin{itemize}
  \item 136. 351 U.S. at 152-53.
  \item 137. 29 U.S.C. § 158(d) (1982).
  \item 138. 361 U.S. 477 (1960).
  \item 139. \textit{Id.} at 490. Amplifying this philosophy in \textit{Local 24, Teamsters v. Oliver}, 358 U.S. 283, 295 (1959), Justice Brennan stated: "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. . . . The purposes of the Act are served by bringing the parties together and establishing conditions under which they are to work out their agreements themselves."
  \item 140. 361 U.S. at 480-81.
\end{itemize}
tuted bad faith bargaining. The Board found that harassing tactics were "plainly irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest." Such tactics impaired the collective bargaining process.

The Supreme Court reversed the Board and held that a refusal to bargain in good faith could not be inferred from the harassing tactics. Economic pressure is not inconsistent with the duty to bargain in good faith, but rather is an integral part of the collective bargaining process. Congress was generally unconcerned with the substantive terms on which parties contracted, and the Board is not to directly judge what proposals, concessions and counterproposals should be made, nor indirectly to influence the substantive terms by regulating the choice of economic weapons. Speaking for the Court, Justice Brennan stated:

It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not yet reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.

The Court thus ruled that the Board was not to function as an arbiter of the particular economic weapons parties might use in support of their bargaining demands. The Board was not to intrude into the substantive aspect of the bargaining process through application of some standard of properly balanced bargaining power. To the extent Congress

142. Id. at 772 (quoting Phelps Dodge Copper Prods. Corp., 101 N.L.R.B. 360, 368 (1952)).
143. Id.
144. 361 U.S. at 490-91.
145. Id. at 490-96.
146. Id. at 488-89.
sought to redress the perceived inequality of bargaining power, it did so by protecting employee organizational and representational rights and establishing a collective bargaining system.

The Warren Court's conceptualization of governmental abstention in a free bargaining process was further reflected in a closely related context with cases involving employer bargaining lockouts.\textsuperscript{147} In a series of cases the Court upheld employer lockouts designed to bring pressure in support of legitimate bargaining demands,\textsuperscript{148} as well as lockouts of regular employees and continued operation with temporary replacements designed to preserve the integrity of struck multiemployer bargaining units.\textsuperscript{149} Such utilization of economic pressure was consistent with the collective bargaining process, and the Board lacked authority to define national labor policy by balancing the competing interests of labor and management.

\textbf{B. The Right to Strike}

The Act contained a general, ambiguous declaration that the Act affected the right to strike only as specifically provided.\textsuperscript{150} The Act also contained various sections susceptible to constructions which could effectively destroy the right to strike.\textsuperscript{151} Had formative construction fallen to an anti-labor Court, the course of labor history would have been markedly different. The Warren Court, however, was committed to the philosophy that the strike is part and parcel of the collective bargaining process. Indeed, it is the motive power that makes the process work.

From its inception the Act contained a general prohibition against employer discrimination to encourage or discourage union membership.\textsuperscript{152} The Supreme Court had made clear that the provision outlawed disparate treatment motivated by antiunion hostility, \textit{e.g.}, discriminatory

\begin{enumerate}
\item \textsuperscript{147} See generally Baird, \textit{Lockout Law: The Supreme Court and the NLRB}, 38 GEO. WASH. L. REV. 396 (1970).
\item \textsuperscript{148} American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).
\item \textsuperscript{150} Section 13 of the Act provides that "\textit{nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.}" 29 U.S.C. § 163 (1982).
\item \textsuperscript{151} \textit{E.g.}, §§ 8(b)(1)(A), (b)(4) (29 U.S.C. §§ 158(b)(1)(A), (b)(4) (1982)). Section 8(b)(1)(A) makes it unlawful for a union to coerce employees in the exercise of rights guaranteed by the Act. Section 8(b)(4) contains several restrictions on coercion rights.
\item \textsuperscript{152} Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 29 U.S.C. § 158(a)(3) (1982) (originally enacted as Act of July 5, 1935, ch. 372, § 8, 49 Stat. 452 (1935)). The section thus proscribes (1) discrimination that (2) encourages or discourages union membership.
\end{enumerate}
discharge of union adherents. The Warren Court extended the prohibition far beyond actions motivated by discrimination to reach employer conduct which was motivated by legitimate business reasons but which had a disparate impact upon union activity.

In NLRB v. Erie Resistor Corp., following contract expiration and extensive bargaining for a new contract, the union called a strike in support of its bargaining demands. All bargaining unit employees joined in the strike. Under intense competitive and customer pressure the company attempted unsuccessfully to operate with replacement personnel. In order to maintain operations the company then accorded twenty years additional seniority both to replacements and to strikers who returned to work, the superseniority being available only for credit against future layoffs and not for other employee benefits based on years of service. The Trial Examiner found that the policy was promulgated for legitimate economic reasons, not for illegal or discriminatory purposes. The Board disagreed and held the action an unfair labor practice.

The Court held the employer's grant of superseniority unlawful. The Court found that it was not decisive that the employer may have been motivated by a legitimate business purpose, and emphasized that specific evidence of an intent to discriminate or interfere with union rights was not an indispensable element of proof of a violation.

"'Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference.' In the Court's view, an employer's grant of superseniority conditioned upon employees' working during a strike fell within such category. "'[I]t is discriminatory and it does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.' In such a situation, the task is one of weighing the employees' interests in concerted activity against the employer's operational interests and of "balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by

154. See id. at 1312-13.
156. Id. at 221-24.
157. Id. at 224-25.
158. Id. at 225.
159. See id. at 235-37.
160. Id. at 227 (citing Radio Officers' Union v. NLRB, 347 U.S. 17 (1954)).
161. Id. (quoting International Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961)).
162. Id. at 228.
the employer’s conduct.”

In so holding, the Court recognized the practical impact of superseniority on striking employees. Superseniority affects the tenure of all strikers whereas permissible permanent replacement affects only those actually replaced. Superseniority necessarily operates to the detriment of strikers compared to nonstrikers. Making superseniority available to striking unit employees and new employees effectively offers individual benefits to strikers to induce their abandonment of the strike. Extending superseniority to striking unit employees as well as new replacements deals a crippling blow to the strike effort. Superseniority makes future bargaining difficult or impossible for the bargaining representative. The Court found that “in view of the deference paid the strike weapon by the federal labor laws and the devastating consequences upon it which the Board found was and would be precipitated by respondent’s inherently discriminatory super-seniority plan,” the Board reasonably held that the employer’s asserted business purpose did not outweigh the invasion of employee rights.165 The Court did not question the right of an employer to permanently replace economic strikers, but refused to extend the rule to encompass superseniority.166

The Court strengthened labor’s protection not only against employer conduct perceived to be inherently destructive of important employee rights, but also against discriminatory conduct with a comparatively slight, adverse effect on employees.167 In Great Dane, the employer refused to pay accrued vacation benefits to striking employees, but announced an intention to pay the benefits to striker replacements, returning strikers, and nonstrikers.168 The employer offered no evidence of a legitimate business purpose for its action.169

Inherently destructive discriminatory conduct may be illegal, said the Court, without proof of antiunion motivation and despite evidence of legitimate business purpose.170 Further, even discriminatory conduct with comparatively slight adverse effect may be illegal without proof of antiunion motivation unless the employer offers evidence of legitimate and substantial business justification.171 If such justification is then made, antiunion motivation must be proved in order to establish illegality. “Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected

163. Id. at 229.
164. Id. at 235.
165. See id. at 235-37.
166. See id. at 237.
168. Id. at 27.
169. Id. at 34.
170. Id. at 33.
171. Id. at 34.
employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.**172** The Court found it unnecessary in *Great Dane* to categorize the destructive degree of the conduct. The discriminatory denial of vacation pay had a potential for adversely affecting employee rights; absent employer evidence of proper motivation the conduct was therefore illegal.**173**

Similarly, in *NLRB v. Fleetwood Trailer Co.*,**174** the Court held that the post-strike right of economic strikers to reinstatement can be defeated only if the employer shows legitimate and substantial business justification. The employer did not reinstate strikers at their first request since jobs were temporarily unavailable due to curtailed production. When production increased the employer bypassed the strikers who remained qualified and available, and hired new employees.**175** The effect of a refusal to reinstate strikers discourages employees from exercising their rights to organize and strike, and can only be justified by countervailing business reasons.**176** Because the employer made no such showing, the conduct was illegal without reference to intent.**177** "This basic right to jobs cannot depend upon job availability as of the moment when the applications are filed. The right to reinstatement does not depend upon technicalities relating to application."**178**

**C. Boycotts**

Notwithstanding clear, broad congressional condemnation of secondary boycotts,**179** the Warren Court preserved significant aspects of the unions' boycott weapon. The Act proscribes coercion (i.e., strikes, picketing) to force unoffending (neutral, secondary) persons to cease doing business with offending (primary) persons with whom the union has a dispute.**180** The Act protects primary strikes and picketing, and certain

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172. *Id.*
173. *Id.*
175. See *id.* at 377.
176. *Id.* at 378.
177. *Id.* at 380.
178. *Id.* at 381.
180. 29 U.S.C. § 158(b)(4)(ii) (1982). The statute provides in relevant part that it shall be an unfair labor practice for a labor organization or its agents "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is . . . (B) forcing or requiring any person to cease . . . dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."
publicity (e.g., handbilling) other than picketing. Unequivocal congressional intent, manifested first in Taft-Hartley and strengthened in Landrum-Griffin, was to outlaw the secondary boycott and prevent enmeshment of neutrals. Congress did not distinguish between good and bad secondary boycotts. Senator Taft had stated, "Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." Section 8(b)(4) of the Act also forbids unions from encouraging others to take part in secondary strikes, either by threats, coercion, or restraint.

The Warren Court, however, eschewed literal interpretation of the secondary boycott provisions of the Act. In *NLRB v. Servette, Inc.*, the union had a labor dispute with Servette, a wholesale distributor of specialty merchandise such as candy and liquor. In furtherance of its strike against Servette the union sought to induce various retail food chains to discontinue handling merchandise supplied by Servette. The union asked store managers to cooperate by not dealing with Servette and by taking Servette merchandise off the shelves, and distributed a handbill at noncooperating stores asking patrons to participate in the boycott.

Applying a literal construction, the court of appeals held that the subsection (i) prohibition against inducement of "any individual" encompassed appeals to any supervisory personnel, and that the union's inducement of the store managers was thus unlawful. The court held further that the union's handbilling was not protected by the publicity proviso because Servette was a distributor, and the proviso applied only where

181. See id. The statute provides that "nothing contained in [§ 158(b)(4)(ii)(B)] shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . ." Furthermore, "[t]hat for the purposes of . . . paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . ."


183. *NLRB, 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1106 (1948).*

184. 29 U.S.C. § 158(b)(4)(i) (1982). The section provides in relevant part that it is unlawful for a union:

- to induce or encourage any individual employed by any person . . . to engage in . . . a refusal in the course of his employment to . . . handle . . . commodities or to perform any services . . . where . . . an object is . . . (B) forcing or requiring any person to cease . . . dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .


186. See id. at 49.
the primary employer was a manufacturer of a physical product.\textsuperscript{187} The Supreme Court reversed.

The Court held that while the supermarket managers might constitute “individual[s]” under subsection (i), the union’s appeals for support were nevertheless not unlawful inducement for a proscribed object.\textsuperscript{188} Rather, only a managerial decision was requested. Such appeals were lawful before the 1959 amendments and were not clearly shown by the legislative history to be among the loopholes sought to be closed by Congress in the amendments.\textsuperscript{189} The Court noted further that if the subsection (i) prohibition against individual inducement reached appeals to managerial judgments then the subsection (ii) prohibition against threats, restraint or coercion of “any person” would be almost superfluous.\textsuperscript{190}

The Court held further that products “produced by an employer” included products distributed by a wholesaler with whom the primary dispute exists, and that the union’s handbilling was therefore privileged by the proviso.\textsuperscript{191} The term “produced” must be given broad reach to avoid undue curtailment of union appeals for public support:

The proviso was the outgrowth of a profound Senate concern that the unions’ freedom to appeal to the public for support of their case be adequately safeguarded. . . . It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union’s labor dispute is with the manufacturer or processor.\textsuperscript{192} The Court noted that Teamster Union secondary boycotts were a primary target of the 1959 amendments, and that the Teamsters usually represent motor carrier not manufacturer employees, and that the proviso was coextensive with the prohibition.\textsuperscript{193} “There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.”\textsuperscript{194} Since the handbilling was protected so also was the threat to handbill. “The statutory protection for the distribution of handbills would be undermined if a threat to engage in protected conduct were not itself protected.”\textsuperscript{195}

The Warren Court understood the congressional proscription of secondary boycotts, but since Congress preserved primary-secondary distinctions, definitional interstices remained. In \textit{NLRB v. Fruit &
Vegetable Packers, Local 760 (Tree Fruits), for example, the Court held that the Act did not prohibit all peaceful consumer picketing at secondary sites but rather permitted limited, struck product picketing. In furtherance of its bargaining dispute with apple growers the union picketed neutral supermarkets requesting consumers not to buy the primary growers' apples. Although the statutory language reached secondary consumer picketing and permitted only publicity other than picketing, this was not determinative. The traditional, primary right of a union to follow the struck product was not encompassed by the statute. Finding that struck product picketing was legitimate under some common law decisions, and concerned over constitutional issues of free speech, the Court concluded that the legislative history "does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites."

In Local 761, IUE v. NLRB (General Electric), the union picketed the premises of General Electric, with whom it had a bargaining dispute, at gates used by the primary (General Electric) employees as well as at a gate reserved exclusively for independent contractors and their employees who were regularly working on the premises. Traditional primary activity included union pressure on neutrals at the primary site not to assist the employer's operations. Separate gate or not, the key question is whether the work being performed by those using the separate gate was related to or connected with the normal, day-to-day operations of the primary employer. "[I]f a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations."

Permitting the involvement of neutrals at the primary site despite their physical separation was extended by the Court to the neutral's property. In United Steelworkers v. NLRB, the Court held that the union was engaged in legitimate primary activity when, in furtherance of its bargaining dispute with Carrier, it picketed an entrance—used exclu-

199. Id. at 62-64.
200. Id. at 63.
204. 366 U.S. at 681.
sively by railroad personnel—to a railway spur track located on a right-of-way owned by the railroad and adjacent to the Carrier premises. The separate location of the picketed gate on New York Central property had little significance to the Court, and was essentially indistinguishable from the separate gate on General Electric property.\textsuperscript{206} The railroad furnished services essential to Carrier's regular operations; such picketing close to the primary site was therefore privileged, primary activity. Since the gate adjoined company property and was the railroad entrance to the plant, "picketing at a situs so approximate and related to the employer's day-to-day operations is no more illegal than if it had occurred at a gate on property owned by Carrier."\textsuperscript{207}

The secondary boycott provisions of the Act broadly proscribe any agreement between an employer and union whereby the employer agrees to cease handling the products of another employer.\textsuperscript{208} The Court excluded work preservation agreements from this ban. In \textit{National Woodwork Manufacturers Association v. NLRB},\textsuperscript{209} the Court upheld a contract clause providing that employees would not handle prefabricated doors at the job site.\textsuperscript{210} In the Court's view the Act was merely intended to reach so-called "hot cargo" and other similar agreements which had a secondary objective, not agreements which sought only to preserve traditional work for the employees covered by the contract which the Court deemed primary in nature.\textsuperscript{211} Agreements designed to protect work traditionally done by bargaining unit employees are legitimate, while agreements tactically calculated to satisfy union objectives elsewhere are not.\textsuperscript{212} "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees."\textsuperscript{213} Stated differently, boycotts used as shields to preserve unit jobs were legal, boycotts used as swords to monopolize or acquire new jobs were illegal. The result was particularly ironic since section 8(e) was enacted to reverse an earlier Warren Court decision validating voluntary hot cargo agreements.\textsuperscript{214}

\begin{itemize}
\item \textsuperscript{206} \textit{Id.} at 499-500.
\item \textsuperscript{207} \textit{Id.} at 500.
\item \textsuperscript{208} 29 U.S.C. § 158(b)(4)(B) (1982).
\item \textsuperscript{209} 386 U.S. 612 (1967).
\item \textsuperscript{210} See generally Feldaker, \textit{Subcontracting Restrictions and the Scope of Sections 8(b)(4)(A) and (B) and of 8(e) of the National Labor Relations Act}, 17 LAB. L.J. 170 (1966); Comment, \textit{Hot Cargo Clauses: The Scope of Section 8(e)}, 71 YALE L.J. 158 (1961).
\item \textsuperscript{211} 386 U.S. at 634-35.
\item \textsuperscript{212} \textit{Id.} at 644.
\item \textsuperscript{213} \textit{Id.} at 645.
\item \textsuperscript{214} \textit{Id.} at 644. The earlier decision was Local 1976, United Bhd. of Carpenters v. NLRB (Sand Door & Plywood Co.), 357 U.S. 93 (1958).
\end{itemize}
Federal antitrust restraints and liabilities had long plagued the house of labor.215 In the Clayton Antitrust Act of 1914216 and the Norris-La Guardia Act of 1932 Congress declared that labor unions were not combinations or conspiracies in restraint of trade, and exempted particular union activities (e.g., strikes, boycotts, picketing) from the antitrust laws.217 The statutory exemption did not protect concerted action or agreements between unions and nonlabor parties.218 National labor policy, however, favors elimination of competition based on differences in wages and working conditions. Antitrust free competition policies must therefore yield, said the Warren Court, to collective bargaining policies, and a limited nonstatutory exemption must be recognized for certain union-employer agreements.

In Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.,219 a multiemployer and union contract was negotiated which provided that meat could not be sold before 9 a.m. or after 6 p.m. The evidence established that night operations were impossible without night employment of butchers or impairment of the butchers' jurisdiction, and that there was no union-employer conspiracy against Jewel. The agreement was lawful despite its real effect on competition because it concerned a mandatory bargaining subject of direct and immediate concern to the particular bargaining unit involved.220 The Court, in a plurality decision, stated that:

[T]he marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.221

Conversely, in United Mine Workers v. Pennington,222 the Court found concerted union-employer agreements imposing restraints on other bargaining units to exceed the limited nonstatutory exemption from the antitrust laws, although mandatory bargaining subjects were involved. In Pennington, the union allegedly conspired with large coal

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218. See Allen-Bradley Co. v. IBEW, Local 3, 325 U.S. 797 (1945).
220. Id. at 689-90.
operators to force smaller operators out of business by agreeing that the same wage scale paid by larger operators would be sought from smaller operators, regardless of financial ability.\footnote{Id. at 659-61.} While the union could unilaterally seek the same wage scale from employers throughout the industry, "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."\footnote{Id. at 665.} Uniformity of labor standards and consequent elimination of competition based thereon are legitimate bargaining goals, but bargaining duty and freedom exist unit by unit. Restraints upon the freedom of economic units violate fundamental antitrust policy. In short, labor and antitrust policies must be accommodated.\footnote{Id. at 666.}

Unions, thus, did not obtain from the Warren Court total exemption from the antitrust laws, nor blanket exemption for mandatory bargaining subjects.\footnote{See generally Handler, Analysis of Pennington, Jewel Tea Antitrust Opinions, in 1965 Lab. Rel. Y.B. (BNA) 119; Feller & Anker, Analysis of Impact of Supreme Court's Antitrust Holdings, in 1965 Lab. Rel. Y.B. (BNA) 129.} Extremely wide latitude, however, was accorded legitimate union activity. Indeed, the Court's framework simply necessitates discreet editing of negotiation and contract language. Through pragmatic awareness of the industry, table-pounding declarations of "unilateral" goals, and a wink-and-nod, sophisticated negotiators remain essentially unhampered by the Court's token obeisance to antitrust law.

\section*{E. Arbitration}

Congressional preference for collective bargaining was clear. Equally clear was congressional preference for collective governance by binding agreement.\footnote{S. Rep. No. 105, 80th Cong., 1st Sess. 16 (1947).} Implementation methodology under the statutory scheme was unclear. The Warren Court's boldest strokes in the jurisprudential forging of a viable bargaining system dealt with contract administration and enforcement.

Section 301(a) of the Taft-Hartley Act provided that suits for violation of labor-management contracts could be brought in federal courts.\footnote{29 U.S.C. § 185(a) (1982).} Section 301(b) provided that unions could sue or be sued as entities in federal court.\footnote{Id. at (b).} On its face section 301(a) appeared merely to be jurisdictional, while section 301(b) appeared simply to provide a procedural remedy lacking at common law. Were section 301(a) deemed jurisdictional but not also substantive, the enforceability of labor con-
tracts would be left to the vagaries of state law. The only light furnished by a cloudy legislative history was that industrial peace was furthered by union agreements not to strike, and that agreements should be equally binding and enforceable on both parties. The Senate Report stated:

If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.\textsuperscript{230}

The Court breathed life into section 301(a) in \textit{Textile Workers Union v. Lincoln Mills},\textsuperscript{231} a union action in federal court to compel the employer to arbitrate unresolved grievances pursuant to the contractual grievance and arbitration procedure. The Court held that an employer's agreement to arbitrate grievance disputes is plainly the \textit{quid pro quo} for the union's agreement not to strike.\textsuperscript{232} To effectuate Court-divined congressional intent to make arbitration agreements enforceable, the statute must therefore not only confer federal jurisdiction over unions but also put sanctions behind such agreements. It follows that the statute not only rejects the common law rule that executory agreements to arbitrate are nonenforceable but also furnishes an affirmative code of enforceability. Accordingly, section 301 was substantive as well as procedural.

Continuing with its conception of an embracing federalism, the Court held that the substantive law to apply in section 301 suits was federal law to be fashioned through judicial inventiveness from existing national labor law and policy.\textsuperscript{233} Compatible state law might be absorbed as part of this new federal law but state law could no longer remain an independent source of private rights. Federal and not state law and interpretation would govern.

Lastly, while the Norris-La Guardia Act sharply curtailed federal court issuance of injunctions in labor disputes, the refusal to arbitrate was not the kind of injunctive use or abuse with which that Act was
concerned. Rather, the Norris-La Guardia restrictions were preempted by the overriding congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes.

In fashioning this new labor law the Warren Court showed a distinct proclivity for *ipse dixit* jurisprudential methodology. Thus, the Court subsequently validated the *quid pro quo* analysis of *Lincoln Mills*, by holding that even absent an express no-strike clause the law would imply a no-strike clause in areas subject to the arbitration clause. Absent such balance, the arbitral process could not serve as a substitute for economic warfare. The syllogism neared perfection. In dissent, Justice Black complained that:

I have been unable to find any accepted principle of contract law—traditional or otherwise—that permits courts to change completely the nature of a contract by adding new promises that the parties themselves refused to make in order that the new court-made contract might better fit into whatever social, economic, or legal policies the courts believe to be so important that they should have been taken out of the realm of voluntary contract by the legislative body and furthered by compulsory legislation.

Three years after *Lincoln Mills* the Warren Court's ideological commitment to grievance arbitration as the road to industrial peace was made emphatic. In the *Steelworkers Trilogy*, the Court ruled that (1) courts should order arbitration absent positive assurance that the arbitration clause does not cover the particular dispute; (2) arbitrators, not courts, are to decide the merits of grievances; (3) courts are not to review the merits of arbitration awards; and (4) courts should enforce arbitration awards which are not absolutely beyond the pale. The grievance and arbitration machinery under a collective bargaining agreement is at the heart of a system of industrial self-government and the system will not function with inappropriate judicial interference.

In the *Steelworkers Trilogy*, the Court placed immense confidence in the arbitrator. The Court stressed that the parties contract for arbitral, not judicial resolution; that arbitrators, not judges, are skilled in the common law of the shop; that arbitrators are chosen because of the parties' trust and confidence in the arbitrator's knowledge and judgment; and

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235. *Id.* at 105.
236. *Id.* at 108.
239. 363 U.S. at 567-68.
therefore that the arbitrator’s award is final and binding as long as it “draws its essence from the collective bargaining agreement.”\textsuperscript{240} In short, the parties bargain for the arbitrator’s interpretation of the contract, and under a national labor policy which emphasizes freedom of contract the parties are not to be deprived of their bargain. Judicial disagreement with the arbitrator’s interpretation is irrelevant.

The \textit{Lincoln Mills} formula for industrial peace through arbitration was completed in 1970, the year after Chief Justice Warren left the Court. In \textit{Boys Markets, Inc. v. Retail Clerks’ Local 770},\textsuperscript{241} the Court held that federal courts may enjoin union strikes in breach of a no-strike obligation where the contract contains a mandatory grievance and arbitration procedure covering the grievance dispute over which the strike is called.\textsuperscript{242} Adopting the dissent of Justice Brennan in a 1962 decision,\textsuperscript{243} the Court found that the denial of equitable remedies for enforcement of no-strike obligations would have devastating implications for the enforceability of arbitration agreements.\textsuperscript{244} Since the no-strike obligation is the \textit{quid pro quo} for the arbitration obligation, employers would have no incentive to agree to arbitration if the most expeditious method for enforcement of the no-strike promise were eliminated. Post-dispute damages were deemed an inadequate substitute for immediate halt to an illegal strike.\textsuperscript{245}

In the Court’s view, arbitration and no-strike obligations are a vital element of stable labor-management relations, and effective enforcement of these obligations is therefore an essential aspect of federal labor policy.\textsuperscript{246}

The Warren Court’s dedication to arbitration as the panacea for industrial relations led the Court to hold that the duty to arbitrate survived the sale and disappearance by merger of the contracting employer. In \textit{John Wiley & Sons, Inc. v. Livingston},\textsuperscript{247} Interscience merged with Wiley, a much larger concern, and ceased to do business as a separate entity. This occurred during the life of its labor contract. Interscience had eighty employees, forty of whom were represented by the union; Wiley had three hundred employees, all nonunion. The union contended that it continued to represent the merged Interscience employees and that Wiley was obligated to recognize certain employee rights vested under the Interscience labor contract (e.g., seniority status, severance pay, pension

\textsuperscript{240} \textit{Enterprise Wheel}, 363 U.S. at 597.
\textsuperscript{244} 398 U.S. at 252-53.
\textsuperscript{245} Id. at 252.
\textsuperscript{246} Id. at 252-53.
\textsuperscript{247} 376 U.S. 543 (1964).
fund payments). Wiley asserted that the merger terminated the labor contract for all purposes, and refused to recognize the union as bargaining agent or to accede to the union's claims for the Interscience employees.248

The Court held that Wiley was obligated to arbitrate.249 Corporate rearrangements could not derogate from the dominant federal policy of resolving labor disputes through arbitration. Rightful management rearrangement prerogatives must be balanced by protection for employees involved in sudden employment relationship changes. While ordinary contract law would not bind an unconsenting successor to a predecessor's contract,250 collective bargaining agreements are not ordinary contracts but rather are generalized codes covering the entire employment relationship and calling upon the common law of the shop. Where substantial continuity exists in the business enterprise before and after a change, the duty to arbitrate may reasonably be found in the contract and acts of the parties.251 Relevant similarity and continuity of operation across the change in ownership was shown by the wholesale transfer of Interscience employees to the Wiley plant. The Court suggested no views on the union's continued representative status, noting that the union sought only to arbitrate claims based on the old labor contract, not to negotiate a new contract.252 Resolution of the union's grievances was for the arbitrator.253

248. Id. at 545.
252. 376 U.S. at 551.
253. Subsequent Court decisions may well have diminished the spirit if not the holding of Wiley. In NLRB v. Burns Int'l Sec. Serv. Inc., 406 U.S. 272 (1972), the Court held that a successor employer is not bound by operation of law to the predecessor's labor contract. Statutory bargaining duties, however, may be imposed upon successor employers in appropriate circumstances. When a majority of the successor's workforce is comprised of the predecessor's employees, and when there is substantial continuity in the employing or business enterprise, the Court held that the successor may be obligated to bargain with the predecessor union. In particular situations the successor may also be barred from making unilateral changes in the predecessor's employment terms.

In Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249 (1974), a § 301 action, the Court held that the successor was not bound to arbitrate the extent of its obligations under the predecessor's labor contract. The successor purchased a motel and restaurant, leased the realty, and continued the operation with 45 employees, only nine of whom came from the predecessor's workforce of 53 employees. The Court stressed that an assets purchase and property rental rather than merger were involved, and that the predecessor continued to exist. The Court also stressed that continuity of identity in the business enterprise was lacking since the successor hired a new workforce with only a small minority originating with the predecessor. The key, said the Court, is whether the successor employer hires a majority of the predecessor's employees. Id. at 263.
The amelioratory aspects of orderly contractual and statutory processes, however, remained complementary to fundamental employee rights to strike to protect freedom of concerted action. In *Mastro Plastics Corp. v. NLRB*, the Court held that neither the contractual no-strike clause nor the statutory prestrike waiting periods deprived employees of their protected right to strike against their employer's unfair labor practices. In that case the contract contained a comprehensive no-strike clause. The employees struck to protest the employer's allegedly discriminatory discharge of an employee for union activity.

Natural application of this waiver clause concerned the parties' economic relationship which was the subject matter of the contract. The strike and lockout clauses were natural adjuncts of a mechanism designed to deal with changes or disputes involving contractual, economic relationships (i.e., employment terms, plant operations). Unfair labor practices entailed different considerations for which waiver could not be implied. "To adopt [the employer's] all-inclusive interpretation . . . would eliminate, for the whole year, the employees' right to strike, even if [the employer], by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union." Similarly, the statutory prestrike notification and mediation requirements concerned economic, not unfair labor practice, strikes. The Court stated:

[In the face of the affirmative emphasis that is placed by the Act upon freedom of concerted action and freedom of choice of representatives, any limitation on the employees' right to strike against violations of §§ 7 and 8(a), protecting those freedoms, must be more explicit and clear than it is here in order to restrict them at the very time they may be most needed.]

III
THE INDIVIDUAL AND THE UNION

Belief in strong unions as a necessity to the collective bargaining system did not blind the Warren Court to abuses of union power underlying the Taft-Hartley Act. The Court struggled for an accommodation of individual and collective rights.

256. 350 U.S. at 281.
257. *Id.*
258. *Id.* at 282-83.
259. *Id.* at 283.
261. 350 U.S. at 287.
Problems of compulsory unionism and union security were among the most difficult and controversial to come before the Court. Various union security arrangements had become common in collective bargaining agreements, designed to protect the union against loss of support among the employees in the bargaining unit. Such union security contracts included closed shop, union shop, preference shop, agency shop, and maintenance-of-membership shop, as well as agreements stipulating that a specified percent of employees must always be union members. To what extent did the law sanction such arrangements?

In the 1947 Taft-Hartley amendments Congress outlawed the closed shop (union membership required to obtain employment) but permitted the union shop (union membership required after thirty days to retain employment).262 The Act allowed union security agreements between an employer and union requiring "membership,"263 but also provided that the employer could not discriminate against (i.e., discharge) an employee if the employer "has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."264 Congress provided further that the federal statute did not preclude the states from prohibiting union security agreements.265

Interpreting the amendments, the Warren Court first found that, while Congress desired to remedy the most serious abuses of compulsory

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263. Section 8(a)(3) provides that it is an unfair labor practice for an employer:

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made . . . and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

264. Id. at (ii)(A).
265. Section 14(b) provides that: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b) (1982).
unionism under the closed shop, it intended to permit unions and employees to continue arrangements which would require all employees to share the cost of bargaining and thereby eliminate “free riders.” The general national labor policy toward union membership was to insulate employees’ jobs from their organizational rights, and thereby to permit employees to freely exercise their right to join unions, to be good, bad, or indifferent members, or to refrain from joining unions without endangering their livelihood. The only qualification on this right was the proviso authorizing certain union security agreements to compel payment of union dues and fees.

Thus Congress recognized the validity of unions’ concern about “free riders,” i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

On its face the Taft-Hartley amendment reflected an intention to make the union shop rather than the closed shop the maximum form of union security permitted by federal law. There was no indication whether or not Congress intended to go further and outlaw lesser types of union security arrangements, i.e., preferential hiring, maintenance of membership, and agency shop agreements. A variety of such union security arrangements less inhibitive than the closed or union shops have become common. To construe the Act to outlaw these lesser arrangements would deal crippling blows to both union strength and personal liberty.

A. Agency Shops

In NLRB v. General Motors Corp., the union sought a contract provision which left optional with the employee whether or not to become a union member but required that the employee nonetheless pay to the union, as a condition of continued employment, a sum of money equivalent to the initiation fee and periodic dues paid by union members. The question presented was whether or not this type of arrangement, characterized as an “agency shop,” was a form of union security permitted by the Act, where such agreement was lawful under state law. Contrary to the Board, the court of appeals held that the language in section 7 of the Act which gives employees the right to refrain from union activities “except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employ-

267. Id. at 40.
268. Id. at 41.
ment as authorized in section 8(a)(3)," excludes "from the operation of the law only agreements requiring membership in a labor organization. . . . An employee involuntarily subjected to the 'agency shop arrangement,' as a condition of his employment, is not a Union member or the equivalent of it."

The court of appeals thus concluded that the agency shop proposal was unlawful because the proviso refers only to agreements requiring union membership, i.e., the union shop.271 The Supreme Court held that an agency shop arrangement is not an unfair labor practice under section 8(a)(3) of the federal Act, where it is not unlawful under state law, and therefore the employer's refusal to bargain with the union about its inclusion in a contract was unlawful.272 The Court found nothing in the legislative history to indicate that Congress intended the 1947 amendment "to validate only the union shop and simultaneously to abolish, in addition to the closed shop, all other union-security arrangements permissible under state law."273 In the Court's view the Taft-Hartley amendment was intended to abolish the closed shop but to permit employers and unions to agree that "free riders" would pay their own way.274 The agency shop was compatible with this objective.

The Warren Court was not troubled by the literal wording of the proviso which privileges agreements requiring "membership" in a union after the first thirty days of employment. The Court construed the second proviso to section 8(a)(3) to mean that:

[T]he burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core.275

The agency shop proposal "conditioned employment upon the practical equivalent of union 'membership' as Congress used that term in the proviso to § 8(a)(3)."276 The agency shop proposal "imposes no burdens not imposed by a permissible union shop contract and compels the performance of only those duties of membership which are enforceable by discharge under a union shop arrangement."277 In short, under union or agency shops employees may be discharged only for nonpayment of dues

270. 303 F.2d 428, 430 (6th Cir. 1962) (emphasis added).
271. Id.
273. 373 U.S. at 741.
274. Id.
275. Id. at 742.
276. Id. at 743.
277. Id.
and fees, not for noncompliance with other union-imposed obligations. The evils of compulsory unionism are thus reduced, while financial support for the bargaining agent is allowed.

What of the employee, unconvinced that the entire bargaining unit (union and nonunion) benefits from union representation, who is conscientiously opposed to giving financial support? Or the employee with religious objections to giving support? Or the employee who believes he or she could strike a better bargain individually? Such employees received no support from the Warren Court, committed as was the Court to the twin propositions of majority rule and progress through unionism.

As noted earlier, Taft-Hartley disclaimed a federal policy hostile to union security, but left room for more restrictive state regulation.278 Section 14(b) provides “Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”279 A Congress somewhat disenchanted with unionism thus validated state “right-to-work” laws.280

In General Motors, the Warren Court had held that “membership” in section 8(a)(3) includes and permits the agency shop as a matter of federal law.281 Consistent with that view the Court was constrained to hold in Retail Clerks, Local 1625 v. Schermerhorn282 that “membership” in section 14(b) must therefore include, and permit the states to outlaw, the agency (and union) shop.283 The Court nevertheless curtailed the scope of permissible state regulation. The second time the case was argued, the Court noted that although a state has power to enjoin enforcement of a union security arrangement unlawful under state law, “picketing in order to get an employer to execute an agreement to hire all union labor in violation of a state union-security statute lies exclusively in the federal domain.”284 Such result obtains “because state power, recognized by § 14(b), begins only with actual negotiation and execution of the type of agreement described by § 14(b). Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the Na-

278. See supra notes 262-65 and accompanying text.
281. 373 U.S. at 741.
282. 373 U.S. 746 (1963); 375 U.S. 96 (1963). The case was argued twice—the first time to validate state right to work laws, the second to determine if the state of Florida, not the NLRB, had jurisdiction over the dispute.
284. 375 U.S. at 105.
The Court thus interpreted the grant of federal authority broadly and permissively to allow unions substantial flexibility in selecting that arrangement most appropriate for preserving union security in the particular situation. Conversely, the Court interpreted the grant of state authority narrowly and restrictively to protect labor's federal enclave and to guard against state overregulation of peaceful picketing.

B. Union Shops

From the outset strong constitutional attacks were made upon the concept of compulsory unionism. In *Railway Employees' Department v. Hanson*, the Court held that the provision of the Railway Labor Act authorizing union shop agreements between interstate railroads and unions was a valid exercise by Congress of its powers under the commerce clause, and violated neither the first amendment nor the due process clause of the fifth amendment. Industrial peace along the arteries of commerce is a legitimate congressional objective and Congress' power to regulate labor relations in interstate industries is clear. Congress could legitimately determine at this point in time that the union shop was a stabilizing force. The Court rejected the argument that compulsory unionism was tantamount to a denial of the right to work (liberty). "One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work."

The Court also rejected the argument that the union shop forces ideological and political associations violative of individual freedom of conscience, association, expression and thought. The only mandatory membership condition was the payment of periodic dues, initiation fees and assessments, not fines or penalties, and the only financial support required relates to the work of the union in the realm of collective bargaining. The Court noted that a different problem would be presented if assessments were imposed for purposes not germane to collective bargaining, or if dues, fees or assessments were used as a cover for forcing ideological conformity or other action in contravention of the first amendment.

While validating compulsory financial union support, the Warren Court was not insensitive to problems of individual freedom. In a series of cases arising under the analogous union security provisions of the

285. Id. (emphasis in original).
287. Id. at 232-38.
288. Id. at 233.
289. Id. at 235.
290. Id. at 236-38.
291. Id. at 238.
Railway Labor Act, the Court carved out the employee's right to object to the use of exacted funds for political causes.

In International Association of Machinists v. Street,292 employees subject to a union shop agreement complained that the money they were compelled to pay to hold their jobs was in substantial part used to finance the campaigns of candidates whom they opposed for federal and state offices, and to promote the propagation of political and economic doctrines with which they disagreed. The state court held that the agreement abridged free speech and due process rights under the first and fifth amendments.293 The Supreme Court avoided the constitutional questions by narrowly construing the statute to deny union authority to spend an employee's money over his objection for political causes which he opposes.294 Endorsement of the free rider concept contemplates compulsory unionism only to force employees to share the cost of negotiating and administering collective bargaining agreements, and the costs of the adjustment and settlement of grievances and disputes.295 Coerced political activity exceeds the scope of the sanction. The dissenting employee cannot preclude the majority's correlative rights and interests in pursuit of political activity of its choosing, but she is entitled to an injunction against expenditure, or restitution, of her proportionate share.296

The Court subsequently encouraged creation of internal union remedies for resolution of expenditure apportionment problems.297 Presaging the current focus upon alternative dispute resolution, the Court observed:

If a union agreed upon a formula for ascertaining the proportion of political expenditures in its budget, and made available a simple procedure for allowing dissenters to be excused from having to pay this proportion of moneys due from them under the union-shop agreement, prolonged and expensive litigation might well be averted. The instant action, for example, has been before the courts for 10 years and has not yet run its course. It is a lesson of our national history of industrial relations that resort to litigation to settle the rights of labor organizations and employees very often proves unsatisfactory. The courts will not shrink from affording what remedies they may, with due regard for the legitimate interests of all parties; but it is appropriate to remind the parties of the availability of more practical alternatives to litigation for the vindication of the rights and accommodation of interests here involved.298

The Warren Court clearly viewed the union as a service agency with
a distinct, significant and legitimate role to play in the industrial life of the nation.

C. Hiring Halls

In *Local 357, International Brotherhood of Teamsters v. NLRB*, the Board, in one of its more overreaching decisions, had concluded that a hiring hall arrangement which vested exclusive authority in a union to clear or designate applicants for employment was unlawful absent various assurances and safeguards against potential discrimination. The Board found that such arrangements displayed and enhanced the union's power and control over the employment status, and that the union would operate the hiring hall so as to win compliance with membership obligations or other union fealty, all unlawfully encouraging union membership and interfering with employee rights to refrain from unionism. Non-sense, said the Court, reversing the Board and holding that an exclusive hiring hall arrangement without safeguards is not *per se* unlawful. Discriminatory purpose cannot here be inferred but must be proven, especially where as here the contract provided union membership was irrelevant to the job referral process.

For years hiring hall arrangements had well served labor, management, and employee, particularly in transient labor pools such as maritime and construction, and the generalized Taft-Hartley proscriptions would not compel the Warren Court to outlaw such arrangements. While the hiring hall may sometimes have been the adjunct of the closed shop, Congress outlawed only the closed shop. "There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act."

The fact that the hiring hall arrangement might encourage union membership did not establish illegality but merely reflected a pragmatic dimension of the union as a service institution. The only encouragement or discouragement of union membership proscribed by the Act is that which is effectuated through discrimination. The Court made clear it would neither presume that unions or employers violated the law, nor would it require affirmative disclaimers of illegal objectives.

It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that in-

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300. *Id.* at 672.
301. *Id.* at 676.
302. *Id.* at 674.
clude arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well.303

D. Unionism's Presumptive Legality

The Court reinforced the presumptive legality of unionism as an institution in \textit{NLRB v. News Syndicate Co.}.304 The Board found that an unlawful closed shop and preferential hiring system was imposed by (1) a contract clause incorporating the union's general laws “not in conflict with . . . federal or state law” and (2) a clause vesting control over hiring in the foreman who was required to be a union member.305 The Board considered the general savings language of the laws clause insufficient to apprise employees that these union general laws requiring union membership as a condition of employment were not incorporated into the labor contract, and that employees would view the contract as specifically containing the membership requirement. The Board also believed that employees would perceive a closed shop arrangement from a contract provision vesting exclusive hiring control in a union foreman obligated by a union general law requiring preference for union members.

The Supreme Court disagreed. The laws clause did not incorporate the illegal provisions of the union's rules into the contract since the clause expressly disclaimed incorporation of any union rule in conflict with federal or state law, \textit{i.e.}, closed shop provisions.306 "Any rule or regulation of the union which permitted or required discrimination in favor of union employees would, therefore, be excluded from incorporation in the contract since it would be at war with the Act."307 As for employee uncertainty:

We can say . . . that while the words “not in conflict with federal . . . law” might in some circumstances be puzzling or uncertain as to meaning, “there could hardly be any uncertainty respecting a closed-shop clause.”

For the command of § 8 is clear and explicit and the only exception is plainly spelled out in the provisos to § 8(a)(3).308

With regard to the foreman clause, the Court found that while the contract limited employment to journeymen and apprentices it did not require them to be union members.309 Further, the foreman was in fact obligated to act as the employer's hiring agent since the contract barred the union from disciplining the foreman “for carrying out the instruc-

\begin{footnotesize}
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\item[303.] \textit{Id.} at 675-76.
\item[304.] 365 U.S. 695 (1961).
\item[305.] \textit{Id.} at 696-98.
\item[306.] \textit{Id.} at 700.
\item[307.] \textit{Id.}
\item[308.] \textit{Id.}
\item[309.] \textit{Id.} at 699.
\end{itemize}
\end{footnotesize}
Finally, going to the heart of the matter:

[As we said in [Local 357], decided this day we will not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress. As stated by the Court of Appeals, “In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.”

Concomitantly, the Court struck down the overreaching, punitive remedies devised by the Board for illegal closed shop and preferential hiring arrangements. In Local 60, United Brotherhood of Carpenters v. NLRB, the Board ordered the parties not only to terminate the unlawful arrangement but also to refund to the employees all dues and fees paid to the union pursuant to the arrangement. Reimbursement was appropriate in the Board’s view because these monies were the price paid by the employees to retain their jobs.

The Court held that refund of dues and fees exceeded the Board’s remedial authority. The employees involved were union members when employed on the particular job and may have been members for years. There was no evidence that any person joined the union to obtain work on the project, nor that voluntary members were precluded from resigning because of fear of retaliation. Absent evidence of coercion the order was inappropriate. Justice Douglas stated:

The Board has broad discretion to adapt its remedies to the needs of particular situations so that “the victims of discrimination” may be treated fairly. . . . But the power of the Board “to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board’s authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.” . . . Where no membership in the union was shown to be influenced or compelled by reason of any unfair practice, no “consequences of violation” are removed by the order compelling the union to return all dues and fees collected from the members; and no “dissipation” of the effects of the prohibited action is achieved. . . . The order in those circumstances becomes punitive and beyond the power of the Board. . . . As Judge Pope said in Morrison-Knudsen Co. v. NLRB, 276 F.2d 63, 76 [(9th Cir. 1960)], “reimbursing a
lot of old-time union men" by refunding their dues is not a remedial measure in the competence of the Board to impose, unless there is support in the evidence that their membership was induced, obtained, or retained in violation of the Act. It would be difficult, even with hostile eyes, to read the history of trade unionism except in terms of voluntary associations formed to meet pressing needs in a complex society.316

E. Intra-Union Discipline

Predating federal labor law, unions were deemed voluntary associations and the union-member relationship consensual.317 Fines, discipline and expulsion from membership for breach of membership obligations voluntarily undertaken were means traditionally utilized for maintenance and preservation of union solidarity, and were enforceable at common law under contract theories.318 Such union power is especially vital during strikes to preserve the efficacy of the strike weapon by protecting against recalcitrants and strikebreakers. The continued legitimacy of this power under the generalized proscription of Taft-Hartley section 8(b)(1)(A) was brought into serious question before the Warren Court.

In NLRB v. Allis-Chalmers Manufacturing Co.,319 the union fined certain members for crossing picket lines and returning to work during a lawful economic strike, and thereafter obtained state court enforcement of the fine. Contrary to the Board, the court of appeals held that the union violated section 8(b)(1)(A) by restraining and coercing employees in the exercise of their section 7 right to refrain from union and other concerted activity.320

The Warren Court upheld imposition and collection of the fines.321 National labor policy rests on the premise that by pooling their economic strength and acting through a majority union, employees have the most effective means of bargaining for improvements. Union power to protect its representative status against erosion through reasonable membership discipline, especially during strikes, is integral to this federal policy.322

The Court noted that union imposition and enforcement of reasonable discipline including fines existed as early as 1867.323 Under the judicial view prevailing when Taft-Hartley was enacted, courts were simply

316. Id. at 655-56 (citations omitted) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938)).
317. Id. at 656.
319. Id.
320. 358 F.2d 656 (7th Cir. 1966).
323. 388 U.S. at 182 n.9.
to enforce the contract between union and member, subject to equitable considerations.\textsuperscript{324} If Congress expected the Warren Court to ignore this labor history and accept rejection of this contractual conception of the relationship, something more specific than the "imprecise words 'restrain or coerce'"\textsuperscript{325} was required. Indeed, congressional disinterest in internal union affairs was evidenced by a proviso to section 8(b)(1)(A) stating that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."\textsuperscript{326} Further, the extensive regulation of internal union affairs undertaken in the 1959 Landrum-Griffin Act reflects the limitations embodied in the 1947 amendments. The Court rejected the argument that the Act only gave unions the power to expel but not fine members. Justice Brennan wrote for the Court:

To say that Congress meant in 1947 by the § 7 amendments and the § 8(b)(1)(A) to strip unions of the power to fine members for strikebreaking, however lawful the strike vote, and however fair the disciplinary procedures and penalty, is to say that Congress preceded the Landrum-Griffin amendments [of 1959] with an even more pervasive regulation of the internal affairs of unions. It is also to attribute to Congress an intent at war with the understanding of the union-membership relation which has been at the heart of its effort "to fashion a coherent labor policy" and which has been a predicate underlying action by this Court and the state courts. More importantly, it is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon. It is no answer that the proviso to § 8(b)(1)(A) preserves to the union the power to expel the offending member. Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a reasonable fine. Where the union is weak, and membership therefore of little value, the union faced with further depletion of its ranks may have no real choice except to condone the member's disobedience. Yet it is just such weak unions for which the power to execute union decisions taken for the benefit of all employees is most critical to effective discharge of its statutory function.\textsuperscript{327}

Sounding the theme raised earlier in \textit{Curtis Brothers},\textsuperscript{328} the Court indicated that section 8(b)(1)(A) did not have a broad and general sweep but rather was designed only to reach extreme union organizational tactics involving violence, intimidation, and reprisal or threats thereof.\textsuperscript{329}

With his penchant for the jugular, Justice Black responded for the

\begin{itemize}
\item 324. \textit{Id.} at 182.
\item 325. \textit{Id.} at 184.
\item 327. 388 U.S. at 183-84.
\item 328. \textit{See supra} text accompanying notes 37-41.
\item 329. 388 U.S. at 190-92.
\end{itemize}
four dissenters. It is one thing, said Justice Black, to preserve union power, similar to that of other voluntary associations, to prescribe specific membership conditions. It is quite another to give unions court-like power to try and punish members with direct economic sanctions for exercising their right to work.\footnote{330}

Further latitude for enforcement of internal union policies came in \textit{Scofield v. NLRB},\footnote{331} where the Court held that a union did not violate section 8(b)(1)(A) by imposing, and bringing court suits to collect, fines imposed against members who violated a union rule prohibiting acceptance of immediate payment for production in excess of a ceiling rate.\footnote{332} Legitimate union concerns over the competitive pressures of an unrestrained piecework system justified reasonable enforcement of the rule, no federal labor policies were contravened,\footnote{333} and union members were free to leave the union to escape the rule.\footnote{334}

\section*{F. The Duty of Fair Representation}

National labor policy as interpreted and applied by the Warren Court thus granted the exclusive bargaining representative extensive power over the individual worker. In various cases the Court found that the grant of exclusive representative status places "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers,"\footnote{335} and "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."\footnote{336} Particular insights into Warren Court perceptions of the scope of this union power are afforded by a series of cases involving the duty of fair representation.

Earlier Supreme Court cases arising under the Railway Labor and National Labor Relations Acts had established that the exclusive bargaining representative has a statutory duty to fairly represent all employees in the bargaining unit, majority or minority, union member or nonmember. The Acts impose upon a bargaining representative "the duty to exercise fairly the power conferred upon it in behalf of all those

\begin{footnotesize}
\begin{enumerate}
\item Id. at 216 (Black, J., dissenting).
\item 394 U.S. 423 (1969).
\item Id. at 428-30.
\item Cf. NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418 (1968) (invalidity of discipline for filing NLRB charges).
\item The Court articulated the determinative principle as follows:
\begin{quote}
[Section] 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.
\end{quote}
\item 394 U.S. at 430.
\item Brooks v. NLRB, 348 U.S. 96, 103 (1954).
\end{enumerate}
\end{footnotesize}
for whom it acts, without hostile discrimination." Good faith, honesty of purpose, and reasonably relevant bases for action were required. The duty was a federal right implied from federal labor law and policy, and federal courts had jurisdiction to grant appropriate remedial relief for breach.

In 1962 the NLRB announced the "novel, if not quite revolutionary theory" that the breach by a union of the duty of fair representation is an unfair labor practice under section 8 of the NLRA. Without passing upon the validity of the Board's determination, the Warren Court made clear that the Board's "tardy assumption of jurisdiction in these cases" did not preempt federal and state court jurisdiction over suits for breach of the duty of fair representation. The Court also reaffirmed an employee's parallel right to maintain a section 301 action against an employer for wrongful discharge in breach of contract even if the challenged employer's conduct is also arguably an unfair labor practice within the Board's jurisdiction.

While the Court subjected union representational conduct to judicial scrutiny, it simultaneously placed procedural and substantive limitations upon the scope of that review. Generally, as a precondition to any suit against the employer for breach of contract, the employee must exhaust (or attempt to exhaust) contractual grievance and arbitration procedures. The arbitration award will normally be final and binding, and will preclude an independent suit by the employee against the employer. The employee's suit is not barred by the exclusive contractual procedures, however, where the union has breached its duty of fair representation in handling the employee's grievance. In Vaca v. Sipes, the Court held that preliminary judicial determination of the question of the union's breach of its duty will, therefore, frequently be required before the section 301 suit against the employer can proceed.

Further, union breach of the duty of fair representation, which would remove the exclusivity of the grievance and arbitration procedure and open the employer to court suit, is not established merely by showing union error or a meritorious grievance. There must be arbitrary, dis-

338. 323 U.S. at 204.
345. Id. at 188.
346. Id. at 190-93.
criminatory, or bad faith union conduct. Stated differently, the fact that the employer may indeed have violated the contract and wronged the employee is not determinative.

In *Vaca* an employee suit was brought in state court alleging that the union breached its duty of fair representation by refusing to take to arbitration the employee's grievance for wrongful discharge in violation of the collective bargaining agreement. The union refused to process the grievance to arbitration because in the union's view the medical evidence was insufficient to prove the employee's fitness for work. While one company physician and one union-selected physician determined that high blood pressure precluded the employee's continued employment, two of the employee's physicians and numerous medical reports certified the employee's fitness for work. The Court stressed that there was no evidence that any of the union officers were personally hostile to the employee nor that the union acted other than in good faith. Therefore, the Court held that because the evidence did not show that the union acted arbitrarily or in bad faith, it had not breached its duty.

The court emphasized that an individual employee has no absolute right to have a grievance arbitrated and that breach of the duty of fair representation is not shown simply by proof that the underlying grievance may have been meritorious.

The Court's rejection of the standard of liability applied by the state court in *Vaca* underscores the wide discretion accorded unions by the Court. The question that the state court regarded as dispositive of the issue of liability was whether the evidence supported the employee's assertion that he had been wrongfully discharged by the employer, irrespective of the union's good faith in taking a different view. The Court made clear that the standard of liability was a much stricter one, namely, whether or not the union acted arbitrarily, discriminatorily, or in bad faith. The Court stated:

> [I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.

The Warren Court endorsed wide union discretion for resolution of
conflicting employee interests. *Humphrey v. Moore*\(^{354}\) arose in the context of an amalgamation of two separate businesses whose employees were represented by the same union. The Court held that the union did not breach its duty of fair representation by agreeing with the employer to dovetail the seniority lists.\(^{355}\) The union’s action was predicated upon its view that the contract authorized the resolution. The Court found that the union “took its position honestly, in good faith and without hostility or arbitrary discrimination,” and that “[b]y choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors.”\(^{356}\) The Court rejected the contention that the union could not fairly represent the antagonistic interests of the two groups of employees, stating:

> But we are not ready to find a breach of the collective bargaining agent’s duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.\(^{357}\)

### IV

**FEDERALISM UNBOUND**

By empowering the Board to prevent unfair labor practices and resolve representation questions affecting commerce, Congress exercised the full reach of its constitutional powers under the commerce clause.\(^{358}\) The Warren Court confirmed that the Act regulates not only activities in interstate commerce but also ostensibly local activities which might adversely affect commerce. In *NLRB v. Reliance Fuel Oil Corp.*,\(^{359}\) the Court held that the Board properly asserted jurisdiction over an employer engaged solely in intrastate commerce, where the employer purchased within the state a “substantial amount” of goods from a supplier engaged in interstate commerce.\(^{360}\) Reliance Fuel Oil Corporation,

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355. *Id.* at 345-46.
356. *Id.* at 350.
357. *Id.* at 349-50.
360. *Id.* at 226-27.
a New York distributor of fuel oils whose gross annual sales exceeded $500,000, purchased within the state from Gulf Oil Corporation fuel oil and related products whose value exceeded $650,000. The products were shipped to Gulf from outside New York state before sale or delivery to Reliance, and were then stored in Gulf tanks located within the state. Based upon this "indirect inflow" of out-of-state supplies, the Board found that Reliance's operations affected commerce within the meaning of the Act. The Second Circuit held that the Board must further demonstrate the manner in which a labor dispute at Reliance would affect or tend to affect commerce.

The Court reversed the Second Circuit and in a per curiam opinion held that "in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." The Court said further, "This being so, the jurisdictional test is met here: the Board properly found that by virtue of Reliance's purchases from Gulf, Reliance's operations and the related unfair labor practices 'affected' commerce, within the meaning of the Act."

Similarly, in Howell Chevrolet Co. v. NLRB, the Court upheld the Board's jurisdiction over retail Chevrolet dealers who operated as "an integral part" of General Motors' national distribution system. The agency agreements under which the dealers operated established the interdependence of the dealers' local activities and the manufacturer's national activities. Repeated unfair labor practices of the dealer would tend to lead to disputes burdening or obstructing commerce; therefore, the Board had jurisdiction.

A. Preemption

The danger of conflict between the state and federal systems was marked in the labor law area. Diverse, conflicting, or hostile regulation could seriously undermine the uniform collective bargaining system envisaged by the Warren Court. Congress was essentially silent on the matter, having made no general state-federal apportionment or allocation of power in the NLRA. The Warren Court filled this void with a strong preemption doctrine distinctly reflecting the Court's vision of an embrac-
The states lack jurisdiction when the activity is protected by section 7 of the NLRA or prohibited by section 8. "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."371 Even where the activity is arguably, though not clearly, subject to sections 7 and 8, the states and the federal courts must defer to the exclusive primary competence of the NLRB for determination of its legal status.372 The Board may ultimately never define the legal significance of particular activity, but the failure of the Board to so act does not give the states the power to act. "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."373

Even if it is determined by the Board (or the Court) that the conduct is neither protected nor prohibited by the Act, the question remains whether or not the states may regulate the conduct, for Congress left some conduct either entirely uncontrolled and/or immune from state regulation.374 The federal regulatory scheme leaves some activities and practices to be controlled by the free play of economic forces.375 As stated in Justice Frankfurter's inimitable style, "[T]he statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation."376

Applying the foregoing principles in San Diego Building Trades Council v. Garmon,377 the Court held that the state court lacked jurisdiction to award damages arising out of peaceful union organizational or recognitional picketing, where such activity was arguably subject to the Act.378 That the Board had already declined jurisdiction in the particular matter379 and might never determine the merits did not deter the Court. The potential conflict with federal policy in its broadest sense, with the complex, interrelated federal scheme of law, remedy, and administration, by allowing two lawmaking sources to govern in areas po-

372. Id. at 245.
373. Id. at 246.
374. Id.
378. Id. at 246.
379. Id.
tentially subject to the exclusive federal regulatory scheme, all counseled against state intrusion. Justice Frankfurter articulated the Court's concern in part as follows:

In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delineating areas of potential conflict; potential conflict of rules of law, of remedy, and of administration. The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations. To the National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration. We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience. . . .

State authority was thus precluded over matters potentially subject to the Act even where the Board declined to exercise its statutory jurisdiction for budgetary or other discretionary reasons. Specifically ceding jurisdiction from the Board to the states was the exclusive method to authorize state action, "whatever policy objections there may be to creation of a no-man's land." Congress subsequently amended the Act to allow state action where the Board declines jurisdiction.

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380. *Id.* at 241-42 (emphasis added).
381. See *Guss v. Utah Lab. Rel. Bd.*, 353 U.S. 1 (1957) (unfair labor complaint was not within NLRB's jurisdiction because employer did less than $50,000 interstate business).
382. *Id.* at 11.
383. 29 U.S.C. § 164(c) (1982). Section 14(c) of the Act provides:

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act shall be deemed to prevent or bar any agency or the court of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

*Id.*
State jurisdiction was disallowed again in an employee's damage action against a union for an allegedly discriminatory refusal to refer him to employment through a hiring hall.\textsuperscript{384} While part of the case may have involved the application of internal union membership rules outside the scope of the Act, the focus of the case involved employment relations arguably subject to the Board's jurisdiction.\textsuperscript{385} "[T]he conduct on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards."\textsuperscript{386} Similarly, state jurisdiction was preempted over an employee's damage action against a union for causing his discharge from employment and preventing his subsequent employment for violation of union rules.\textsuperscript{387} In the Court's view the crux of the action was directed to interference with existing or prospective employment relations arguably subject to the unfair labor practice provisions of the Act, not internal union matters.\textsuperscript{388}

In \textit{Local 20, International Brotherhood of Teamsters v. Morton},\textsuperscript{389} application of state law to award damages for peaceful union secondary activity was held preempted by the Court, even though the particular form of conduct was neither arguably protected nor prohibited by sections 7 or 8 of the Act.\textsuperscript{390} Further inquiry was necessary to determine whether Congress had occupied the field and closed it to state regulation.\textsuperscript{391} Stated differently, application of state law might frustrate the purpose of the federal legislation.

Apart from the unfair labor practice provisions administered by the Board, section 303 of the Act authorizes state and federal court civil damage actions by any person injured by certain secondary boycott activities.\textsuperscript{392} The conduct affording a damage claim under section 303 tracks that proscribed by section 8(b)(4), but section 303 specifies a remedy (damages) different from the section 8(b)(4) administrative remedy (cease and desist order). In addition to a permissible damage award for conduct clearly violative of section 303, the district court in \textit{Morton} awarded damages for boycott persuasion not violative of federal law but violative of state common law.\textsuperscript{393} The Supreme Court found that section 303 de-limited boycott illegality and that the state prohibition therefore intruded

\begin{itemize}
\item \textsuperscript{384} Local 100, United Ass'n of Plumbers v. Borden, 373 U.S. 690 (1963).
\item \textsuperscript{385} Id. at 697.
\item \textsuperscript{386} Id. at 698.
\item \textsuperscript{387} Local 207, Int'l Ass'n of Iron Workers v. Perko, 373 U.S. 701 (1963).
\item \textsuperscript{388} Id. at 707-08.
\item \textsuperscript{389} 377 U.S. 252 (1964).
\item \textsuperscript{390} Id. at 258.
\item \textsuperscript{391} Id.
\item \textsuperscript{392} 29 U.S.C. § 187 (1982).
\item \textsuperscript{393} 200 F. Supp. 653, 656, 661 (1961).
\end{itemize}
upon an area left unregulated by Congress.\textsuperscript{394} By selecting the forms of economic pressure proscribed by section 303, Congress struck a balance between employer and union power to pursue their interests, and preserved the union's right to exert certain pressures including the peaceful persuasion of neutral employers to support the union's primary dispute.\textsuperscript{395} Only coercive means were proscribed. Speaking for the Court in \textit{Morton}, Justice Stewart stated:

This weapon of self-help, permitted by federal law, formed an integral part of the [union's] effort to achieve its bargaining goals during negotiations with the [employer]. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. . . . If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy.\textsuperscript{396}

The same considerations impelled the Court to hold invalid the district court's award of punitive damages for the section 303 violations.\textsuperscript{397} The federal scheme contemplated only actual, compensatory damages, and state law must yield to the federal limitations. The Court thus recognized that punitive damages pose a threat far more serious than compensatory damages to unions as institutions.

Concern also existed over enmeshment doctrines which gave the union the burden of separating the consequences of lawful from associated unlawful conduct (\textit{e.g.}, violence accompanying peaceful picketing). Absent clear disentanglement, all losses were attributed to the unlawful conduct. \textit{Morton} held that damage recovery in section 303 actions was limited to the direct and proximate consequences of proscribed secondary activity, and that punitive damages were not recoverable.\textsuperscript{398} Parallelizing that holding, during the next term, in \textit{United Workers v. Gibbs}\textsuperscript{399} the Court held that as to claims involving force and violence the "permissible scope of state remedies . . . is strictly confined to the direct consequences of [illegal conduct] and does not include consequences resulting from associated peaceful picketing or other union activity."\textsuperscript{400} Further, the evidence must establish a "proximate relation" between the illegal acts "complained of, on the one hand, and the loss of [profits or] wages

\begin{itemize}
\item \textsuperscript{394} 377 U.S. at 259.
\item \textsuperscript{395} \textit{Id}.
\item \textsuperscript{396} \textit{Id.} at 259-60.
\item \textsuperscript{397} \textit{Id.} at 260.
\item \textsuperscript{398} \textit{Id}.
\item \textsuperscript{399} 383 U.S. 715 (1966).
\item \textsuperscript{400} \textit{Id.} at 729.
\end{itemize}
allegedly suffered, on the other."\textsuperscript{401} The Court stressed that "[w]here the consequences of peaceful and violent conduct are separable . . . it is clear that recovery may be had only for the latter."\textsuperscript{402} Further, the plaintiff, not the union, has the burden of proving the inseparability of legal and illegal acts, and a proximate relation between the illegal conduct and the damage.

The Court further stressed in \textit{Gibbs} the necessity for strict proof of union responsibility under the federal standard contained in the Norris-La Guardia Act.\textsuperscript{403} Thus, union liability for force and violence is contingent on clear proof of actual participation in, or authorization or ratification of, illegal action. The Court recognized "the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control."\textsuperscript{404}

State antitrust laws were not allowed to intrude upon or limit areas carved out for mandatory collective bargaining under the federal Act. In \textit{Local 24, International Brotherhood of Teamsters v. Oliver},\textsuperscript{405} to prevent undermining of the negotiated drivers' wage scale the parties negotiated provisions regulating the carriers' leasing of vehicles to owner-operators. The Court found that the provisions were directly related to the basic contractual wage structure and were therefore mandatory bargaining subjects immune from state regulation.\textsuperscript{406}

\begin{itemize}
\item \textbf{B. Permissive State Jurisdiction}
\end{itemize}

State jurisdiction and remedies were permissible in those few situations involving areas of serious local concern and/or of only peripheral concern to the NLRA or federal labor policy. Thus, for example, the Court allowed state jurisdiction in situations involving violence, mass picketing, intimidation, and threats to the public order,\textsuperscript{407} "because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction."\textsuperscript{408}

State civil actions for malicious libel arising out of defamatory statements published during a union organizing campaign were allowed.\textsuperscript{409} The Court found that the NLRA did not protect such material, that the Board was not concerned with an individual's reputation, and that the

\textsuperscript{401} Id. at 730.  
\textsuperscript{402} Id. at 732.  
\textsuperscript{403} Id. at 735-36.  
\textsuperscript{404} Id. at 736-37.  
\textsuperscript{405} 358 U.S. 283 (1959).  
\textsuperscript{406} Id. at 295-97.  
states had an overriding interest in protecting their residents from malicious libels.\textsuperscript{410} To avoid state interference with the free labor-management debate favored by national labor policy, however, state relief was confined to situations involving malicious statements causing actual damage.\textsuperscript{411}

State jurisdiction over civil actions for wrongful expulsion from union membership was upheld by the Court, because the Act did not regulate such internal union affairs, states traditionally determined and enforced rights of union membership, and absence of state jurisdiction would leave the member remediless.\textsuperscript{412} "Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act."\textsuperscript{413}

Paramount federal interests which would normally warrant preemption were also lacking in \textit{Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association}.\textsuperscript{414} In \textit{Hanna Mining}, the Board had declined to order an election because the engineers were supervisors excluded from the Act's coverage.\textsuperscript{415} The Court found that this Board determination resolved the nonapplicability of the Act to the employees involved "with the clarity necessary to avoid preemption" of the state action.\textsuperscript{416} The Court rejected the further argument that a state court injunction against the picketing would intrude upon the Board's authority to regulate potential secondary effects of the picketing.\textsuperscript{417} It noted that the Board's General Counsel had determined that the union's earlier picketing was primary and not secondary.\textsuperscript{418} Further, since the union's primary picketing was not protected by the Act, state regulation of any secondary aspects would be peripheral to and consistent with the regulatory scheme of the Act.\textsuperscript{419} The Court stated that "the present case . . . finds itself at that far corner of labor law where . . . federal occupation is at a minimum and state power at a peak."\textsuperscript{420}

\begin{footnotes}
\item[410.] \textit{Id.} at 63-64.
\item[411.] \textit{Id.} at 64-65.
\item[412.] \textit{International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 620 (1958).}
\item[413.] \textit{Id.}
\item[414.] 382 U.S. 181 (1965).
\item[415.] \textit{Id.} at 184-85.
\item[416.] \textit{Id.} at 190.
\item[417.] \textit{Id.} at 192-93.
\item[418.] \textit{Id.} at 191-92.
\item[419.] \textit{Id.} at 192-93.
\end{footnotes}
C. Board Jurisdiction

Further strengthening the federal regulatory process, the Warren Court determined that federal district courts may enjoin state action which constitutes an intrusion on subject matters within the exclusive jurisdiction of the Board. In *Capital Service Inc. v. NLRB*, following state court issuance of an injunction against certain union picketing, the Board's Regional Director issued an unfair labor practice complaint against certain aspects of the picketing and, pursuant to the statutory scheme, petitioned a federal district court for an injunction against the picketing pending final adjudication by the Board. Simultaneously with filing the federal court petition, the Board filed suit in the same federal court requesting that the employer be enjoined from enforcing the state court injunction. Because of the exclusiveness of the Board's remedial jurisdiction in matters regulated by the Act, the Supreme Court upheld the federal court authority. The Court stated that "where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right." Further, while Congress had enacted certain prohibitions against federal injunctions of state proceedings, the injunction involved here was necessary in aid of the federal court's jurisdiction over the NLRA case and thus permitted under exceptions specifically allowed by Congress.

Protection of federal labor legislation against frustration or impairment by the states was again emphasized by the Court in *Nash v. Florida Industrial Commission*, where the Court held that a state cannot refuse to pay its unemployment insurance to persons solely because they brought unfair labor practice charges against their former employer. In *Nash* an employee filed a charge with the Board alleging she was discriminatorily laid off because of her participation in a strike. The State Industrial Commission found that the filing of the charge constituted disqualification from unemployment due to a labor dispute under state law. The employee was thus denied unemployment for the pe-
period of the pendency of the charge. The Court found that the state action frustrated the congressional purpose to leave persons free to file charges with the Board, since implementation of the Act depends upon the initiative of individual persons filing charges.432 “A national system for the implementation of this country’s labor policies is not so dependent on state law. Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government’s constitutional plan.”433 The state law as applied in the case conflicted with the supremacy clause of the Constitution.434

The Court thus effectively eliminated the states from any significant role in interstate labor relations, and created a federal enclave wherein unions enjoyed substantial protection against the generally unsympathetic judgments of state legislatures, judges and juries.

The Court substantially broadened the scope of the federal regulatory scheme over jurisdictional disputes by assigning the NLRB a decisional role previously declined by the Board. Section 10(k) of the Act, a part of the Taft-Hartley amendments in 1947, provides that where an employer is subjected to union pressure (i.e., strikes, threats) over conflicting union claims to work assignments “the Board is empowered and directed to hear and determine the dispute. . . .”435 Since the enactment

432. Id. at 239.
433. Id.
434. Id. at 239-40.
435. Section 8(b)(4)(i)(ii)(D) of the Act, in relevant part, makes it an unfair labor practice for a labor organization or its agents:

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . .

29 U.S.C. § 158(b)(4)(i)(ii)(D) (1982). Section 8(b)(4)(D), the substantive provision relating to jurisdictional disputes, thus proscribes certain union conduct (e.g., strike) which has as an object forcing or requiring the employer to make a change in his assignment of work. The substantive effect of section 8(b)(4)(D) is qualified by the special procedure set forth in section 10(k) which provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

of section 10(k) the Board had consistently held that it satisfied its statutory duty to "hear and determine the dispute" by ascertaining whether the striking union was entitled to the disputed work by virtue of either an outstanding Board order or certification, or a collective bargaining agreement, and that unless one of these conditions was met the union could not override the employer's normal right to assign work to employees of its own choosing.

In *NLRB v. Radio and Television Broadcast Engineers Union, Local 1212 (Columbia Broadcasting System)*, the Warren Court rejected the Board's view and held that section 10(k) requires the Board to decide jurisdictional disputes on their merits. CBS had contracts with two unions, one representing television technicians and the other stage employees. Neither the labor contracts nor Board certification clearly apportioned the work of providing electric lighting for television shows, and CBS was "caught 'between the devil and the deep blue'" in the constant disputes which arose over the proper assignment of this work. CBS assigned the lighting work for a major telecast to the stage employees, whereupon the technicians refused to operate the cameras and caused the program's cancellation. The Board found that the technicians' union was not entitled to the work under either a Board order or certification, or contract, but refused to consider other criteria or to make an affirmative award of the work between the competing groups. The Court held that the Board should have decided which group was entitled to the work. Speaking for the Court, Justice Black made clear that industrial peace required the permanent settlement of jurisdictional disputes:

To determine or settle the dispute as between [the groups] would normally require a decision that one or the other is entitled to do the work in dispute. Any decision short of that would obviously not be conducive to quieting a quarrel between two groups which, here as in most instances, is of so little interest to the employer that he seems perfectly willing to assign work to either if the other will just let him alone. This language [of section 10(k)] indicates a congressional purpose to have the Board do something more than merely look at prior Board orders and certifications or a collective bargaining contract to determine whether one or the other union has a clearly defined statutory or contractual right to have the employees it represents perform certain work tasks. For, in the vast majority of cases, such a narrow determination would leave the broader

438. 364 U.S. at 575.
439. *Id*.
440. *Id.* at 577-78.
441. *Id.* at 579.
problem of work assignments in the hands of the employer, exactly where it was before the enactment of § 10(k)—with the same old basic jurisdictional dispute likely continuing to vex him, and the rival unions, short of striking, would still be free to adopt other forms of pressure upon the employer.

The Court did not preclude the Board from continuing to inquire whether the striking union was entitled to the work in dispute based upon a prior Board order or certification, or contract, but held that a negative answer did not conclude the Board’s duty. Rather, the Board must proceed and determine affirmatively whether one or the other disputing unions (or groups of employees) is entitled to do the work in controversy. The Court recognized that its mandate required the Board to exercise “powers which are broad and lacking in rigid standards to govern their application,” but the Court expressed confidence that the Board, with its “long experience in hearing and disposing of similar labor problems,” and with “a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem,” would rise to the task. “Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.”

The Act clearly vests the Board with jurisdiction over unfair labor practice and representation matters, whether or not such matters may also involve breaches of collective bargaining agreements. The Act provides that the Board’s power “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.” By the same token, as explored earlier, national labor policy encourages and supports private arbitration of disputes arising under collective bargaining agreements. The Act provides that “final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application of interpretation of an existing collective-bargaining agreement.”

The Warren Court did not allow policies favoring arbitration to divest the Board of jurisdiction over contract related disputes. Harmonizing the potentially conflicting policies in NLRB v. C & C Plywood

442. Id.
443. Id. at 582.
444. Id. at 583.
445. Id.
446. Id.
447. Id.
Corp., the Court affirmed the Board's authority to construe collective bargaining agreements where necessary to resolve unfair labor practice issues. The Court acknowledged that the Board lacked general jurisdiction over alleged violations of collective bargaining agreements, and that by section 301 of the Act Congress had conferred such jurisdiction upon the courts. Congress feared that to have given such power to the Board "would have been a step toward governmental regulation of the terms of those agreements." Such policy, however, was not impaired in the case before the Court because the Board "has not imposed its own view of what terms and conditions of the labor agreement should be" but merely construed the agreement "to determine that the union did not agree to give up" the statutory right to bargain about the matter in question.

The Court held further in NLRB v. Acme Industrial Co. that a contractual grievance and arbitration procedure did not toll or preclude the Board's enforcement of the statutory duty of furnishing information. The employer could not refuse to furnish the union with information relevant to grievances over removal of plant equipment and subcontracting on the ground that by the contractual grievance and arbitration provision the parties had channeled their requests for information to the arbitrator. The Court emphasized that its conclusion did not conflict with decisions under section 301 giving great deference to arbitration for "in assessing the Board's power to deal with unfair labor practices, provisions of the Labor Act which do not apply to the power of the courts under § 301, must be considered."

The Court noted that in enforcing the union's right under section 8(a)(5) to information essential to carrying out its statutory responsibilities, the Board was not interfering with, but rather was aiding, the arbitral process. The Board "was not making a binding construction of the labor contract. It was only acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." Prompt receipt of relevant information was essential to permit the grievance proce-

452. Id. at 427-30.
453. Id. at 427.
454. Id.
455. Id. at 428.
456. Id.
458. Id. at 438-39.
459. Id. at 435-36.
460. Id. at 436.
461. Id. at 438.
462. Id. at 437.
dure leading to arbitration to function properly, for it would permit unmeritorious claims to be sifted out promptly. The Court stated:

Far from intruding on the preserve of the arbitrator, the Board's action was in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the Respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. The expensive arbitration might be placed upon the union only for it to learn that the machines had been relegated to the junk heap. Nothing in federal labor law requires such a result.\(^4\)

Implicit in the Court's reasoning is recognition that NLRB processes are paid by taxpayers rather than users, whereas going to costly arbitrations each time threshold information is needed could break the union bank.

**POSTSCRIPT**

In retrospect, one is struck by the sophisticated vision of the influential justices of the Warren Court. Strand by strand over the years the Court spun a comprehensive web of federal labor relations regulation. Despite the renovation of amendatory legislation the spirit of the Wagner Act remained the Court's guiding philosophy.

Workforce improvement in wages, hours, and terms and conditions of employment would be achieved through a collective bargaining system which encompassed strong unions. Protection of employee organizational and representational rights was predominant. Individual employee interests were relevant but subservient to majoritarian principles. Combination, informed by the overriding concept of unity of interest, was the touchstone.

The reality is that the Court diverted the potential antiunion impact of the Taft-Hartley and Landrum-Griffin labor relations amendments. Destructive impact was both patent and incipient in the statutory language as written by Congress and as applied by the NLRB. Neutralization of such impact must surely be viewed as the Warren Court's most significant contribution to labor's cause.

But now there is a new NLRB, dominated by the appointments and philosophies of the Reagan Administration. This NLRB has proceeded with alacrity to respond to its perceived constituency.\(^4\) Indeed, NLRB

\(^4\) Id. at 438-39.

precedents have become like a "restricted railroad ticket, good for this
day and train only." The Board revisions are attacked by union repre-
sentatives for "malevolence," and defended by management represent-
atives as a "return to sanity."

Many of the Board reversals reflect a substantial deregulation of em-
ployer conduct with a concomitant potential disenfranchisement of em-
ployee rights and interests. The NLRB appears intent upon placing its
politicized imprimatur on national labor policy and thereby reordering a
perceived imbalance.

By the very nature of legal events major NLRB decisional reversals
will reach the Court. In light of the substantial, supervening change in
Court membership and ideology since Warren Court days, the outcome
is uncertain. Preliminary returns suggest that labor's ship is moving
into troubled waters and will miss the Warren Court's gentle currents.

465. Smith v. Allwright, 321 U.S. 649, 669 (1944) (metaphor not applied to NLRB but used as
self-criticism by the Court).

466. AFL-CIO Views on NLRB Actions, in News and Background Information, 116 LAB. REL.

467. Rulemaking as Aid in NLRB Policy Reversals, in News and Background Information, 116
LAB. REL. REP. (BNA) 142 (June 24, 1984) (remarks of Peter Nash).

468. See generally Modjeska, supra note 464.