Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law

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I.
INTRODUCTION

The right of American workers to form meaningful unions and to engage in effective forms of protest and collective bargaining was won only in the 1930s and only by tremendous political struggle in the face of extraordinary resistance from employers and their allies in government.\(^1\) The chief product of this effort was one of the most important pieces of legislation in the Twentieth Century, the National Labor Relations Act, or Wagner Act, of 1935. The Wagner Act was by no means fundamentally radical; it did not in any way portend the destruction of private property, wage labor, or capitalism. At the same time, the Wagner Act was a remarkably progressive legal document, consistent with a genuinely reformist vision of labor relations. It could be read to support effective rights to organize, strike, and compel collective bargaining, to sanction a vibrant labor movement, and even to endorse a truly progressive regime of "industrial democracy."\(^2\)

But the fact that such a reformist regime was consistent with the Wagner Act did not make it the law in any practical sense. As is true of all important statutes, the meaning of the Wagner Act was from the outset quite contingent and would follow not simply from a straightforward application of its text, or even its legislative history, but from a wide-ranging struggle to hammer out its meaning.\(^3\)

An important actor in the struggle to define the meaning of the Wagner Act was the Supreme Court. As most legal scholars know, one of the Late New Deal Court’s defining deeds was to uphold the Act against constitutional challenge.\(^4\) Less well known, however, is the fact that this Court did much to define the substance of the Wagner Act. As Karl Klare states, the Roosevelt Court of the late 1930s and early 1940s took up “the task of plotting the contours of the nation’s new labor law.” As it carried out this fundamentally political project, the Court “shap[ed] the ideological and institutional architecture of the modern capitalist workplace.”\(^5\)

The Court managed to shape the meaning of the Wagner Act within the first six years or so of the statute’s enactment. In a handful of decisions, some of them ostensibly in the interests of labor, the Court essentially purged the Act of its more reformist tendencies.\(^6\) As scholars like Klare

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3. Id. at 266, 291.
6. Id. at 297–99. For example, in the very case in which it upheld the Act’s constitutionality, the
argue, these decision limited labor’s protections under the Act, endorsed a traditional conception of private property and contract, affirmed a long-established distribution of power and control in the American workplace, and eventually influenced labor to trade activism for quietism, direct action for litigation, and the radical unionism of the 1930s and early 1940s for the “responsible,” or “business” unionism that would characterize the rest of the Twentieth Century and carry into the Twenty-First Century.

At the center of this process, as sociologist Holly McCammon demonstrates, was the Court’s erosion of the right to strike. With cases like *NLRB v. Fansteel*, which held the sit-down strike illegal and unprotected, and *NLRB v. Mackay Radio and Telegraph Co.*, which exposed strikers to permanent replacement, the Court dramatically narrowed the legal definition of acceptable strikes, limiting their frequency and militancy, and reducing their overall effectiveness as a means of challenging employers’ sovereignty over the workplace.7 By this attack on the right to strike, the nominally progressive Late New Deal Court helped to deny labor free resort to tactics essential not only to mounting any meaningful challenge to capital—and with this, the very prospect of labor radicalism—but also to advancing the Act’s basic agenda of collective bargaining.8

To be sure, as critics of the Court’s role in this process recognize, other factors have also been important in organized labor’s long decline. Frequently mentioned in this connection is the internal history of the post-war labor movement, which has often been characterized by corrupt,

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conciliatory, and incompetent leadership,\textsuperscript{9} as well as deindustrialization, the collapse of political liberalism, and other unfavorable changes in the political and economic landscape.\textsuperscript{10} Legal phenomena besides the Court’s jurisprudence in the late 1930s and early 1940s are mentioned as well. Some commentators have cautioned against overstating the reformist tendencies of the Wagner Act itself.\textsuperscript{11} Others have stressed, rather convincingly, that the Taft–Hartley Act of 1947, which dramatically transformed the structure of the National Labor Relations Board (Board) as well as the substantive law, no doubt did at least as much as the Late New Deal Court to alter the meaning of the Wagner Act.\textsuperscript{12} Still others have pointed to the impact of court decisions from the mid–1940s onward in rendering the labor law less favorable to labor.\textsuperscript{13} If nothing else, these diverse accounts demonstrate quite reasonably that the role of the Late New Deal Court in transforming the American labor movement should not be taken as the only, or even the central, explanation for labor’s decline. At the same time, the argument that the Late New Deal Court played a very important role alongside other factors in defining the substance of the labor law and in contributing to labor’s decline is compelling.

An immensely important, and as yet almost completely overlooked, chapter in the Supreme Court’s erosion of New Deal labor law involved the law of mutiny and its bearing on a brief, peaceful, and seemingly well-justified strike by a handful of Depression-era seamen aboard a nondescript freighter called the \textit{City of Fort Worth}. Although not a concern of many contemporary labor lawyers and labor law scholars, and little discussed either in the scholarly literature or teaching materials, the Court’s resolution


of this matter, in *Southern Steamship Co. v. NLRB*, 14 helped to define the meaning of post–New Deal labor law and to shape the history of the American labor movement.15

On the morning of July 18, 1938, just as the *City of Fort Worth* prepared to embark from the Port of Houston bound for its home in Philadelphia, thirteen crewmen, all members of the radical and militant National Maritime Union (NMU), struck to protest their employer’s unfair labor practices: its refusal to recognize and bargain with their union. The strikers remained aboard ship throughout and their refusal to work successfully prevented the ship from sailing. But the strike was free of any violence and did not entail any threat to the ship’s safety or any interference with its primary functions. Indeed, the whole affair was rather tame; by the end of the day, the dispute was temporarily resolved and the ship was under way. Although the ship had no further labor troubles of any kind during the voyage, when the *City of Fort Worth* reached Philadelphia, the ship’s officers discharged five crewmen who had played an active role in the strike. This, it seemed at the time, constituted another violation of the Wagner Act and in the view of the union, the Board, and the Third Circuit Court of Appeals, clearly warranted the standard remedies of reinstating the fired strikers and awarding them back pay. But when the matter was finally decided by the Supreme Court, the Court found against the Board and the seamen.16 It held that a shipboard strike constituted an act of mutiny, a felony under federal law, that the strike aboard the *City of Fort Worth* was illegal and unprotected, and that the Board therefore could not remedy the discharges by ordering that the seamen be reinstated and provided back pay.17

16. An important point about the term “seamen” should be made at the outset. Seamen is a term of art, albeit one subject to somewhat varied definition. As I use the term here, it denotes shipboard workers generally, but so-called “unlicensed” personnel in particular. Through the Great Depression, this class of shipboard workers included members of the deck crew, including “deck boys,” “able-bodied seamen,” and “boatswains; members of the engine department, including “trimmers,” “oilers,” “stokers,” and engineers; and the catering crew, meaning mainly stewards and cooks. Not included are the so-called “executive departments”: the chief engineer; the chief steward; the mates; and the captain, or “master.” I avoid the term “sailor,” as it usually denotes only those seamen who are part of a vessel’s deck crew. See James C. Healey, *Foc’S’Le and Glory-Hole: A Study of the Merchant Seamen and His Occupation* 6–10, 18–38 (1936). As we shall see, the strike aboard the *City of Fort Worth* involved unlicensed personnel, who were the mainstay of the NMU’s membership.
On one level, *Southern Steamship* is a case about the labor rights of seamen. Unlike the great industrial sit-down strikes of the 1930s—with which it was on legal grounds somewhat dubiously identified—the strike aboard the *City of Fort Worth* was hardly an unusual event among seamen, who, as this article shows, have always been among the most militant workers in Western society. Nor was the Court’s decision to prohibit the shipboard strike, which left seamen no meaningful right to strike at all, in the least bit unprecedented. As we shall see, the tradition of labor protest is so pronounced among seamen that it is from their world that the very word strike derives—as in “to strike” the sails. As this etymology implies, very often such strikes took place aboard ship. In fact, in the months leading up to the *City of Fort Worth* strike, the shipboard strike had proven decisive to the belated rise of effective union representation among seamen—and to labor’s belated realization, in the face of employer resistance and government ambivalence, of rights ostensibly guaranteed by the Wagner Act. At the same time, the courts, which had long treated seamen in a speciously paternalistic way, had also long called on mutiny law to prohibit such strikes. By deeming the strike aboard the *City of Fort Worth* a mutiny, the *Southern Steamship* Court not only affirmed a traditional function of mutiny law (albeit on the basis of authority that had by the late 1930s become very questionable) and the paternalistic view of seamen that underlay this function. In addition to this, and against the view of the Board and the Wagner Act’s seemingly substantial expansion of labor rights, the Court essentially deprived seamen of the right to strike and affirmed their inferiority under the law.

On another level, *Southern Steamship* affected the meaning of the Wagner Act for all workers. It accomplished this by advancing a multiple part doctrine. First, the Court’s decision broadly upheld traditional notions of private property and contract against the Wagner Act’s implication and labor’s demand that these rights of capital be compromised to accommodate limited rights for labor. *Southern Steamship*, perhaps even more than *Fansteel*, affirmed the position that strikes at the point of production or in violation of certain contractual regimes would not be tolerated. Second, *Southern Steamship* dramatically expanded *Fansteel* in another way. While *Fansteel* rendered unprotected those strikes that were both unlawful and featured manifest violence, *Southern Steamship* held that the mere unlawfulness of a strike limited the Board’s remedial powers and with this the right to strike. The Court justified this rule by speculating widely as to the inherent risks of mutiny. In so doing it established this kind of speculation as a legitimate mode of analysis for courts to engage in to test

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the limits of the Board's remedial powers and the reach of the Act's protections. In fact, *Southern Steamship* established a clear rule to the effect that the Board's remedial powers and the Act's protections should yield *wherever* they came into conflict with other federal statutes or policies. As we shall see, every aspect of this doctrinal approach has had important practical consequences. This was most recently and ominously on display in the Court's own 2002 decision, *Hoffman Plastic Compounds v. NLRB*, where a majority of the Court relied on *Southern Steamship* to effectively deny undocumented workers any rights under labor law.19

None of this, it is important to stress, was foreordained by the terms and history of the Wagner Act, or by the facts of the case. In fact, as we shall also see, the Court's reasoning is highly questionable with regard to its interpretation of mutiny law, its view of the Wagner Act itself, as well as its incorporation of the facts. It is for this reason that *Southern Steamship* reveals so much about the Court's view of the proper relationship of labor and capital—so much more than it does the meaning of the law. Indeed, *Southern Steamship* forced the Court to lay bare its views on the respective rights of labor and capital under the New Deal labor law. For, as I shall argue, the modern ship evolved as a crucible of class conflict, including shipboard strikes. And as it was practiced by Depression-era seamen, the shipboard strike was an enormously powerful weapon. While it did not displace the superiority of capital over labor, the shipboard strike did much to reduce the huge disparity in power that characterized this relationship aboard ship throughout the modern era. By resorting to the shipboard strike, seamen of the 1930s were able to give real effect to labor law's promises. At the same time that the shipboard strike was a tremendously effective form of labor protest, it was also the *only* effective form of labor protest available to seamen. The Court knew that to deny the legality of shipboard strikes would leave seamen with no meaningful right of labor protest at all. And yet it did just this. It is for these reasons that *Southern Steamship* provides perhaps such a clear example of the Court's view of labor rights as narrow and limited under the Wagner Act.

Of course to say the Court subverted the Wagner Act in these ways should not be taken to imply that it conspired to do so, or was somehow iron-bound by its members' class interests. Such scenarios are certainly possible, given the American judiciary's persistent and well-documented bias against the interests of labor.20 But these scenarios are not easy to demonstrate. Nor are they necessary to explain a decision likely rooted more in a genuine faith among the members of the Court in the traditional

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virtues of private property and contract, as well as in the merits of industrial order and the sanctity of the law itself. In the end, what the Court did to the Wagner Act in *Southern Steamship* says at least as much about the Court’s jurisprudential framework and its overall political orientation as it does the character or political affinities of the justices.21

I organize this Article in the following way: Drawing on literature on the social history of the maritime world, Part II considers broadly the condition of labor aboard the modern merchant ship. I describe the modern ship as a distinctly capitalist institution that emerged in the Eighteenth Century and that, in its basic structures, remained unchanged through the Nineteenth Century into the early Twentieth Century. The social and material world of the modern ship emerges as a cauldron of class conflict whose main structures remained very much in place aboard ships like the *City of Fort Worth* in the 1930s. In Part III, I discuss the prominent role of shipboard strikes in defining the world of shipboard labor and the consistency with which this form of labor protest was prohibited by the law of mutiny. In Part IV, I consider more narrowly the state of shipboard labor relations as they existed in the three or four decades leading up to the *Southern Steamship* mutiny. This Part emphasizes the slow rise of effective, radical unionism. Parts V and VI are the analytical heart of the Article. In Part V, I examine the strike itself and the history of the legal controversy, from the trial examiner’s decision to that of the Supreme Court. Drawing in part on arguments raised by the parties themselves, I show in this Part the poverty of the Court’s reasoning and the ample opportunities, which it ignored, to decide the matter differently. In Part VI, I take up *Southern Steamship*’s role in transforming New Deal labor law. I do this by laying out both its jurisprudential connotations and its more doctrinal implications—both for seamen and for workers in general. I also try to situate the case within its historical context. Part VII is a relatively brief conclusion in which I offer a postscript on the fate of the NMU and seafaring labor. I also ask what effect a different outcome in *Southern Steamship* might have had on that union, on shipboard labor relations, and on the American labor movement generally.

II.
THE MODERN SHIP AS A CRUCIBLE OF CLASS CONFLICT

In the scheme of things, the strike aboard the *City of Fort Worth* on July 18, 1938, was neither a random nor a particularly exceptional event. In fact, the strike was in many ways the culmination of a long history of class conflict aboard ships. The structure of the modern ship, which came to

embody perhaps more than any comparable institution, the contradictions of labor in capitalist society, made such conflict inevitable. Indeed, the structure of the ship not only portended the City of Fort Worth strike, but also ensured that in passing on the legality of that strike, the Court would have to confront head-on the limits of labor freedom under the Wagner Act. It is for this reason, as well as the fact that it begins to reveal some of the law's ingrained biases in this context, that a review of the class structure of the modern ship provides a useful introduction to the Southern Steamship affair.

The class structure of the modern ship was defined above all by the rise of capitalism. Prior to capitalism's penetration of the maritime world in the Seventeenth and early Eighteenth centuries, medieval shipboard life was dominated by norms of paternalism, reciprocity, and stability. As in other contexts, the rise of capitalism displaced these medieval norms with a dynamic, profit-driven logic of commodification and accumulation. This transformation was at its most salient with respect to labor relations. While medieval norms often encouraged enduring and mutually supportive relationships between a seaman and his captain, capitalism replaced this with a system of anonymous and transitory contracts, mediated by money wages, and largely devoid of any kind of security against loss or injury. As this transformation unfolded, the seaman's worth was radically recast in terms of the relationship between the costs of maintaining him in wages and accommodations, on the one hand, and the value of his work to a commercially successful voyage, on the other. A hard-driven crew and a hard-driven ship, which would likely have constituted serious transgressions of medieval workplace norms, now appeared as legitimate—in fact, from the vantage of ship owners, desirable—methods to achieve a more profitable voyage.

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22. I do not mean to idealize the condition of medieval shipboard labor, which was characterized by its own kinds of unpleasantness: social immobility, material poverty, parochialism, and the like. Rather, in drawing the contrast between the modern and the medieval, I mean to show the unique ways in which the penetration of capitalism made the condition of shipboard labor not only unpleasant, but unpleasant and immersed in class conflict. All the same, the cooperative moral economy of medieval seafaring is clearly suggested in the French LAWS OF OLERON and the BARCELONA MARITIME CODE, both of which emerged in the Thirteenth Century. They provided, among other things, for the captain to submit important decisions to crew for approval, for the distribution of risks and gain between captain and crew, for the captain to care for lost or injured seamen, and for mutual defense and support generally.

23. With very few exceptions, the modern maritime world from its advent through the mid-twentieth century was composed entirely of men. For this reason alone, I use male pronouns throughout this article.

The outstanding expression of the ship owner’s organization of labor as it emerged aboard the modern ship was its intense authoritarianism, which on the modern ship evolved well beyond the inherent needs of navigation and beyond tradition to entail the very different function of better exploiting labor from the ship’s crew. With capitalism, the structure of authority aboard ship became both more hierarchical and more dictatorial. Indeed, the captain emerged as “master” of the vessel, his reign governed by the law of profit. He became the absolute arbiter of the ship’s interests while away from home port, charged by the ship’s owners (of whom he was sometimes one) with managing the ship and its cargo and advancing the owners’ interests against all impediments—for example, poor weather and sea conditions or competition from rivals. And he assumed a near absolute right to control the ship’s crew. It was the captain’s near complete prerogative to control the size of the ship’s crew, the structure of its workday, and the nature of individual assignments. Some captains bowed to limitations imposed by custom or law, or more often to the threat of labor unrest, and maintained more or less adequately sized crews, reasonable work schedules, and perhaps even a bit of deference to the crew itself in sorting out the ship’s work. Many others, though, simply managed the ship and its crew according to their own commercially driven judgment. As a result of these changes, the ship became quite literally a model of industrial organization.

The captain’s right to control the crew entailed a right to discipline it as well. Indeed, for over two centuries of modern seafaring—from the Eighteenth Century until about 1900—this prerogative was backed by a notorious right to beat, threaten, or otherwise punish his crew almost at will. Variously justified, both legally and morally, by patriarchal notions of the captain as “father” to a childish crew, or by appeal to the practical virtues of brutality in a dangerous realm, the captain’s authority included the right to inflict corporal punishment on any member of his crew. Even the doctrines of “reasonable” and “proportionate” punishment, which

25. REDIKER, supra note 18, at 111–14, 207–12.
26. Id. at 84, 211–12.
28. In the words of Peter Linebaugh and Markus Rediker, leading social historians of the maritime world, “the work, cooperation, and discipline of the ship made it a prototype of the factory.” LINEBAUGH & REDIKER, supra note 24, at 150.
29. See, e.g., Bangs v. Little, 2 F. Cas. 587 (D. Me. 1839) (No. 839); Wilson v. The Mary, 30 F. Cas. 146 (E.D. Pa. 1828) (No. 7,823); Rice v. The Polly & Kitty, 20 F. Cas. 666 (D. Pa. 1879) (No. 11,754); Fuller v. Colby, 9 F. Cas. 980, 985 (C.C.D. Mass. 1846) (No. 5,149). The captain had a reciprocal obligation to “protect” the crew, which was limited but not altogether meaningless. Shorey v. Rennell, 22 F. Cas. 1 (D. Mass. 1858) (No. 12,806).
30. See, e.g., The Palledo, 18 F. Cas. 1013 (D. Me. 1865) (No. 10,677); Thompson v. Hermann, 3 N.W. 579 (Wis. 1879).
Nineteenth Century American courts invoked ostensibly to place some limits on the captain’s power, often served perversely to justify abuses.\textsuperscript{31} As late as 1891, a federal court determined that breaking a broomstick over a sailor’s head for a relatively trivial act of insubordination was “not an unusual means of punishment” for a captain to inflict.\textsuperscript{32} In fact, in the American context, corporal punishment reached its most pervasive levels in the several decades following the Civil War.\textsuperscript{33} Not until 1898 did the law explicitly prohibit corporal punishment aboard merchant ships.\textsuperscript{34} Even after this, courts continued to speak of “reasonable” beatings.\textsuperscript{35} Corporal punishment likely did not fade from widespread use on American ships until a decade or so into the Twentieth Century.\textsuperscript{36} It is just as important to note that corporal punishment was but the most extreme of a number of methods of punishment that ship’s captains routinely visited on their crews. These included imprisoning seamen, denying them rations, putting seamen “in irons,” assigning them extra labor, subjecting them to dangerous conditions (for example, ordering a sailor aloft during a fierce storm), marooning them in distant ports, and refusing

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  \item 31. On judicial conceptions of these doctrines, see, for example, United States v. Freeman, 25 F. Cas. 1208, 1210 (C.C.D. Mass. 1827) (No. 1208); Brown v. Howard, 14 Johns. 119 (N.Y. Sup. Ct. 1817); Sampson v. Pease, 6 Haw. 2 (1867); The Lizzie Burrill, 115 F. 1015 (S.D. Ala. 1902). A number of cases illustrate the courts’ frequent resort to these doctrines to justify corporal punishment. For example, when in one instance the captain randomly, but reasonably, beat up one of several crewmen for responding too slowly to his orders, a federal court cited the master’s need to compel immediate obedience as grounds for him to draw on “all the force that is actually necessary to secure it, even to the extent of striking blows.” Stout v. Weedin, 95 F. 1001, 1002 (D. Wash. 1899). Similarly, it was deemed reasonable for a riverboat captain to punch a female seaman (a chambermaid), break her nose, and generally slap her around because she was “insolent and insubordinate,” and possibly threatened the captain with a lump of coal. Johns v. Brinker, 30 La. Ann. 241, 241 (La. 1878). Nor was it a basis for damages for the captain of an arctic whaleship to put a seaman in irons with a stick under his knees and over his arms, as this caused “no appreciable suffering.” The Thrasher, 173 F. 258 (9th Cir. 1909).
  \item 33. As late as 1895 the National Seaman’s Union could compile, over a limited time and space, dozens of cases of serious beatings and other truly brutal acts, and fourteen murders, committed by captains and their officers on seamen. N.A. L. Seam'en’s Union of Am., The Red Record: A Brief Resume of Some of the Cruelties Perpetrated Upon American Seamen at the Present Time (San Francisco 1895). This report not only excludes routine acts of violence; it covered only seven years and was limited to incidents aboard ships sailing from West Coast ports (mostly San Francisco) and engaged in domestic, as opposed to foreign, trade.
  \item 34. Act of Dec. 21, 1898, ch. 28, § 22, 30 Stat. 761–62. A half-century earlier, in 1850, Congress enacted a statute banning “flogging” aboard any naval or merchant vessel. Act of Sept. 28, 1850, ch. 80, 9 Stat. 515. But this was quickly construed to prohibit only one very particular kind of abuse: use of the cat-o’-nine-tails. See, e.g., Dorrell v. Schwerman, 111 F. 209 (E.D. Wis. 1901); Charge to Grand Jury, 30 F. Cas. 981, 983 (C.C.R.I. 1853) (No.18249). In all, according to a scholar who has studied mutinies from 1820 to 1920, the 1850 statute made “little difference,” even in the frequency with which the cat-o’-nine-tails was used. Briton C. Busch, “Brace and be Dam’d:” Work Stoppages on American Whaleships, 1820–1920, 3 INT’L J. OF MAR. HIST. 95, 103 (1991).
  \item 35. See, e.g., Dorrell, 111 F. at 210. See also City of Mobile, 116 F. 212 (S.D. Ala. 1902).
  \item 36. Bruce Nelson, Workers on the Waterfront: Seamen, Longshoremen, and Unionism in the 1930s 14 (1990).\end{itemize}
to pay their earned wages. Lacking corporal punishment’s sensational features, these methods were objects of labor protests and, eventually, organizing efforts, which were frequently unsuccessful. But they seldom generated public anger, official outcry, or legal action and remained commonplace well into the New Deal era.37

The most important point that can be made about the abusive discipline aboard the modern ship is that, like the ship’s authoritarianism generally, it reflected a “rational” economic agenda. It was not “for his own pleasure,” as one outraged Nineteenth Century writer put it, that the captain “beats and starves and maltreats his crew.” Rather, “it is his business” to do so.38 Discipline was meant to wrest as much work as possible from as small a crew as possible and for the least possible compensation. While a few captains surely were pathologically sadistic, and while a few others no doubt overreacted to some genuine threat to the ship or some other peril of navigation, profit was the usual motive behind beating, threatening, and otherwise relentlessly hounding the crew.39

Although the authoritarianism of the modern ship was not mandated by the technical and physical conditions unique to seafaring, this state of affairs was in practice much exacerbated by these conditions. In some respects modern seamen were prototypical examples of capitalist “free labor”—they were after all money wage earners, hired for discrete periods of time, who entered their positions by contract. But in other respects they remained rather serf-like, tied to the ship and its authoritarian regime. This dual role followed from both the law and the practical realities of shipboard

37. See, e.g., Busch, supra note 34, at 102 tbl.3.
39. Some authorities, the popular maritime historian Samuel Eliot Morrison among them, have suggested that the pervasiveness of these punishments and the overall authoritarianism that prevailed aboard the modern ship flowed naturally out of the nature of seafaring. See, e.g., SAMUEL ELIOT MORRISON, THE MARITIME HISTORY OF MASSACHUSETTS, 1783–1860 (1961), at 24. See also JUDITH FINGARD, JACK IN PORT: SAILORTOWNS OF EASTERN CANADA (1982), at ch. 2, pp. 46–81. Although perhaps intuitively attractive and consistent in a perverse way with literary images of the ship as theatre of timeless dramas—a superficial reading of Herman Melville, Jack London, or Joseph Conrad comes to mind—it seems that this more traditional view is quite wrong. An important suggestion that the ship could be managed in a more humane way emerges, of all places, from the history of the pirate ship. Unlike their popular image as dens of cruelty and avarice, the pirate ship evolved in the Eighteenth Century first and foremost as a way for seamen to strike back at the awful conditions they experienced aboard merchant and naval ships. More surprisingly, the pirate ship was—to again quote Linebaugh and Rediker—“democratic in an undemocratic age,” “egalitarian in a hierarchical age,” and surprisingly diverse, both ethnically and by sex. For the pirates themselves, plunder and mayhem were neither simple acts of greed or expressions of violence, but ways of “taking revenge against merchant captains who tyrannized the common seaman and against royal officials who upheld their prerogative to do so.” With this agenda, pirates proved that neither the sea itself nor the technology of the ship necessitated the deep authoritarianism of the modern ship, nor its total commitment to the project of accumulating capital. LINEBAUGH & REDIKER, supra note 24, at 162–67. See also REDIKER, supra note 18, at 254–87.
service. Once at sea or in a distant port, seamen were for the most part quite unable to escape the ship’s service or the captain’s jurisdiction. There were, of course, few places to hide for very long aboard a ship, even a large one. It was likewise very difficult and dangerous to flee the ship once it was at sea. This could be done, but it entailed a number of very risky steps: first, stealing a ship’s boat or pirating the ship itself; second, successfully reaching a safe harbor; and third, evading prosecution for the crimes necessarily committed to get this far. Simply deserting the ship in port avoided these risks, but came with its own hazards. As a condition of employment seamen were long required to execute “shipping articles” by which, among other things, they obligated themselves not to desert. A seaman who deserted notwithstanding this agreement legally forfeited his wages and his personal property and, through much of the Nineteenth and early Twentieth centuries, also faced criminal prosecution. Besides this, a deserting seaman, finding himself in a strange place, could very easily end up “impressed” or “shanghaied” into the service of another, perhaps more authoritarian merchant ship or naval vessel. And if he deserted in a foreign port he could find himself simply unable to get home—perhaps even forced to work his way home on another ship for no pay.

The nature of shipboard service exacerbated the ship’s authoritarianism in another way. Seafaring has always been an extremely dangerous calling. A sailor could easily be swept way and drowned, dashed against the ship, crushed by machinery—he could be killed or maimed in any number of ways. And of course even a staunch, well-handled ship could founder, likely killing everyone on board. These risks surely made the life of the seaman all the more unpleasant. Worse for him they also, as we have just seen, provided both ship’s captains and the courts with an appealing, if ultimately dubious, manner of rationalizing the ship’s authoritarianism.


41. In American ports, this was a particular risk in the early Twentieth Century. See, e.g., Lance S. Davidson, Shanghaied! The Systematic Kidnapping of Sailors in Early San Francisco, 64 CAL. HIST. 10 (1985).

42. For an empirical review of the extensive hazards of shipboard service in the early Twentieth Century, see, for example, HEALEY, supra note 16, at 103–16.

43. Such a defense of shipboard authoritarianism in fact suffers from several limitations. The first is that modern seamen often knew as much about sailing the ship as their captain and his officers. REDIKER, supra note 18, at 94–96. The second problem with this reasoning is its assumption that a crew would recklessly compound the risks to themselves in a storm, for example, simply to challenge the captain’s rule. As Rediker points out, the axiom that “everyone is in the same boat” was quite true, albeit in two very different senses. The modern ship featured both a corporate and a class “collectivism,” the former representing the investment of all sailors, officers, and seamen in the fate of the ship and the voyage, the latter representing each side’s class interests as against the other. Id. at 83–115. Of course, the captain might be the best person to pilot the ship through a dangerous situation. But just the same, he might not. As we shall see, many instances of “mutiny” were nothing more than the crew banding together to save themselves from the captain’s incompetence. In this light, the law’s hard
The penetration of capitalism, also accounted for incredibly poor accommodations that prevailed aboard most ships. Money or space that might have been expended on the crew's accommodations was better invested in cargo or labor, or in the ship itself. The same logic applied to allowing the crew time to tend to their own needs (for example, by cooking, cleaning, or sewing) when this might better go towards operating the ship. Each of these dynamics created a powerful incentive for owners and captains to consign their crews to the most austere accommodations. As a result, right through the Great Depression, seamen's quarters on American merchant ships were invariably dank, unventilated, and vermin-infested. Food and bedding were poor, medical care was often virtually nonexistent, and clothing ragged. Indeed, this stingy logic often compromised the integrity of the ship itself; many vessels were intentionally operated in a state of unseaworthiness simply to limit costs and maximize profits.44

The process by which the rise of capitalism replaced a system of maritime labor dominated by medieval norms with one dominated by capitalist norms was in most senses much more beneficial to capital than to labor. And yet it is important to recognize that this process yielded not so much a stable regime of class domination, as it did an unsettled regime of class conflict. The modern ship should be seen as both an "engine of capitalism" that embodied capitalism's normative structure and as a primary "setting of resistance" to those very structures.45 Poor pay and other deprivations, rigid hierarchy, the captain's dictatorial rule, physical isolation, service on an unseaworthy vessel—each of these developments conspired with the collective character of shipboard labor to engender a tradition of class consciousness among seamen.

Of particular importance in converting the generalized resentment that the ship's objective hardships generated among seamen into a real sense of class consciousness was the unique quality of shipboard labor as both an intensely hierarchical process, as between seamen and their officers, and a uniquely cooperative undertaking, among the seamen themselves. Seamen were not an entirely undifferentiated lot in terms of their respective skills, rank, and influence. But in light of the tremendous gulf between themselves as a group, and the captain and his officers (who, though simply the captain's managers, wielded authority over the crew in his name), the presumption that the captain was virtually always right—and that he could confirm his superior seamanship by force—reveals more about the social norms of capitalism and the law's support for these norms than it does the nature of seafaring.


45. LINEBAUGH & REDIKER, *supra* note 24, at 144.
seamen could hardly help but recognize themselves as a distinct class—one particularly burdened by the many adversities of shipboard service. This inspired the seamen themselves to disavow paternalistic medieval norms—which had bound them, too, to quiescent service—in favor of a genuine sense of class identity. Furthering this sense of class identity was the architecture of the ship, which from the dawn of modern seafaring right through the Depression physically segregated seamen from the captain and his officers. Seamen ate, slept, and fraternized in a space, the “fo’castle,” completely separate from their superiors. Even ashore, they tended to hold themselves apart from other workers, and from ships’ officers, in their own “sailortowns.” In their separate domain seamen not only felt a sense of class identity in some passive way; they also actively cultivated this identity, through rituals and games and talk.46

In this context the ship’s authoritarian structure remained unstable and the captain’s own authority quite tenuous. Class identity and class conflict became class resistance. Many ships—in fact probably most—were scenes of continual, low-level skirmishing between captain and crew involving as much in the way of threats and intrigue as actual, overt combat between sides.47 On many other ships, though, resistance took more overt forms. Throughout the modern era of seafaring, seamen fought their captain or his officers, or they sabotaged the ship’s gear. On some occasions (rare after the Eighteenth Century) they even resorted to outright piracy, an institution that evolved as much out of maritime class conflict as it did greed or simple criminality.48 In other cases, some contingent of the crew—usually only one or two men—simply deserted the ship, walking away in the hope that a better ship, with better accommodations, easier work, or a better captain, might be found.49 But most importantly, seamen resorted to forms of collective protest—or as the law long saw it, they mutinied.

III.
MUTINY AND LABOR PROTEST

“There is no justice or injustice on board ship, my lad. There are only two things: duty and mutiny—mind that. All that you are ordered to do is


47. This dynamic is clearly illustrated in the some of the most famous fictional literature on shipboard life, especially the works of C.H. Dana, Herman Melville, Joseph Conrad, and Jack London.

48. On the class dimensions of piracy, see Linebaugh & Rediker, supra note 24, at 162–67; Rediker, supra note 18, at 254–87.

49. See, e.g., The Lola, 15 F. Cas. 790 (E.D.N.Y. 1872) (No. 8468). In some cases, a crew might be involuntarily “deserted” by a captain seeking to replace them with cheaper labor in a port featuring a labor surplus. See, e.g., The William Cummings, 29 F. Cas. 1293 (E.D. Penn. 1870) (No. 17,690).
duty. All that you refuse to do is mutiny." So the advice of a Nineteenth Century Swedish sailor captured mutiny’s dual nature as the practice of shipboard labor protest and the legal cornerstone of labor repression aboard ship. For most of American history any shipboard strike or work stoppage involving more than a couple of sailors was almost certain to be declared a mutiny by the ship’s captain and its owners as well as by the courts. But as is so often the case where the law’s class biases are insufficiently concealed by ideology and where the police and courts are not literally at hand, what the law of mutiny dictated and what seamen did were often very different things. And so for much of American history seamen simply resorted to shipboard strikes in violation of the law.

A. Mutiny as Criminal Law

The power to enact mutiny laws rests with the Congress. Reflecting their common concern with labor protest and other challenges to maritime authority, the mutiny laws were initially embedded in laws aimed at punishing piracy. This was true of this country’s first mutiny statute, which was enacted as a provision of the Crimes Act of 1790 alongside more extensive provisions on piracy. The statute held that “if any seamen . . . shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death.” Elsewhere, the statute also provided that “if any seaman shall confine the master of any ship or other vessel, or endeavor to make a revolt in such ship” he would, upon conviction, “be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.” In 1835, following a general trend towards statutory refinement, the mutiny statute was redrafted. In lieu of the 1790 statute’s perfunctory definition of the completed crime of mutiny, the new statute provided,

That if any one or more of the crew of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall unlawfully, willfully, and with force, or by fraud, threats, or other intimidations, usurp the command of such ship or vessel from the master or other lawful commanding officer thereof, or deprive him of his authority and command on board thereof, or resist or prevent him in the free and lawful exercise thereof, or transfer such authority and command to any other person not lawfully entitled thereto,

50. REDIKER, supra note 18, at 211 (quoting KNUT WEIBUST, DEEP SEA SAILORS: A STUDY IN MARITIME ETHNOLOGY 362 (1969)).
54. § 12, 1 Stat. at 115.
each such person so offending, his aiders or abettors, shall be deemed guilty of a revolt or mutiny and felony.\textsuperscript{55}

Moreover, the capital punishment provision which had applied to the completed crime was removed altogether—apparently because its severity discouraged convictions.\textsuperscript{56} It was replaced by imprisonment at hard labor, for up to ten years and a fine of up to $2,000, “according to the nature and aggravation of the offence.”\textsuperscript{57}

In lieu of the 1790 statute’s pithy definition of inchoate mutiny, the new statute inserted language that was not only broader in coverage and more detailed, but that explicitly recognized a conspiracy charge. The 1835 statute made it a felony if “any one or more of the crew . . .

Shall endeavour to make a revolt or mutiny on board such ship or vessel, or shall combine, conspire or confederate with any other person or persons on board to make such revolt or mutiny, or shall solicit, incite or stir up any other or others of the crew to disobey or resist the lawful orders of the master, or other officer of such ship or vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust therein, or shall assemble with others in a tumultuous and mutinous manner, or make a riot on board thereof, or shall unlawfully confine the master or other commanding officer thereof.\textsuperscript{58}

For conviction of this felony, a sailor faced up to five years in prison and a fine of up to $1,000.\textsuperscript{59} Remarkably, this statutory regime, which is what the Court invoked in \textit{Southern Steamship}, remains in place today, substantially unchanged from its 1835 form.\textsuperscript{60}

Although the mutiny statute has remained fundamentally unchanged, in 1872 Congress did significantly expand the law in a related area by passing the Shipping Commissioners Act. This statute, which comprehensively reformed much of maritime law, included a lengthy section on the “discipline of seamen,” which added alongside mutiny other lesser crimes of shipboard insubordination. The simple act of “willful disobedience” of “lawful commands” was made punishable by up to two months imprisonment and forfeiture of up to four days pay. “Continued willful disobedience to lawful commands, or continued willful neglect of duty” could be punished by six months imprisonment as well as forfeiture of up to twelve days’ wages. Assault on the master or a mate could be punished by

\begin{footnotes}
\item[55] Act of Mar. 3, 1835, ch. 40, § 1, 4 Stat. 775, 775–76.
\item[56] See, e.g., Gales & Seaton’s Register, Feb. 19, 1835, pp. 535–36.
\item[57] Act of Mar. 3, 1835, ch. 40, § 1, 4 Stat. 775, 775.
\item[58] § 2, 4 Stat. at 776.
\item[59] Id.
\end{footnotes}
up to two years imprisonment. And "combining with any other" to disobey commands or neglect duty or otherwise interfere with the operation of the ship could result in a year in prison.\textsuperscript{61} An 1898 statute, the White Act, halved the prison sentences for willful disobedience and for continued willful disobedience and removed the "combining with others" language; but the new statute also granted the captain the authority to punish the remaining offences at sea by placing the offender "in irons" and, in case of continued disobedience, putting him on a diet of "bread and water."\textsuperscript{62} So amended, these lesser crimes and analogous punishments are still part of the federal law today.\textsuperscript{63}

Other sections of the 1872 statute were dedicated to protecting seamen from a number of abuses prevalent in the post–bellum context. The statute sought, in part by installing a number of United States Shipping Commissioners who would enforce these standards, to remedy such things as inadequate provisioning of vessels, inadequate clothing and accommodations, predatory contracting, exploitative practices of unscrupulous "sailor town" labor agents, or "crimps," and abandonment of seamen after shipwreck or other disaster.\textsuperscript{64}

By enacting these protections, the Congress expanded on a paternalistic theme that has always characterized maritime labor law: marrying punitive measures that restrict labor freedom to other provisions that ostensibly protect or benefit labor. Not unlike the Congress that passed the Shipping Commissioners Act, the First Congress—the one that prescribed the death penalty for mutiny—also enacted protective legislation giving seamen the right to written employment contracts, access to a "medicine chest," the right to a portion of their wages during the voyage, protection from onboard debt collection, and a limited right to demand a survey of a ship thought to be unseaworthy.\textsuperscript{65} Other Congresses, and on occasion the courts, expanded these protections numerous times in the Nineteenth Century.\textsuperscript{66} This protective impulse culminated—at least as a


\textsuperscript{63} Today, instead of being placed in irons for willful disobedience, the seaman, "at the discretion of the master may be confined until the disobedience ends." 46 U.S.C.S. § 11501(4) (2002). And, for "continued willful disobedience," instead of a diet of bread and water, the seaman, "at the discretion of the master, may be confined, on water and 1,000 calories, with full rations every 5th day, until the disobedience ends." § 11501(5).


\textsuperscript{65} Act of July 20, 1790, ch. 29, §§ 1–3, 6, 8–9, 1 Stat. 131, 131–35.

\textsuperscript{66} For example, the 1835 mutiny statute went so far as to impose up to five years imprisonment and a $1,000 fine for corporal punishment or imprisonment of a seaman by an officer if such punishment were unjustifiable and malicious or otherwise motivated by hatred or revenge. Act of Mar. 3, 1835, ch. 40, 4, § 3, Stat. 775, 776–77. Following this pattern, an 1840 statute that dramatically expanded the duties of United States Consuls to require them to "reclaim deserters and discountenance insubordination by every means within their power" also obliged them to "inquire into the facts" and
matter of formal law, if not actual practices—in the 1910s, when agitation by organized labor and the work of their supporters in Congress resulted in the enactment of the LaFollette Seamen’s Act of 1915.67 With this statute maritime labor law evolved into an elaborate system that regulated working hours, living accommodations, clothing, safety equipment, and security in cases of illness and injury. In fact, by the 1930s, seamen were, as a formal matter, the most extensively protected workers in America.68

The overall merits of legal paternalism aside, it would yet constitute a grave mistake to equate the existence of these formal protections with a system that actually protected the wellbeing of seafaring labor. It is in this sense that the paternalism of modern shipboard labor relations was actually rather fraudulent. We have already seen how ineffective anti-corporal punishment laws could be. So ineffective, in fact, were all these protective statutes that they helped to inspire among seamen an enduring skepticism about the value of law and legal process—an attitude that would frame the labor politics of the 1930s.69 As we shall also see, seamen in the 1930s still labored under horrendous conditions that the law had done little to change. While statutes like the LaFollette Act had some potential to protect seamen in fairly meaningful ways, they initially did little more than obscure and rationalize the true condition of shipboard labor.70

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68. For a summary of the many legal protections seamen nominally enjoyed by the mid 1930s, see, for example, Rothschild, supra note 52, at 1181–84.

69. Citing the RED RECORD, which is replete with stories of un-remedied abuse, historian of maritime labor Bruce Nelson notes how this official indifference lead to an enduring cynicism about the law. Nelson, supra note 36, at 13–14.

70. The Court’s hand in this system of malign paternalism is perhaps most clearly evident in the Supreme Court’s notorious 1897 decision, Robertson v. Baldwin. There, the Court ruled seven-to-one that the Shipping Commissioner’s Act’s criminalization of desertion, which also provided for seamen to be forcibly returned to their vessels, did not offend the Thirteenth Amendment. The majority based this decision squarely on the paternalistic view that such punitive measures were justified by the “very careful provisions... made for the protection of seamen against the frauds and cruelty of masters, the devices of boarding-house keepers, and, as far as possible, against the consequences of their own ignorance and improvidence.” Seaman are properly treated this way by the Congress, the Court continued, because they are “deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and [need] the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians.” Robertson v. Baldwin, 165 U.S. 275, 287 (1897). It took almost two decades and the passage of the LaFollette Seaman’s Act for Congress to fully overturn this decision.
Any doubt, though, that the regime of mutiny law that first emerged in 1790 would be called on to punish shipboard strikers was resolved even before the 1835 statute was enacted. Early courts were forced to confront the 1790 statute’s considerable ambiguity with regard to the basic meaning of the concepts, “revolt” and “mutiny” (which are synonymous terms). Of course, all mutiny statutes proscribe overt, unjustified efforts to seize the ship or displace the captain. This basic agenda, which is hardly controversial, is described in a United States v. Kelley, an 1826 Supreme Court decision clarifying some of the ambiguities of the 1790 statute. Revolt, the Court determined,

consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person.

The much more important question—the one that would arise in Southern Steamship—was whether mutiny law proscribed not only taking the ship or actually displacing the captain, but also a simple refusal among the crew to carry out the captain’s orders. For if this fell within the meaning of mutiny, all that the captain needed to do in order to convert any shipboard strike into a serious felony was to order the crew to resume their duties. An answer to this question was supplied by none other than soon-to-be Supreme Court Justice, Joseph Story. In the course of authoring several opinions on the matter, Story made clear that such a refusal to follow the captain’s orders would indeed constitute mutiny. He declared that,

[a]n endeavor to commit a revolt may be complete, not merely by stirring up, encouraging, or combining with others of the ship’s crew to produce a general disobedience of all order; but also by stirring up, encouraging, or combining with any one or more of the crew to produce a deliberate disobedience to any one lawful order of the master or other officers.

Story elsewhere made clear that the 1790 statute encompassed conspiracy liability, including a circumstance where the crew conspired “to refuse to do any further duty on board, and to disobey any further orders of the master, with a view to compel him to yield up the command of the ship, or to grant them any allowance inconsistent with his duty as master.”

This expansive interpretation was not in any way mandated by the

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73. United States v. Thompson, 28 F. Cas. 102, 103 (C.C.D. Mass. 1832) (No. 16,492) (emphasis added).
literal terms of the 1790 statute. Indeed, the most important Supreme Court
decision of the day, the Kelly case mentioned above, could be read to
contemplate a much more restrictive view of the matter. Nonetheless,
Story’s interpretation of mutiny law emerged as a majority rule and was
soon reflected, apparently, in the 1835 statute. While the statute’s origins
are not entirely clear, for Story, the new text affirmed the interpretation he
had given the earlier statute. Story’s view of mutiny became the dominant
conception in American courts through the Nineteenth Century, into the
early Twentieth Century. For example, in 1857, in United States v. Borden,
the federal district court for Massachusetts, confronting a work stoppage
aboard a whaleship, held that a “command to continue the business of
whaling is prima facie a lawful command, and if the prisoners at the bar, by
their united refusal to obey such command, prevented the master from
carrying on that lawful business, they prevented him in the free and lawful
exercise of his authority.” While this court was careful to point out that
the mere fact that the workers had created a “combination” would not alone
constitute mutiny, such a combination would constitute mutiny if directed at
preventing the captain conducting the ship’s business as he saw fit. Much
later, in Hamilton et al. v. United States, a 1920 case involving a mass
refusal to continue service on an apparently unseaworthy vessel, the Fourth
Circuit explicitly embraced Story’s interpretation over the narrower one
contemplated by the Supreme Court in Kelly. Following Story’s earlier
construction, the court in Hamilton ascribed no significance to the fact that
the striking seamen, whose behavior was entirely non-violent, made no
effort at all to take control of the ship, which was then in a foreign harbor,
or to interfere with the non-striking crew members.

As a result of these constructions, any seamen who collectively refused
the captain’s orders were subject to conviction of mutiny. It did not matter
that they conducted themselves peacefully. It did not matter that they did
not intend to displace the captain. And it did not matter that they had no
desire to seize the ship or determine its course. Indeed, even if the seamen
had no specific intent at all, beyond refusing the captain’s orders, they
could still be found guilty of mutiny. Whether this regime would survive
the Wagner Act and the demands for greater labor freedom raised by New

75. Kelly, 24 U.S. at 417.
legislative history of the 1835 statute is very sketchy, to say the least, and says nothing of its primary
goals.
78. Id. See also United States v. Lynch, 26 F. Cas. 1033 (C.C.S.D.N.Y. 1843) (No. 15,648).
80. Id. at 18–20.
81. See, e.g., Thompson v. The Stacey Clarke, 54 F. 533 (S.D. Ala. 1892); United States v. Nye 27
Deal labor remained very much to be seen.

B. Labor Protest as Mutiny

By the beginning of the Twentieth Century, only a handful of exceptions, none of them particularly significant, restricted mutiny law’s prohibition of concerted labor protests by the crew.82 Not only substantively weak, these defenses could only be raised in court, usually many months and hundreds of miles from the point where the decision to mutiny was made in the first place. But the same was also true, to the captain’s or owner’s detriment, of the prospect of quickly or successfully prosecuting the mutineers. The law, to invoke Starbuck of Melville’s *Moby Dick*, could well be “two oceans and a whole continent away.”83 No doubt because of this difficulty of effective and prompt enforcement as much as the awful conditions aboard ship, sailors throughout the modern era frequently defied both the law and the captain’s extraordinary authority (which was at its strongest in the right to put down mutinies)84 to strike aboard ship.

The typical mutiny was not, as some uncritical authorities persist in suggesting, some wild and sensational act by a gang of common criminals bent on violence, mayhem, or a gratuitous challenge to authority.85

82. Notwithstanding the more expansive definition of mutiny offered in cases like *United States v. Thompson*, an act of disobedience involving only one or two seamen was not likely to be construed as mutiny unless it went beyond simply refusing the captain’s orders. See, e.g., *United States v. Huff*, 13 F. 630 (C.C.W.D. Tenn. 1882); *United States v. Forbes*, 25 F. Cas. 1141 (E.D. Pa. 1845) (No. 15,129). Seamen could also raise the contractual defense that they are not obliged to sail the ship to a place not described in the terms of their shipping articles, though in doing so they had to show that the deviation was not justified by exigent circumstances. For example, the crew could defend themselves against a mutiny charge if the orders disobeyed involved sailing the ship to a destination not named in the articles. See, e.g., *United States v. Matthews*, 26 F. Cas. 1207 (C.C.D. Mass. 1837) (No. 15,742). Likewise, the crew could avoid conviction if they were able to show that their disobedience was an effort to avoid sailing on an unseaworthy ship, although to succeed seamen were eventually required by the courts to overcome a strong presumption of seaworthiness. The ship involved in *Hamilton*, for example, had serious difficulties with its boiler and had lost three propellers in the course of only four days. But this would not overcom the presumption that it is for the captain to decide whether the vessel is ready for sea. *Hamilton*, 268 F. at 21–22. See also *United States v. Ashton*, 24 F. Cas. 873, 874 (C.C.D. Mass. 1834) (No. 14,470). Cf. *United States v. Givings*, 25 F. Cas. 1331, 1332 (D.C.D. Mass. 1844) (No. 15,212), where the court held that a reasonable belief that the vessel was unseaworthy would constitute an effective defense even if the jury inclined to think differently. Finally, the captain’s incompetence or abusiveness might also be raised as a defense, but again subject to a substantial burden of proof. See, e.g., *United States v. Cassedy*, 25 F. Cas. 321, 322 (C.C.D. Mass. 1837) (No. 14,745); *The Ulysses*, 24 F. Cas. 515, 518 (C.C.D. Mass 1800) (No. 14,330).

83. Says Starbuck, “I stand alone here upon an open sea, with two oceans and a whole continent between me and law... .” *MOBY DICK: AN AUTHORITATIVE TEXT* 422 (Norton 1967).

84. *United States v. Lunt*, 26 F. Cas. 1021 (D. Mass. 1855) (No. 15,642) (captain authorized to used deadly force if necessary to avert mutiny).

85. See, e.g., LEONARD F. GUTTRIDGE, MUTINY: A HISTORY OF NAVAL INSURRECTION (1992); EDMUND FULLER, MUTINY!: BEING ACCOUNTS OF INSURRECTIONS, FAMOUS AND INFAMOUS, ON LAND AND SEA, FROM THE DAYS OF THE CAESARS TO MODERN TIMES (1953).
According to maritime historian Marcus Rediker, this would not accurately characterize most Anglo-American mutinies at any point in the modern era.\textsuperscript{66} It would certainly not characterize mutinies on American ships in the Nineteenth and early Twentieth centuries. During this period mutinies were seldom anything other than simple labor protests, usually devoid of any real violence and with modest, rational, and usually just aims. Most were aimed not at seizing the ship, displacing the captain, or anything of the sort, but at obtaining immediate redress of specific grievances about work assignments, discipline, the seaworthiness of the ship, adequacy of provisions or compensation, and the like. In other words, mutinies were a way of responding to the very features that made day-to-day service aboard the modern ship so difficult in the first place. This characterization is amply supported by the reported cases as well as the historical literature.

The most compelling of these authorities are historical studies based on ships' logbooks, sailors' journals, or other documents. One such study was conducted by W. Jeffrey Bolster, who analyzed shipboard journals and logbooks from 1820 to 1920. Bolster determined that the vast majority of mutinies in this period "involved nothing more threatening than a discontented lot of men fed up with endless work, little sleep, and barely edible provisions who mustered aft in a body and simply refused to work."\textsuperscript{87} He found that most mutinies were not only limited in their objectives, but also brief in duration and, especially in the earlier part of the period he studied, apt to end in failure and repressive punishment. Bolster cites numerous instances aboard ship in which a hungry or overworked crew, or one perhaps angered by disciplinary action against a fellow seamen or concerned for the condition of the vessel, simply "mustered" and presented demands in connection with a contingent offer to return to work. Seldom did mutinous seamen attempt actually to take command of the ship or displace the captain, and even more seldom did mutineers inflict much injury on ship's officers.\textsuperscript{88}

Bolster's conclusions correspond closely to those reached by Briton Busch in his somewhat more recent and specialized study of New England whaleship voyages over the same period. Busch examined 2828 journals and logbooks from 1820 through 1920 and found that an amazing seven percent of voyages featured a documented work stoppage or some other concerted protest by at least three crewmen—a rate that remained roughly constant throughout this period.\textsuperscript{89} Busch found the vast majority of these events to have had their origins in disputes about labor conditions, with

\textsuperscript{66} REDIKER, supra note 18 at 226–43.
\textsuperscript{87} W. JEFFERY BOLSTER, BLACK JACKS: AFRICAN AMERICAN SEAMEN IN THE AGE OF SAIL 14 (1997).
\textsuperscript{88} Id.
\textsuperscript{89} Busch, supra note 34, at 98–99 tbl.1.
skimpy shore leave policies, severe or unjustified disciplinary action, poor provisions, onerous work assignments, and questions about the seaworthiness of the vessel forming the most common discernable reasons. Most mutinies—about two-thirds—failed to achieve their objective and resulted instead in the punishment of some or all of the mutineers. Being put in irons was by far the most common punishment for mutiny on the voyages Busch studied, followed by flogging and imprisonment ashore. Other notable findings by Busch are that, like the strike aboard the City of Fort Worth, the vast majority of mutinies actually occurred dockside, and, confirming Bolster, that most mutinies usually did not result in any physical harm to ships’ officers.

A few mutinies have inspired scholarly case studies. These tend to focus on the best-documented mutinies, and therefore the most elaborate, intriguing, or outrageous episodes. But in a number of instances they too reveal the way persistently abusive labor conditions could eventually inspire the crew to take drastic steps. A case in point is the 1866 mutiny aboard the clipper ship, White Swallow, which is described in detail by Robert Schwendinger. No sooner had the ship sailed than the crew was put to the dangerous and unnecessary task of scraping the hull in heavy weather. Their protests were met with beatings and a refusal to change the work assignments. Eventually one man was swept away and drowned, his death made certain by half-hearted efforts of the ship’s officers to save him. The beatings and dangerous work continued until, a number of days later, another man was swept away. In this instance, no attempt whatsoever was made to save him. At that point the White Swallow’s crew organized themselves and seized the vessel. Seeking to avoid unnecessary violence, they threw all weapons and alcohol overboard and compelled the captain to agree to terms including reasonable and safe work assignments and a cessation of beatings. Although the ship was able to continue with no

90. Id. at 100-01 tbl.2.
91. Id. at 102 tbl.3.
92. Id.
93. Id. at 99. In many respects both Bolster’s and Busch’s contentions are confirmed by Margaret Creighton in her analysis of social and labor relations aboard Nineteenth Century merchant ships. According to Creighton, mutinous protests and desertion were quite common on Nineteenth Century vessels. Mutiny encompassed a spectrum of strategies, from slowdowns and “pretenses of incompetence,” to outright work-stoppages, to rare efforts to take over the ship. And like Bolster and Busch, Creighton locates the typical causes of these episodes in overwork, excessive punishment, arbitrary leave policies, and the like. Creighton, supra note 47, at 545-47.
further drama, the crew was charged with mutiny and saved from prison only by a sympathetic jury. 95

Although they share the limitation of all appellate decisions as historical sources, the reported judicial cases offer a very similar portrait of mutiny. While very few involved any wholesale attempt to take the ship or anything else so sensational, a great number of the cases (many of them civil actions involving forfeiture of wages that are premised on mutiny’s criminal definition) arose from straightforward disputes about working conditions. This is true of the early, formative cases in mutiny law. In two cases central to Story’s definition of mutiny, United States v. Hamilton and United States v. Haines, the mutiny developed as a nonviolent protest against sailing under an undesirable substitute captain. 96 Another of Story’s important mutiny cases, United States v. Gardner, arose when the crew quit work to protest the arrangement of the watches. 97 In other ante–bellum cases, mutiny charges were brought against seamen who ceased work to protest undermanning or other occasions of unseaworthiness, 98 deviation from the planned voyage, 99 and inadequacy of provisions. 100

Similar reasons continued to motivate mutinies in the post–bellum period. In 1867, for instance, the crew of the William Cummings, seeking early discharge from service, “made a concerted effort” to accomplish this, and “would have been successful, had not energetic measures of suppression been adopted.” 101 The same year, the captain of the Laura Madsen brought about a mutiny by deviating from the planned voyage. 102 In 1868, the crew of the Almatia, then at the port of San Francisco, was refused breakfast at the customary time and ordered by their intoxicated captain to perform the apparently “unnecessary” task of unfurling a sail. To this they responded by refusing to work and eventually quitting the ship. 103 In 1890, the Shawnee had its windlass carried away by heavy seas; anticipating a heavier workload as a consequence, the crew demanded higher wages. When this was refused, they mutinied to compel the master to meet their demand. 104 A dispute over an order to work after normal hours led the crew of the Topgallant to mutiny and eventually desert that ship in

102. Henrici v. The Laura Madsen, 84 F. 362 (S.D. Cal. 1867).
103. The Almatia, 1 F. Cas. 535 (D. Or. 1868) (No. 254).
104. McKenna v. The Shawnee, 45 F. 769 (E.D. Wis. 1891).
In 1906, an unplanned extension of the voyage of the whaleship Bowhead, which lay icebound in the Arctic, as well as dissatisfaction with provisions and workloads, led the crew of that vessel to mutiny. In 1907, the crew of the William H. Clifford mutinied in protest of an order to help unload the ship’s cargo, when they had not agreed to this beforehand. In 1910, the entire crew of the John and Winthrop refused to work because the master denied them shore leave and, they felt, owed them money which he refused to pay. Two years later, it was a dispute over the seaworthiness of the vessel that caused the crew of the Condor to mutiny. And we have already seen the mutiny in the Hamilton case, aboard a ship called the Poughkeepsie, where the underlying compliant was the vessel’s apparent unseaworthiness.

The same picture of mutiny as a way of describing and prohibiting shipboard strikes that arose over working conditions emerges from newspaper accounts—in this case taken from the New York Times—from the late Nineteenth and early Twentieth centuries. For example, in 1882 the crew of the Vigilant was put in irons by their captain and charged with mutiny for refusing to work the ship. The seamen, who were described by the ship’s mate as “as good a set of men as ever he sailed with,” had mutinied to protest a diet of rotten meat and “maggoty” bread as well as a work schedule that reached twenty hours a day. In 1900, part of the crew of the Montcalm mutinied—again, they refused to sail the ship—a few miles down river from New Orleans to protest the hiring of Danish crewmen and the fact they were served moldy bread and meat that “was full of worms.” A 1916 mutiny aboard the liner Brazos, then moored at Brooklyn, New York, was nothing but a work stoppage to support a demand for higher wages. Likewise, a 1924 mutiny aboard the schooner Barnsdell involved nothing more than two sailors refusing to work after they were made ill by a meal of “stewed tripe.” Even those mutinies mentioned in the newspaper that went beyond simple work stoppages often began as labor protests. For example, the 1889 mutiny aboard the iron ship Lindores Abbey, a case where the crew actually imprisoned the captain, developed out of a dispute about work assignments and orders. The 1886

108. The John & Winthrop, 182 F. 380 (9th Cir. 1910).
112. Ship’s Fare Caused Mutiny, N.Y. TIMES, Sept. 4, 1900, at 2.
mutiny aboard the _Frank N. Thayer_, which resulted in the killing of the captain and his mate and the destruction of the ship, was motivated by beatings and "outrageous tyranny" on the part of the officers.\textsuperscript{116}

What all these records show is that mutiny, defined by the law to encompass even the most mundane forms of labor protest and made subject to very serious punishments, was nonetheless a common feature of shipboard life in the Nineteenth and early Twentieth centuries. Any shipboard strike was likely to be treated by the captain and by the courts as mutiny and punished accordingly. And yet seamen not only continued to mount such protests right through the Depression; in that dynamic era they embraced it.

\textbf{IV.}

\textbf{THE RADICALIZATION OF SHIPBOARD LABOR AND THE RISE OF THE NATIONAL MARITIME UNION}

Although in many ways a typical episode of maritime labor protest, the strike aboard the _City of Fort Worth_ in the summer of 1938 unfolded in a distinct historical context. As we have seen, seamen in the early Twentieth Century were the beneficiaries, in theory at least, of considerable protective legislation. And yet the conditions under which they actually lived and labored were little changed from the preceding century. By the mid 1930s, persistent economic crisis had worsened their situation, reducing many of the country's seamen, who numbered perhaps over 100,000, to truly desperate circumstances.\textsuperscript{117} At the same time, the early Twentieth Century marked the beginning of meaningful union representation of seamen. The dominant union through the 1920s was conservative and largely concessionary. But by the mid 1930s, seamen had begun in increasing numbers to embrace a style of unionism that was tactically militant, politically radical, and altogether more effective than that of its predecessors. These latter trends were essential features in the rise of the NMU, to which the _City of Fort Worth_ strikers belonged.

\textsuperscript{116} \textit{How A Mutiny Was Provoked}, N.Y. TIMES, Apr. 10, 1886, at 1.

\textsuperscript{117} Historian of the CIO Walter Galenson cites government reports that suggest a membership of 140,000 in the 1930s. \textit{WALTER GALENSON, THE CIO CHALLENGE TO THE AFL: A HISTORY OF THE AMERICAN LABOR MOVEMENT, 1935–41, 427 (1960)}. This figure is inconsistent with Department of Census figures that indicate about 64,500 "sailors and deck hands" and 24,000 "captains, masters, mates, and pilots" in 1930. \textit{ALBA M. EDWARDS, POPULATION COMPARATIVE OCCUPATION STATISTICS FOR THE UNITED STATES, 1870, 1940, 67, tbl.4 (1943)}. The disparity likely reflects an inherent difficulty in tracking the number of seamen in this period. According to James Healey, a contemporary authority on Depression-era seamen, the number of men "shipped, reshipped, and discharged" in 1934 was over 500,000, while the number simply "shipped or reshipped" was about 271,000. But these figures, he points out, reflect cases of individual assignment, not the number of individual men who made the labor force that year. That number, he figured, is difficult to fix with such a casual labor force. \textit{HEALEY, supra} note 16, at 8–9.
A. The Condition of Shipboard Labor in the Early Twentieth Century

If the life of seamen in the Eighteenth and Nineteenth centuries bore little resemblance to romantic visions of seafaring as adventurous exploration, the world of the seaman in the early Twentieth Century bore these visions no resemblance at all. The industrialization of merchant shipping, which had been underway throughout the modern era, culminated in the early 1900s. The complex art of wind sailing was by then almost totally replaced by the routine of the factory and all genuine norms of paternalism by the logic of profit and exploitation. To be sure, paternalism and other archaic notions of seafaring survived, but only in a very peculiar way. Completing a process that had begun with capitalism’s first penetration of the maritime world, paternalism was reduced from providing the structure for a genuine moral economy of shipboard labor, to simply justifying authority, hierarchy, and wage–labor exploitation.

In fact, with the sole exception of corporal punishment, the conditions for shipboard labor at the time of the City of Fort Worth strike were surprisingly little changed from earlier times. Corporal punishment had largely vanished, as shorter voyages, brought about by the triumph of steam propulsion over sail, reduced shipboard tension, and union activism finally yielded effective political and legal responses to the problem. In just about every other respect, though, the conditions for seamen in the early Twentieth Century remained awful. Living accommodations were often crowded and unsanitary, food unpalatable, work schedules grueling, and discipline arbitrary. According to the United States Maritime Commission, which was charged under the Merchant Marine Act of 1936 with investigating various aspects of the waterborne shipping industry, conditions overall in the mid 1930s were simply “deplorable.”

To top it

119. Confronting at the outset a serious lack of reliable information on the state of maritime labor, the Commission held a number of hearings, inspected over forty vessels, and interviewed about 1,000 sailors. The Commission found that by the early 1930s, “some American seamen were receiving as little as $25 a month, living under wretched conditions, eating unpalatable food, and working 12 hours or more a day.” United States Maritime Commission, Economic Survey of the American Merchant Marine 46 (1937). On conditions for shipboard labor in the early Twentieth Century, see also Healey, supra note 16, at 47–58; Goldberg, supra note 27, at 11–12; Nelson, supra note 36 at 15. Adding to their problems, seamen in the 1930s still faced various types of on–shore predation which had in theory been eliminated by statutes years earlier. Chief among these predatory practices was “crimping,” which was basically a system of corrupt labor agency through which seamen in many ports were forced to deal in order to get a job on a ship. Usually run through some kind of dockside boarding house, crimping was premised on skimming a seaman’s wages through exorbitant fees, as well as the equally exploitative practice of playing middle–man to his needs ashore. A waste to everyone except the crimps themselves, crimping nonetheless survived efforts by organized labor, ship owners, and the government to put an end to it. According to Nelson, crimping was especially prevalent in East Coast ports. Nelson, supra note 36, at 15–17. For a seaman’s account of crimping in action, see, e.g., Charles Rubin, The Log of Rubin the Sailor 86–88 (1973).
off, seafaring in this period remained among the most dangerous occupations.\textsuperscript{120}

The Depression did not fundamentally cause these conditions, which to a great extent had prevailed aboard ship throughout the modern era. But combined with the general slump in shipping that followed the First World War, the economic crisis of the 1930s did worsen conditions considerably. Desperate men thrown out of work by the collapse of farming and other industries flooded the docks looking for jobs on a fleet of ships depleted in number by a dramatic fall off in global trade, undermanned, and poorly maintained by cost-conscious owners. As a result, many seamen found themselves either unemployed, working for starvation wages, or, most extraordinarily, serving as "workaways"—that is, sailing for food and lodging in lieu of wages. Those who did find paying work aboard ship were driven ever harder for less wages and were often forced to work far below their qualifications: licensed officers worked as seamen, skilled seamen as unskilled. At the same time, the ships on which work could be found featured even more awful conditions.\textsuperscript{121}

Exacerbating the problems faced by seamen were, as one authority put it, the "mechanics of employer job control."\textsuperscript{122} In the period between the end of the First World War and at least the mid-1930s, ship owners, typically operating through well-organized "associations," perfected a multi-faceted program designed to reduce labor costs and to undermine labor organizing. This scheme entailed setting up company-dominated unions, blacklisting \textit{bona fide} union organizers and other militants, forcing seamen to submit to so-called yellow dog contracts, underbidding native seamen with foreign-born labor, and requiring seamen to maintain "continuous discharge books," or "fink books," in which employers, in the guise of tracking a seaman's job history, could carry out their blacklisting.\textsuperscript{123} According to a leading historian of maritime labor, Bruce Nelson, this program achieved for employers "nearly complete dominance in maritime labor relations," which would only be challenged by the changed legal and political climate and the increased labor militancy of the mid and late 1930s.\textsuperscript{124}

Throughout this period, the law remained a largely ineffective instrument of reform. The most important statute in this regard, the LaFollette Act, which had been embraced by many in organized labor as the

\textsuperscript{120} HEALEY, \textit{supra} note 16, at 103–09.

\textsuperscript{121} NELSON, \textit{supra} note 36, at 80–81; GOLDBERG, \textit{supra} note 27, at 117. \textit{See also Seamen Denounce Living Conditions: Maritime Commission Heirs Dozen Witnesses Demand Better Quarters, N.Y. TIMES, June 14, 1937, at 9.}

\textsuperscript{122} GOLDBERG, \textit{supra} note 27, at 106.

\textsuperscript{123} \textit{Id.} at 106–10.

\textsuperscript{124} NELSON, \textit{supra} note 36, at 68–73.
“Emancipation Proclamation of the Seamen,” had so far proved largely meaningless. While the Lafollette Act on its face comprehensively addressed the major problems facing shipboard labor—including poor wages, excessive hours of work, inadequate manning and provisioning, poor accommodations, lack of medical facilities, inadequate remedies in cases of injury or sickness, and insufficient safety equipment—its enforcement provisions proved utterly inadequate. Initially, the statute’s fundamental weakness was obscured by war-time prosperity, which generated a temporary boom in American shipping from which labor broadly benefited. But in the face of the dramatic post-war decline in shipping and a maritime labor movement thrown into disarray, employers routinely ignored the law. Indeed, they conspired to do so, reducing the Lafollette Act to a “dead letter.”

B. The Advent of Modern Unionism

Although the first seamen’s unions appeared in the mid-Nineteenth Century, early organizing efforts were sporadic and largely ineffective. Not until the 1870s and 1880s did serious and more or less permanent unions begin to emerge. Initially these consisted of regional organizations: the Lake Seamen’s Union; the Sailor’s Union of the Pacific; and the Atlantic Coast Seamen’s Union. In late 1899, these regional organizations were consolidated to form the first significant seamen’s union of national scope, the International Seamen’s Union, or ISU. The ISU would remain the dominant labor organization for seamen until its eventual collapse in the 1930s.

The ISU was above all else a deeply conservative organization with a number of truly reactionary characteristics. It was constructed along these lines by a dictatorial figure named Andrew Furuseth, who led the union for almost fifty years. From its inception, Furuseth committed the ISU to a

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125. For an overview of this regime of formal protections as established largely by the Lafollette Act, see, for example, Laws and Agreements Governing Working Conditions Among American Seamen, 10 MONTHLY LAB. REV. 1075 (May 1920).
126. NELSON, supra note 36, at 44–45; see also GOLDBERG, supra note 27, at 50–71.
128. For Furuseth, sailing was a skilled calling rightly reserved to the Nordic “races” and in danger of being debased by the twin forces of industrialization and the intrusion of lesser races. Thus for Furuseth, as for many craft unionists of the day (and a few industrial unionists), racism and nativism were necessary features of effective unionism. Improving the conditions of maritime labor was not simply for the good of white seamen, it was necessary to prevent the industry’s takeover by “Orientals,” blacks, and other “inferior” races—an eventuality that would, in turn, damage the interests of white civilization. Jerold S. Auerbach, Progressives at Sea: The LaFollette Act of 1915, 2 LAB. HIST. 344, 346–47 (1961). In this light, Furuseth understood one of the LaFollette Act’s key “safety” features—the requirement that a majority of the crew speak English, which Senator Robert LaFollette himself saw as contributing to better responses to emergencies—in the following terms: “It will mean safety to our part of the human race, national safety, and racial safety as well.” Id. at 355 (quoting Andrew Furuseth, The
vision centered on notions of craft integrity, bourgeois respectability, and deference to the fundamental institutions of capital. Accordingly, the ISU required that its members abide shipboard discipline, respect conventional notions of private property and contract, and follow the union leadership's policies implicitly. While it did on occasion strike, under Furuseth the ISU put much greater faith in collective bargaining and legislative reform. Even more so than other craft unions of the day, which were notorious in this regard, the ISU advanced a deeply racist and xenophobic program and adhered firmly to this from its inception through the 1930s. Designed either to exclude blacks and "Orientals" entirely from shipboard employment, or at a minimum to reduce their numbers and confine them to the lowest ranks, the ISU's racist agenda dramatically increased the level of segregation among American seafarers.

Initially, the ISU's conservative program yielded some results. It was the ISU that successfully championed passage of the LaFollette Act, just as its antecedents had in the 1890s successfully lobbied passage of the White Act, and before that, another reformist statute, the Maguire Act. Moreover, in the first decade of the Twentieth Century, the ISU enjoyed great success organizing seamen, particularly those on the Pacific Coast and the Great Lakes. The union eventually managed to achieve a number of collective bargaining agreements featuring wage scales and grievance arbitration provisions. During the First World War, when shipboard labor was in relatively short supply and the federal government willing to compel employer compromises for the sake of labor peace, the ISU extended these gains. By the war's end, perhaps nine out of ten seamen were members of the organization and overall membership reached over 100,000.

The ISU's post-war experience was much less impressive, however. Presented in 1921 with a demand by ship owners for substantial economic concessions, the union refused and called a strike, which was then soundly defeated. Already doomed by resurgent government hostility, unfavorable economic conditions, and employers' increasingly effective use of job


131. PHILIP TAFT, The Unlicensed Seafaring Unions, 3 INDUS. & AND LAB. REL. REV. 187 (1949–50); NELSON, supra note 36, at 51; GALENSON, supra note 117, at 428.
control strategies, the strike's defeat was hastened by the ISU's relentless white supremacy, which gave racial minorities in the maritime trades little reason to respect its picket lines. In any case, defeat left the union's membership disillusionsed and demoralized and the organization ill-prepared to contend with the structural realities of the post-war period. As jobs evaporated and wages declined, so too did ISU membership. Indeed, membership fell from over 100,000 to 50,000 within a few months after the defeat of the strike and would continue to fall to around 15,000 in 1926 and probably fewer than 5,000 in the early 1930s.

Even before its post-war/post-strike collapse, the ISU found its conservative, craft orientation challenged by a rival current of radical industrial unionism. Occasionally, this impulse emerged from within the ISU's own affiliates; more often at this juncture it came from a rival union movement, affiliated with the Industrial Workers of the World (IWW). Committed to industrial unionism, direct action, and a syndicalist social vision, the IWW came to some prominence in the seafaring world of the late 1910s and early 1920s by offering a radical alternative to the racism, xenophobia, and general conservatism of the craft union movement. Never approaching the ISU's peak membership numbers in the first place, the IWW's seamen's affiliate, the Maritime Transport Workers, Local 510, suffered from all of its parent union's notorious organizational shortcomings and was unable to translate its widespread appeal into stable, functional membership. By the mid 1920s, these organizational shortcomings had combined with relentless official repression as well as the post-war shipping slump to drive the IWW out of the maritime trades almost entirely. In the meantime, though, the union left a lasting mark. The IWW introduced thousands of seamen to a militant, leftist alternative to the ISU's conservative agenda. Many of these men would play key roles in the surge of radical unionism of the 1930s.

By the mid-1920s, the seamen's unions had been "laid low as if by a tidal wave." The collapse of both the ISU and the IWW left seamen to face dismal post-war conditions without any effective union representation. Well organized into various associations, and drawing substantial support from government subsidies and a weak and compliant regulatory agency,

132. NELSON, supra note 36, at 55.
133. GOLDBERG, supra note 27, at 120–21; GALENSON, supra note 117, at 428.
134. GOLDBERG, supra note 27, at 120–21.
136. GOLDBERG, supra note 27, at 118.
the United States Shipping Board, the ship owners were able to give full effect to their various job control devices. Ship owners found themselves “in sole control of labor policy” aboard ship. Well before the Depression, owners were already reducing wages, doubling watches, blacklisting unionists, and sailing ships that were either totally unseaworthy or woefully lacking in decent accommodations. Needless to say, with the onset of the Depression, conditions deteriorated even further.

Under these increasingly desperate conditions, even the conservative and weakened ISU was occasionally ready to endorse ship-side, if not shipboard, strikes. Predictably, militant remnants of the IWW went even further by undertaking shipboard strikes as well. In part because of the threat of mutiny charges in the atmosphere of intense labor repression of the 1920s, though, the shipboard strike tactic was seldom undertaken with any regularity. And none of these strikes did much either to undermine employer hegemony. It would take another decade and a new labor movement with altogether new organizations to begin to accomplish this.

C. The Rise of Militant and Radical Shipboard Labor

The decline of seamen’s unions in the 1920s and first few years of the 1930s was slowly halted and then reversed beginning about 1933. This revival of unionism among seamen, which would prove nothing short of spectacular, was the product of a number of complex forces. The most obvious of these included the very high levels of unemployment and pauperization caused by the Depression, the final culmination of industrialization in the maritime industry, as well as the rise in workers’ expectations and ambitions brought about by apparent legitimation of organized labor on the part of the Franklin Roosevelt administration and the New Deal Congress. As much as any of these factors, though, it was effective organizing that made the second half of the 1930s so different for seamen than previous years. By vigorous and intelligent organizing, seamen were finally able to convert awful working conditions, industrialization, and the apparent promise of a more progressive political

137. Created in 1916 to help coordinate the maritime war effort, the United States Shipping Board was not abolished until 1934. The Shipping Board was generally complicit in advancing employers’ job control agenda. Id. at 106–10.
138. TAFT, supra note 131, at 192.
139. See GOLDBERG, supra note 27, at 104–29.
141. GOLDBERG, supra note 27, at 120. The IWW’s favorable disposition toward “mutiny” had long been interpreted as an expression of its seditious character. See, e.g., Oil Ship Mutiny was I.W.W. Plot, N.Y. TIMES, Sept. 9, 1917, at 1.
142. GALENSON, supra note 117, at 428–29.
and legal order, into unions able to challenge employer hegemony.

This renewed success in organizing seamen was largely the work of leftist organizers. Many of these organizers were associated with the Committee for Industrial Organization (CIO), which emerged in 1935 with a mission to organize the millions of industrial workers so far largely ignored by its parent organization, the craft-oriented American Federation of Labor (AFL). Many of the most capable of these CIO organizers were members or allies of the Communist Party. Typically disciplined, principled, and well trained, these communists were instrumental in organizing seamen and other maritime workers. It is no exaggeration to say that communists were ultimately vital to the successful organization of shipboard labor in the 1930s.

At the same time, it is important to note that the role of communists in the maritime labor movement of the 1930s was also complex. This reflected chaotic strategy on the part of the Party itself. Between 1928 and 1934 the Party held to a policy of “dualism” premised on the formation of independent communist unions that would vie with their rivals for influence. After 1934, though, the strategy was changed (actually changed back—for the cycle had begun earlier) to one of “boring from within,” by which communists sought membership in rival unions in a bid to exert influence, if not outright control, over those organizations. While this latter strategy tended to lend credence to notions of communists as devious conspirators bent on exploiting legitimate labor organizations for ulterior political ends, the facts reveal a rather less pernicious role. In the maritime context, as in other industries, boring from within offered labor activists opportunities to steer unions towards more progressive forms of industrial unionism and especially to challenge racist and xenophobic policies. In only a few cases were communists inclined simply to hijack incumbent unions.

Communists played the leading role in the formation of two important seamen's unions that appeared in succession in the late 1920s and 1930s: the Marine Workers Industrial Union, or MWIU, and the NMU itself.

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143. Formed in late 1935, the CIO was initially an appendage of the AFL. In 1938, however, the CIO disassociated itself from the AFL and renamed itself the Congress of Industrial Organizations. The two federations clashed often and bitterly until 1954, when the CIO, weakened by government instigated anti-communist purges, re-affiliated with the AFL. On the complex origins of the CIO and its early history, see, generally, GALENSON, supra note 117.


145. NELSON, supra note 36, at 77–78.

146. Id.

147. See generally id.
brief review of the history of each reveals much about the nuanced, and generally progressive nature of communist involvement in maritime labor in this period. It also reveals much about the forces that lead to the City of Fort Worth strike.

The MWIU was formed in the spring of 1930 in New York City.\(^\text{148}\) Delegates arrived in many cases in the fashion of the IWW, by “hobooing” in on freight trains.\(^\text{149}\) Many were blacks, and perhaps half were veterans of the IWW. Although it is not clear how many delegates were actually Communist Party members, it is clear that the communists were important in framing the union’s structure and its ideology.\(^\text{150}\) Much more than the NMU or other CIO unions, the MWIU was at least initially subject to significant, if ineffective, attempts at control by the Communist International.\(^\text{151}\) Open to seamen, longshoremen, and other maritime workers, the MWIU was fundamentally committed to unionism along industrial lines and the repudiation of the ISU’s craft parochialism and general conservatism.\(^\text{152}\) Although it was not always successful in the face of decades of segregation and racial privilege, the MWIU zealously advanced a policy of racial equality.\(^\text{153}\) The organization likewise advanced the cause of socialist revolution, exhorting the ideals of workers’ revolution, anti-fascism, and anti-imperialism.\(^\text{154}\)

Above all else, though, the MWIU aspired to function as a rank-and-file union. Despite the Party’s attempts to control it, the union’s leaders were for the most part neither Party functionaries nor professional union bureaucrats, but rather seamen, longshoremen, and other industrial workers.\(^\text{155}\) The union’s leaders made sincere efforts to address the needs of the union’s members. Overall, the leadership of the MWIU was also dedicated, principled, and generally above the corruption that ran through the ISU and other maritime unions of the day.\(^\text{156}\)

MWIU membership probably never exceeded 5,000; but in the early
1930s this was at least as many as the ISU.\textsuperscript{157} And unlike the ISU, the MWIU was a vibrant organization with influence beyond its numbers. By 1933 it was organizing political protests (including tenant protests), attempting to establish its own hiring halls,\textsuperscript{158} and, most importantly, orchestrating shipboard strikes against dockside vessels.\textsuperscript{159} These tactics, in particular the ready resort to shipboard strikes, would prove especially influential in subsequent labor disputes.\textsuperscript{160} Later the MWIU played a central role in the huge maritime strike that erupted on the West Coast in the summer of 1934. The MWIU's ability to strike several vessels calling on San Francisco proved instrumental in converting a limited strike by longshoremen into a general work stoppage that would last eighty–three bloody days and build a tide of labor militancy among maritime workers.\textsuperscript{161} Yet in a political climate still skeptical of, if not overtly hostile to, radical unionism, the MWIU was unable to translate its burgeoning respectability—which was considerable, even among many ISU members—into lasting organizational gains. And it suffered from organizational shortcomings. By February 1935, the MWIU had withered away, its leaders and activists abandoning the strategy of dual unionism and once again "going underground" to bore from within.\textsuperscript{162}

Ironically, the ISU was the immediate beneficiary of the 1934 strike as well as an East Coast strike that the MWIU orchestrated later that fall. The ISU was able to regain thousands of members as well as recognition by dozens of East Coast companies. In spite of depressed economic conditions, it even managed to negotiate collective bargaining agreements

\textsuperscript{157} In 1934, the organization claimed 12,000 members; but this was likely an exaggerated figure. GALENSON, supra note 117, at 433.

\textsuperscript{158} See, e.g., Reds, Vocal But Polite, Hold Street Protest, N.Y. TIMES, May 11, 1930, at 24; 6,000 Protest in Harlem, N.Y. TIMES, May 31, 1933, at 6; 100,000 Rally Here, With No Disorder, N.Y. TIMES, May 2, 1933, at 1. The effort to establish union-run hiring halls was essential to undermining both the crimping system and the continuous discharge books.

\textsuperscript{159} See, e.g., 'Left Wing' Union Maps Ship Strike, N.Y. TIMES, Oct. 7, 1934, at 36. A telling example of a shipboard strike in action is told by MWIU (later NMU) delegate Charles Rubin. In June 1934, Rubin, with the support of thirty–eight of forty–one seamen, called a shipboard strike aboard the S.S. Texan, then docked in Brooklyn. The strikers demanded recognition of the MWIU, an increase in deck watches from two to three, overtime pay, and the employer's use of the MWIU hiring hall. The strikers also sought to express sympathy with maritime workers then striking \textit{en masse} on the West Coast. Rubin and company had no sooner presented their demands to the captain than they were confronted by thugs who beat and routed the pickets Rubin had set up on the dock. Late that night, "several platoons of police with sawed–off shotguns" ran the striking crewmen off the ship. RUBIN, supra note 119, at 152–54.

\textsuperscript{160} GOLDBERG, supra note 27, at 127–30.

\textsuperscript{161} The 1934 strike helped forge structures and strategies that would serve maritime labor well in the coming years. NELSON, supra note 36, at 134–36; John Kagel, \textit{The Day the City Stopped}, 63 CAL. HIST. 212 (1984); Charles P. Larrowe, \textit{The Great Maritime Strike of '34}, 11 LAB. HIST. 403, 405 (1970).

\textsuperscript{162} On the forces leading to the collapse of the MWIU, see, for example, GOLDBERG, supra note 27, at 150; NELSON, supra note 36, at 100–02; Pederson, supra note 151, at 313–20.
with those companies. This did not reflect any genuine redress of the
union's fundamental weaknesses, however. Instead, the ISU's success
seemed to follow from a generalized increase in seamen's interest in union
representation—which the MWIU helped create, but could not take
advantage of—as well as the union's success in presenting itself to workers
and employers alike as a less militant and less radical alternative to the
MWIU. The union's leadership remained incredibly corrupt, reactionary,
and inept. On the East Coast especially the ISU repeatedly failed to provide
seamen with effective representation, even by its own debased standards.
Moreover, even as the ISU recovered some of its old influence, it was being
compromised from within by ex-MWIU or ex-IWW members and other
radicals, who were "swarm[ing] into the ISU, despite the desire of [ISU]
officials to keep them out."
6 It was by this infusion of radicals into the
ISU that the ISU—in another ironic turn—would eventually give birth to
the NMU.

The precipitating events in the birth of the NMU began to unfold in
1935. At the beginning of that year, the ISU negotiated an agreement with
several dozen East Coast owners that offered its members less favorable
terms than those negotiated by West Coast seamen later that year.165 When
this contract expired at the end of 1935, ISU leaders proposed simply to
renew its terms.166 A surge of rank-and-file dissension caused the
leadership to reconsider and put the issue to a referendum, where the
membership demanded higher wages, better overtime rules, and more
effective hiring hall procedures.167 Indeed, eventually the membership
demanded instead point-by-point parity with West Coast seamen.168
Unmoved by this current of disaffection, in March, 1936, the ISU
leadership signed a modified, but ultimately concessionary contract.169

In January 1936 as all this played out, over 300 members of the crew
of the passenger liner Pennsylvania, which had sailed from New York,
walked off the ship in San Francisco. This strike was but the most notable
of scores, if not hundreds, of "interruptions to the operation of American
merchant vessels" by "insubordinate" crews to protest the leadership's
concessionary bargaining.170 Many of these were orchestrated by a Rank—

163. GOLDBERG, supra note 27, at 141–44; GALENSON, supra note 117, at 433.
164. Taft, supra note 127, at 197.
167. Seamen Here Vote for Higher Wages, N.Y. TIMES, Jan. 30, 1936, at 39; Seamen Demand a
20% Wage Rise, supra note 166, at 33.
169. Seamen Repudiate New Pay Contract, N.Y. TIMES, Mar. 13, 1936, at 45. See also GALENSON,
supra note 117, at 433–34; GOLDBERG, supra note 27, at 151–52.
170. Weaver Gets Data on Sea 'Incidents', N.Y. TIMES, Apr. 10, 1936, at 47.
and-File committee, which had been put together by MWIU veterans precisely to mobilize the rank-and-file against the ISU’s leadership. Although the Pennsylvania strike helped to compel the union leadership to submit the agreement to a referendum, the striking crew members were summarily discharged and left stranded in San Francisco. Several weeks later, the Pennsylvania’s sister ship, the California, approached San Francisco, having also sailed from New York. In an unsuccessful bid to avoid sympathy action on behalf of the stranded Pennsylvania crew, the California was diverted to San Pedro. Here, though, the California’s crew met a delegation from the Pennsylvania. Informed of the situation, they returned to their ship, and through their ad hoc spokesman, an “obscure” seaman named Joseph Curran who had briefly been an MWIU member, notified the California’s captain that they would not sail the ship back to New York without the Pennsylvania’s stranded seamen. 

Panama Pacific, the company that owned the ships (actually, a subsidiary of International Mercantile Marine), agreed to the crew’s initial demand; but Curran quickly followed with another: that East Coast companies pay West Coast wages. Expecting a walkout and a conventional strike on the dock, Panama Pacific began to recruit replacements. Curran, though, had organized a shipboard strike. The crew remained aboard, but refused to perform any duties beyond maintaining the ship in a safe condition and tending to the passengers’ needs. For three days this continued. In a move that anticipated subsequent events aboard the City of Fort Worth, Panama Pacific, as well as the Secretary of Commerce called for the Justice Department to charge Curran and the other strikers with mutiny. Panama Pacific even took out an advertisement in various newspapers advocating this position. Perhaps not surprisingly, the ISU leadership supported the company on this point and sought first to reign in and then to expel the “mutineers.” In the meantime, Curran, who had little experience in union matters but quickly proved to be tough and pragmatic leader with a knack


172. See, e.g., Charge of ‘Mutiny’ Seen In Ship Strike: Indictments Against Crew That Tied Up the California Are Being Considered, N.Y. TIMES, Mar. 5, 1937, at 45. 


174. Ship Strikers Face Chief Foe In Conservatives of Own Union, N.Y. TIMES, May 14, 1936, at 19; Ship Strikers Sued by Seamen’s Union, N.Y. TIMES, Mar. 31, 1936, at 45; Seamen’s Union Acts to Restrain Strikers, N.Y. TIMES, Mar. 29, 1936, at N12. When ordered by ISU vice president David Grange, who was a notoriously corrupt figure, to sail the California, Curran apparently responded, “Go to hell . . . you sold us out.” BERNSTEIN, supra note 1, at 574.
for dealing with labor disputes, found himself negotiating via a waterfront payphone with Secretary of Labor Frances Perkins, who was called away from a dinner with the President.\textsuperscript{175} According to the strikers, Perkins promised Curran that if the strikers agreed to sail the ship, no mutiny charges would be brought and (more controversially) that the company would not be allowed to discriminate against the strikers.\textsuperscript{176}

With some effort, Perkins was able to keep the first of these promises against the wishes of others in the Roosevelt administration. But when the \textit{California} reached New York, Curran and around sixty other seamen were docked six days wages, fired, and effectively blacklisted for their role in the strike. Curran’s group promptly organized a picket of the \textit{California}, preventing it from hiring a crew and sailing on its next voyage.\textsuperscript{177} The strikers’ narrow aim was to get the fired seamen reinstated; their broader aim was to force all East Coast owners to extend West Coast wages and conditions and to oust the ISU leadership.\textsuperscript{178} The strike lasted nine weeks, featured a number of bloody incidents, and eventually involved 4,500 seamen.\textsuperscript{179} Though it left the ISU leadership intact, this strike did earn the seamen some concessions. These entailed agreements by employers and the union leadership to handle grievances more efficiently, to reinstate perhaps some of the strikers who had been discharged and expelled from the union, and to seek certain improvements in hours and wages.\textsuperscript{180} Of more lasting significance, the strike also established within the ISU a core group of insurgents, lead by Curran and other capable organizers, with immense credibility among an increasingly disgruntled rank-and-file.

Over the next year or so, this insurgent faction—the Rank-and-Filers—attempted to force the ISU leadership to undertake significant reforms. They pressured the ISU’s parent, the AFL, to bring about these reforms. And they also undertook (unsuccessful) court action in a bid to

\textsuperscript{175} \textit{M’Grady’s Efforts Fail to End Strike}, N.Y. TIMES, Apr. 23, 1936, at 47.

\textsuperscript{176} Secretary Perkins may have been misunderstood by the strikers—or she may have lied to them to end the strike. \textit{Ship Strikers Face Chief Foe In Conservatives of Own Union}, N.Y. TIMES, May 14, 1936, at 19; \textit{How Miss Perkins Ended Ship Strike}, N.Y. TIMES, Mar. 6, 1936, at 43. The effort to forestall mutiny charges involved complicated negotiations among government officials and the intervention of a committee, chaired by New York attorney Louis S. Weiss, which had just completed a scathing report on the state of shipboard accommodations. \textit{California Strike Held Not Mutiny}, N.Y. TIMES, Jul. 25, 1938, at 29.


\textsuperscript{178} \textit{NELSON, supra note 36, at 214–15.}

\textsuperscript{179} \textit{BERNSTEIN, supra note 1, at 580.} In one particularly bloody clash in May, 1936, 221 strikers were arrested and scores beaten by New York police. \textit{221 Strikers Seized In Battles With Police Here}, N.Y. TIMES, May 12, 1936, at 1.

\textsuperscript{180} \textit{PHILIP TAFT, THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS} 198 (1954); \textit{Seamen End Strike, Fearing Cause Lost}, N.Y. TIMES, Mar. 30, 1936, at 1.
oust the ISU’s leadership and set aside ISU–negotiated agreements. In some instances the Rank–and–Filers even demanded recognition directly from owners. In all these efforts they were, for the time being, unsuccessful.\textsuperscript{181} To greater effect, the insurgents launched a relentless series of shipboard strikes involving scores of individual vessels.\textsuperscript{182} In late 1936 and early 1937, Curran’s group also mobilized thousands of East Coast seamen to join another massive West Coast maritime strike—once again a violent affair that achieved a few concessions from employers but enhanced the militant faction’s reputation.\textsuperscript{183}

Within a few months, Curran and his group had managed to construct a rival union structure within the ISU. According to the NMU’s own publication, by the fall of 1936, the Rank–and–Filers enjoyed the support of 20,000 men, representing the vast majority of East Coast ISU members.\textsuperscript{184} A number of ship owners recognized this fact and granted Rank–and–File agents “shore passes” (actually boarding passes) normally reserved for recognized representatives—a tacit, if limited, form of recognition. Indeed, early in 1937 International Mercantile Marine—the owner of Panama Pacific—petitioned the newly established NLRB to conduct an election to clarify and formalize the representation issue.\textsuperscript{185} But as long as Curran’s group was merely a collection of insurgents and not a genuine rival union, and as long as the ISU enjoyed incumbent status, the NLRB refused to do this.\textsuperscript{186}

The situation began to change in late spring, 1937, when the crew of the \textit{President Roosevelt}—yet another International Mercantile Marine vessel—launched a shipboard strike as the ship lay in New York harbor to protest discrimination in hiring based on union affiliation. In essence, the strikers demanded separate recognition of the Rank–and–File faction. While this was not the first time the group used the shipboard strike in this way, previous gains were limited. On May 4, though, International Mercantile agreed to allow Rank–and–File delegates aboard its ships—and to hire crew through the Rank–and–File’s hiring hall. Within two days,

\textsuperscript{181} BERNSTEIN, \textit{supra} note 1, at 583–84.

\textsuperscript{182} \textit{See, e.g.}, \textit{Ship Union Fights ‘Outlaw’ Strikers; Will Man Vessels}, \textit{N.Y. Times}, Nov. 3, 1936, at 1; \textit{18 Vessel Tied Up Here; Strike Hits Other Ports; U.S. Ready to Intervene}, \textit{N.Y. Times}, Nov. 2, 1936, at 1. For a detailed account of the Rank–and–File’s successful use of the threat of a “sit–down” strike to displace the ISU representation on three ships docked at Philadelphia in late March 1937, see RUBIN, \textit{supra} note 119, at 251–53.

\textsuperscript{183} \textit{See, e.g.}, \textit{Strikers on Coast Widen “Blockade”}, \textit{N.Y. Times}, Nov. 3, 1936, at 22; \textit{1500 Seamen Call Active Strike Here for ‘Wage Parity’}, \textit{N.Y. Times}, Nov. 7, 1936, at 1.

\textsuperscript{184} \textit{ON A TRUE COURSE: THE STORY OF THE NATIONAL MARITIME UNION, AFL–CIO 34} (1967). For the sake of convenience, I use the term “East Coast” to describe the Atlantic Coast, as well as the Gulf Coast and Great Lakes.

\textsuperscript{185} Int’l Mercantile Marine, Inc., 2 N.L.R.B. 971 (1937).

\textsuperscript{186} \textit{TAFT, supra} note 180, at 198–99.
Curran announced the formation of the NMU.\footnote{BERNSTEIN, supra note 1, at 584; GOLDBERG, supra note 27, at 154–55. See also Ship Union Formed as A.F. of L. Rival, N.Y. TIMES, May 6, 1937, at 1.}

Now desperate, the ISU leadership responded to this surge in NMU success with a final act of incompetence. The ISU petitioned the NLRB to conduct representation elections at virtually all the East Coast companies. The Board held the elections, which yielded entirely predictable results. At the end of a campaign involving crews on over 700 ships, the NMU carried the vote at over fifty shipping lines and the ISU less than ten. In virtually every election that it won, the NMU prevailed by a wide majority.\footnote{The available authorities differ slightly on the respective number of lines carried by each union, with Philip Taft claiming a 54–9 advantage for the NMU, while Nelson claims an advantage of 52–6. TAFT, supra note 180, at 198; NELSON, supra note 36, at 231.} By mid summer, the NMU claimed 35,000 members; by the end of that year, a still-growing NMU held 47,000 members while the ISU was once again essentially defunct.\footnote{BERNSTEIN, supra note 1, at 685; GOLDBERG, supra note 27, at 166–67. This structure was abandoned in 1939 in favor of a more streamlined industrial union structure. GALENSON, supra note 117, at 443.}

While committed from the outset to industrial unionism, for the first several years of its existence the NMU retained some of the decentralized, craft union structures of the ISU in the form of separate departments for deck, engine, and steward sailors and separate districts for the Atlantic and Gulf coasts and the Great Lakes.\footnote{BERNSTEIN, supra note 1, at 585; GOLDBERG, supra note 27, at 166–67. According to the NMU, the union’s first convention was attended by “135 delegates from 118 ships and 68 from 14 ports”; the delegates had to make their own way to the convention. ON A TRUE COURSE supra note 184, at 40. See also BERNSTEIN, supra note 1, at 485.} In other respects, though, the new union was radically different from its predecessor. Most delegates at the first constitutional convention in July, 1937, were working seamen—not, as had long been typical with the ISU, shore bound bureaucrats.\footnote{BERNSTEIN, supra note 1, at 485. See also BERNSTEIN, supra note 1, at 584; GOLDBERG, supra note 27, at 154–55. See also Ship Union Formed as A.F. of L. Rival, N.Y. TIMES, May 6, 1937, at 1.} Many were communists, IWW veterans, or, as was often the case, both. At its founding convention, the NMU formalized its affiliation with the CIO and committed itself to an agenda centered on improving working conditions, maintaining union democracy, advancing social welfare, unifying the maritime labor movement, and achieving racial equality. Unlike the MWIU, the NMU was never really subject to Communist Party attempts at manipulation.\footnote{BERNSTEIN, supra note 1, at 585; GOLDBERG, supra note 27, at 166–67. This structure was abandoned in 1939 in favor of a more streamlined industrial union structure. GALENSON, supra note 117, at 443.}

The NMU took its larger social vision quite seriously. It quickly stood out even among CIO unions for its dogged commitment to racial equality
and earned a lasting reputation for this stance. But the NMU also represented its members in conventional ways. By November 1937, the union was negotiating its first contracts; by 1938 it had taken over from the ISU the customary practice of bargaining with the large, multi-employer associations. Though wracked by a number of tensions that included unwieldy organizational structures, a growing rivalry with the ISU’s resurgent West Coast affiliate, the Sailor’s Union of the Pacific, and mounting red and race baiting, the NMU had quickly established itself as the largest and most vibrant seamen’s union. Its success raised for the first time the promise of mass representation of American seamen by a principled and effective labor union.

The NMU’s tremendous ascent was achieved largely by frequent and skillful resort to shipboard strikes. By striking aboard ship, seamen hit their employers at the point of production. They were able to avoid being replaced or marooned in distant ports and they were usually able to tie up the ship and its cargo or passengers. The ship’s officers and owners were thereby forced to confront the strikers’ demands and do so from an unaccustomed position of relative weakness. It was this tactic, clearly, that allowed the NMU to sweep aside the ISU, to force employers to take it seriously, and to build a solid membership.

To the extent that these strikes represented a shipboard version of the sit-down strike—and they were often described this way in the press—their use simply reflected the adoption of a form of labor protest that proved essential to the CIO’s broader campaign from 1936 through 1938 to organize the major heavy industries. And however one judges its legality or morality, there can be no doubt that sit-down strikes were absolutely

193. The NMU leadership maintained its commitment to racial justice even in the face of resistance from racist employers and a sometimes reluctant membership. Nelson, supra note 36, at 259; Donald T. Critchlow, Communist Unions and Racism, 17 LAB. HIST. 230 (1976). The NMU was condemned as a "nigger union" by racist seamen. See, e.g., Richard O. Boyer, The Dark Ship 36–37 (1947). In his memoirs, NMU organizer Charles Rubin tells of both the strident efforts of the union’s leadership to confront racism among seamen and owners, and the vexing difficulties they sometimes encountered. Rubin, supra note 119, at 273–76.

194. Taft, supra note 180, at 200–01.

195. In the late Spring and Summer of 1937, for example, numerous shipboard strikes by NMU crew seeking recognition or concessions were reported in the New York Times. Remarkably, all were at least partially successful. See, e.g., 70 Of Crew Strike As Liner Arrives, N.Y. Times, Aug. 23, 1937, at 33; NLRB Plea Fails to Halt Ship Row: Crews on Two Freighters Here Continue Sit-Dows and Strikes Hit Baltimore, N.Y. Times, June 18, 1937, at 6; Strike Holds Up Sailing, N.Y. Times, June 5, 1937, at 3; Seamen Call Strike on Lykes Ship Line: Action Ties Up Five Vessels—Working Conditions and 'Recognition' at Issue, N.Y. Times, May 18, 1937, at 46; Strike of C.I.O. Foes Holds Ship & Hours, N.Y. Times, May 14, 1937, at 47; Sit-Down on Four Ships Ends in Agreement, N.Y. Times, May 12, 1937, at 10; Ship Group Calls for Strike Here; Tie-Up on Pacific, N.Y. Times, Oct. 31, 1936, at 1.

196. In 1937, the height of this campaign, which focused on the automobile, tire, and steel industries, there were 400 sit-down strikes involving almost 400,000 employees. Bernstein, supra note 1, at 499–501.
essential to the successful organization of these industries. Indeed, these strikes did as least as much to reverse decades of anti-union policies in the United States as did the mere passage of the Wagner Act or the Norris-LaGuardia Act. Time and again, sit-down strikes were decisive in overcoming a concerted campaign among employers to ignore the law’s obligation to recognize and bargain with labor unions. At the same time, many participants in these strikes embraced the very plausible view that they held a property right, of sorts, to their jobs, and that such right could only be vindicated by the sit-down strike.197

In fact, there were real differences between shipboard strikes and true sit-down strikes.198 True sit-down strikes involved workers seizing possession and effective control of their workplace, sometimes violently and for weeks on end; shipboard strikes of the 1930s, like the vast majority of their predecessors, usually involved nothing more than part of a ship’s crew simply refusing to work while remaining aboard a vessel that was safely moored to dock and that doubled as their home. Unfortunately for the NMU, though, the courts took an intolerant view of militant labor protest no matter how peaceful, one that was more concerned with protecting the rights of property and capital against any effective challenge, than either drawing fine distinctions of law or applying the law in a realistic way. This orientation emerges very clearly in Southern Steamship.

The NMU was not done organizing seamen on the East Coast; neither had employers ceased the practices—illegal and otherwise—that tended to inspire this kind of labor militancy in the first place. Despite growing frustration among owners and other business interests, and growing unease about the tactic among union leadership, the shipboard strike remained a common feature of NMU organizing efforts throughout 1937 and 1938.199

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197. According to Walter Galenson, the sit-down strike was tolerated for a time by the courts and the government precisely because it was often the only way for workers to compel employers to recognize and bargain with their unions—as the law clearly required. GALENson, supra note 117, at 143-48.

198. This will be explored infra Part V.

199. In fact, the NMU leadership made some efforts to discourage shipboard strikes once it emerged in 1937 as a legitimate union. See, e.g., Warns Ship Crews Against Sit-Downs: Curran Declares ‘Disruptive Elements’ Seek to Break Up Maritime Union, N.Y. TIMES, Feb. 16, 1939, at 42. These efforts were not very successful, though. By the time the City of Fort Worth was struck in July, 1938, about 100 members had been stripped of their sailing certificates by the Marine Inspection and Navigation Bureau for participating in such strikes. GOLDBERG, supra note 27, at 175. See also Sea Strikers Held on Mutiny Charge: Twenty-Five Men of Ship Sagebrush Staged Sit-Down in Philadelphia N.Y. TIMES June 29, 1938, at 5. By early 1938, Joseph Kennedy, father of the future president and senators, and chairman of the United States Maritime Commission, was advocating legislation to prevent shipboard strikes; this he did against the views of Secretary of Labor Perkins, who favored a more patient approach. Kennedy Demands Sea Strike Curb; Scores Secretary, N.Y. TIMES, Feb. 17, 1938, at 1.
The City of Fort Worth Strike and the Southern Steamship Decision

In one sense, the strike aboard the City of Fort Worth in July 1938 represented a small skirmish in a larger campaign by the NMU to displace the ISU and gain meaningful recognition from all East Coast ship owners. In a broader sense, the strike reflected a longer-standing struggle between seamen to gain more control over and better conditions within a workplace in which the impersonal norms of industrial capitalism predominated, in which authority, deprivation, and class conflict were uniquely salient, and in which the law meant next to nothing on paper. Moreover, what occurred that summer in Houston and Philadelphia forced the Supreme Court to confront more directly than in any other case the limits of the rights of labor protest under the Wagner Act. For unlike the true sit-down strikes, the City of Fort Worth strike presented the Court with a tactic that was both very effective in advancing labor’s cause against capital and, as the many counter-arguments in Southern Steamship show, not at all clearly illegal or threatening to anything beyond the employer’s complete sovereignty in the workplace. The Courts’ response to those arguments expressed very clearly a view that the seamen would remain subject to traditional notions of maritime service and, further, that the traditional notions of private property and contract should prevail fundamentally intact against the challenge posed—either directly by New Deal labor or by labor’s allies in government. In the end seamen were left with no real right to strike at all, and the right of all workers to strike was substantially compromised.

A. The Strike Aboard the City of Fort Worth

Southern Steamship Company was one of the fifty or so companies named by the ISU in its fatal petition to the NLRB to hold representation elections.200 The company, a Delaware corporation based in Philadelphia, operated seven ships, all of which sailed regular routes between Houston and Philadelphia.201 Prior to the Board election, which was held in October 1937, the ISU held a contract with Southern Steamship. But in the Board’s opinion the ISU had waived any rights of incumbency under the contract by

201. In 1937, these vessels carried 341,581 tons of cargo. They were not large. All seven totaled only 18,382 gross tons (a measure of cargo capacity by volume)—compared to over 7,000 gross tons for a single Second World War ‘Liberty Ship’ and over 80,000 gross tons for the passenger liner Queen Elizabeth, launched the same year as the strike aboard the City of Fort Worth. This information emerges from the Board’s fact-finding for decisions involving the company. S. S. Co., 12 N.L.R.B. 1088, 1089 (1939); S. S. Co., 23 N.L.R.B. 26, 29 (1940). The City of Fort Worth itself was apparently a general cargo vessel constructed in 1919 by the McDougall–Duluth Company at Duluth, Minnesota, for the United States Shipping Board. Originally named La Crosse, it was renamed in 1925.
filing the petition. In any case, the NMU’s victory over the ISU among Southern Steamship employees was decisive. Out of 134 eligible voters, 132 cast ballots; of the 128 ballots that were counted, 73 were for NMU representation, 51 for neither the NMU nor the ISU, and only 4 for the ISU.

Southern Steamship immediately challenged the results of the election on the grounds that its representative was not present for the vote on one of its ships, the City of Houston. Despite the fact that the Board rejected this claim out of hand, the company refused to recognize the union. Between late January 1938, when the Board affirmed the NMU’s representative status, and August 1938, after the strike aboard the City of Fort Worth, the NMU’s Philadelphia business agent, Paul Palazzi, made repeated attempts by letter and phone, and in person, to initiate bargaining with Southern Steamship officials and to obtain shore passes. The company either ignored or refused each request.

The decision to strike Southern Steamship in order to force it to recognize the NMU and to grant the shore passes was made on July 17, 1938, by thirteen crewmen from the City of Fort Worth who had met in a Houston union hall to discuss the matter. They represented over half of the “unlicensed” seamen—the non-officers over whom the NMU enjoyed representative status—of the crew. At 8:00 a.m. the next morning, one of these men, John J. Tracey “failed to turn on the steam” to the machinery needed to load the ship’s cargo. When the ship’s assistant engineer turned it on himself, Tracey had another crewman “throw the pumps.” Eventually the ship’s officers and the six seamen who did not strike got the steam up. But in the meantime the thirteen strikers gathered on the poop deck, which served as the crew’s “general meeting place” when not on duty, and refused to do any further work.

While the City of Fort Worth’s officers managed to load its cargo, they

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204. The Board found that Southern Steamship had no right to observe the election. In any case, both the ISU and NMU consented to the presence of company representatives at subsequent elections aboard the other ships. *Am. France Line*, 4 N.L.R.B. at 1141. In 1939, the Board found that Southern Steamship had unlawfully discharged and refused to reinstate the chief engineer of the City of Philadelphia, who was a member of the Marine Engineers Beneficial Association, which was allied with the NMU, for his participation in one of the strikes of 1936. The employee, one Max Starke, had an exemplary service record and was recommended by the captain of the City of Philadelphia for reinstatement. He was also the last of the crew to go out on strike, having remained on board for several days after the strike commenced. *S. S. S. Co.*, 12 N.L.R.B. at 1090–91.
206. *S. S. S. Co.*, 23 N.L.R.B. at 33. Tracey and the other four seamen, who would be discharged when the ship reached Philadelphia, were delegates or otherwise active in the union’s organizing campaign. Transcript of Record at 127–29, S. S. S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320).
could not get the ship under way as long as the strike continued. At 10:30 a.m. the captain recited a copy of the strikers' shipping articles and demanded that they return to work. Their spokesman, Joseph Warren, responded by reiterating the strikers' demands and pointing out to the captain that the law—the Wagner Act—was actually in the strikers' favor. Later that morning, the captain summoned to the ship the deputy United States Shipping Commissioner, who also recited the articles, but to no avail. The strike continued through the afternoon, during which time the strikers were allowed to remain on board the ship. In fact they were all allowed their lunch and some of them were permitted to go ashore to confer with the union's shore delegates. During the meantime, negotiations began between the attorneys of Southern Steamship and the NMU. By 7:00 p.m., Southern Steamship's attorney had promised that if the strike were ended, collective bargaining would begin the following week and shore passes would be granted. As soon as this information was communicated to the strikers, they returned to work and at 9:00 p.m. the City of Fort Worth set sail for Philadelphia.

According to subsequent findings by the Board, "[t]he officers on board admitted that the strike did not delay the [ship's] sailing and that the vessel was in no danger during the period of the strike." In fact, the strikers had conceived the strike such that it would not result in violence or danger to the ship. Moreover, during the passage to Philadelphia, the strikers "conducted themselves in a competent manner." The captain had no complaints to make about them. Other officers admitted that the crew was "good" and "safe" during the trip. Indeed, one officer proposed to the "boys" that they "forget all about what happened." Unbeknownst to the strikers, who nonetheless anticipated trouble, Southern Steamship's attorney had given them a promise which he had not cleared with either the company's marine superintendent or its president and which the company had no intention of fulfilling. Moreover, the captain and his officers were not inclined to "forget all about" the strike. Before the ship reached Philadelphia, the ship's officers decided to refuse to re-ship five of the

207. S. S. S. Co., 23 N.L.R.B. at 33–34 (1940); Transcript of Record at 162–63, 436–40, S. S. S. Co. v. NLRB, 316 U.S. 31 (1942) (No.320). Warren did not testify; but according to fellow striker John Pfuhl, Jr., Warren told the captain, "We realize we are under articles, but we are alongside the dock of an American port, safely moored, and we are on strike, and we have a right to strike." Transcript of Record, at 220, S. S. S. Co. v. NLRB, 316 U.S. 31 (1942) (No.320).


210. According to Tracey, the seaman whose actions initiated the strike, "It was to be conducted very orderly, no violence whatsoever, just tell them what we want [recognition], and if we didn't get it, we were going to sit down. We were going to keep steam in all of our auxiliaries, and if they put steam on the deck, we were going to shut down on them, we were not going to give them no steam." Transcript of Record at 130–31, S. S. S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320).
strikers, which they carried out as soon as the ship arrived on July 25. Acting on a prior agreement, all but one of the original strikers then struck the ship in protest; they too were discharged.\textsuperscript{212}

B. \textit{The Southern Steamship Case: From the Board to the Supreme Court}

The very next day, July 26, the NMU filed unfair labor practice charges against Southern Steamship.\textsuperscript{213} The charges alleged that by refusing to bargain with the NMU, Southern Steamship violated § 8(5) of the Wagner Act, that by discharging and refusing to reinstate the strikers, it violated § 8(3) of the Act, and that by interfering with the workers' right to organize and bargain collectively the company violated § 8(1) of the Act.\textsuperscript{214} On November 23, 1938, the NLRB's Regional Director for the Fourth Region issued a formal complaint based on these charges. In December 1938 and January 1939, several days of hearings were held on these charges, first in Philadelphia, then in Houston, before a trial examiner. In February 1939, the trial examiner ruled against Southern Steamship on all charges and recommended that it be ordered to cease and desist from its unfair labor practices, that upon application, it reinstate four of the five seamen\textsuperscript{215} discharged for their participation in the July 18 strike and offer all five of them back pay, and that it also reinstate with back pay those discharged for the July 25 strike.\textsuperscript{216} Southern Steamship promptly filed exceptions and the Board granted a full hearing with oral arguments, which was held on November 2, 1939.

Southern Steamship's arguments before the Board, which would frame the later litigation of the case, essentially consisted of the following contentions. First, regarding its refusal to recognize and bargain with the NMU, Southern Steamship claimed that the NMU had made no demand to bargain before the July 18 strike, that the strike, because unlawful, negated any obligation to bargain, and that in any case it had no obligation to bargain pending a judicial hearing on its earlier objections to the

\textsuperscript{212} S. S. S. Co., 23 N.L.R.B. 26, 34–35 (1940). See also Transcript of Record at 60–85, 150–58, 244, S. S. S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320).

\textsuperscript{213} These charges were amended on November 22, the day before the Board issued a formal complaint. (The changes mainly added factual information. They did not alter the basic substance of the ULP claims.)


\textsuperscript{215} The trial examiner agreed with Southern Steamship's contention that the fifth seamen, John Pfuhl, Jr., was unfit for reinstatement because he was a "slow worker" and had a petty larceny record. The Board, citing Pfuhl's long and apparently effective service with the company, rejected this conclusion and ordered that Pfuhl also be offered reinstatement. S. S. S. Co., 23 N.L.R.B. at 41–42, 44–45, 47–48.

\textsuperscript{216} S. S. S. Co., 23 N.L.R.B. at 28. See also NLRB Aide Backs Ship Crew's Strike, N.Y. TIMES, Mar. 5, 1939, at S9.
representation election. Second, regarding the discharges, the company argued that the discharged seamen’s shipping articles, which like most articles\(^2\) expired upon the vessel completing its voyage, terminated the seamen’s employment, so that there could be no claim of unfair discharges. Third, again regarding the discharges, Southern Steamship argued that the July 18 strikers engaged in a sit–down strike by which they “took possession” of the ship, trespassed upon it, and stirred up disobedience among the crew; by so doing, the company claimed, the strikers forfeited any right to continued employment. With this, the company clearly hoped to invoke the rule just announced by the Supreme Court in *Fansteel* casting sit–down strikers outside the protection of the labor law.\(^{2,18}\) As to its discharge of the July 25 strikers, the company raised no clear defense, although it would subsequently suggest that they had not been discharged but had simply “voluntarily left the ship” and not returned.\(^{2,19}\) Finally, Southern Steamship claimed that the July 18 strikers violated the terms of their shipping articles, thereby committing a breach of contract that justified the company’s refusal to re–ship them.\(^{2,20}\)

In a unanimous decision released April 23, 1940, the Board rejected each of these contentions.\(^{2,21}\) On the issue of recognition, the Board noted that it had already resolved the representation issue in an earlier decision in which it emphasized that the company had no right to participate in representation proceedings. Furthermore, the Board held, the NMU’s agent had made repeated efforts before the *City of Fort Worth* strike to bargain with the company.\(^{2,22}\) Moving to the issues regarding the strikes, the shipping articles, and the subsequent discharges, the Board, citing an earlier

\(^{2,17}\) Shipping articles, which are statutorily required of all seamen, may be of two types: continuous articles, which continue over a definite time period, and voyage articles, which describe a particular voyage. See NORRIS, supra note 71, at § 6:11. Most seamen in the 1930s, including those aboard the *City of Fort Worth*, sailed under voyage articles.


\(^{2,19}\) Brief of Petitioner at 6, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320). It is possible that Southern Steamship also felt that the status of the July 25 strikers was contingent on that of the July 18 strike. This was apparently the Board’s view as well. Although it is nowhere entirely clear on this question, the Board seemed to hold that if the July 18 strike was legal, then the July 25 strike was as well, and the discharge of the July 25 strikers an unfair labor practice. S. S.S. Co., 23 N.L.R.B. at 44–45. In any case, the status of the July 18 strike was throughout the most important question for all involved.

\(^{2,20}\) S. S.S. Co., 23 N.L.R.B. at 38–39. Southern Steamship also alleged that it had alternative reasons, unconnected to the strike, to discharge each of the July 18 strikers. But these reasons were not taken seriously by the trial examiner (except with respect to one striker, John Pfuhl, Jr.), the Board (which reversed the trial examiner on that one striker), or the courts. Id. at 40–43; S. S.S. Co. v. NLRB, 120 F.2d 505, 508 (3d Cir. 1941). The matter was not raised by Southern Steamship before the Supreme Court. See Brief of Petitioner, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320); Transcript of Record at 68–75, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320).

\(^{2,21}\) *NLRB Rules Sitting on Deck Not a Sit–Down; Orders Pay for Five Seamen From July, 1938*, N.Y. TIMES, Apr. 24, 1940, at 14.

decision upheld by the Supreme Court, held that the shipping articles did not conclusively define seamen’s tenure of employment. Indeed, it noted that the City of Fort Worth crew, including all the discharged strikers, had worked under a clear presumption of continuous employment and that relative to employment tenure, the articles were therefore an irrelevant formality. The Board was also firm in its view that the July 18 strike was not illegal. Noting first that the strike was caused by Southern Steamship’s own illegal act, its refusal to bargain, the Board also emphasized that the strike was not actually a sit-down strike. The July 18 strikers did not seize, take possession of, or otherwise jeopardize the ship; they were not violent and were apparently never ordered to leave the ship; and in remaining on board during the strike they were, in a very real sense, simply retiring to their home. Accordingly, the Board construed the July 18 strike as a lawful protest of Southern Steamship’s continuing unfair labor practice, its refusal to bargain with the NMU. Likewise, the July 25 strike was a lawful protest of that unfair labor practice as well as another, the discharge of the July 18 strikers. Finally, the Board rejected Southern Steamship’s breach of contract argument. The Board acknowledged that the July 18 strike contravened a covenant of the shipping articles but pointed out that this would often be the case with any kind of individual employment contracts and that—consistent with the anti-yellow dog contract provisions of the Wagner and Norris-LaGuardia acts—such contracts must necessarily yield on many occasions to a meaningful right to strike. Because the July 18 strike in this case was legal, a contractual promise not to strike would not control.

After rejecting all of Southern Steamship’s arguments, the Board upheld the trial examiner’s findings that the company had committed several violations of the law. It held unequivocally that Southern

223. It was customary for Southern Steamship to have its seamen sign new articles at the conclusion of a voyage at the same time that they signed off on the old articles. Even if for some reason this did not happen, the seamen considered themselves employed for the next voyage unless specific notice to the contrary was given. Id. at 36. The Supreme Court upheld the Board’s view of this issue in a very similar case. NLRB v. Waterman S.S. Corp., 309 U.S. 206 (1940).

224. The Board’s finding that the strikers were never ordered to leave the ship remained a matter of minor controversy throughout the litigation. There was some testimony from one of the strikers—Tracey—that they were asked to leave the ship. Transcript of Record at 140–42, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320). No other striker testified to this effect. And Tracey’s testimony, while not overly contradictory, is inconsistent with the other strikers on less controversial issues—including Warren’s response to the Captain’s demand to get back to work, which Tracey alone did not recall occurring. Id. at 138–39. In any case, the Board was not swayed by his reference to the command to leave the ship.

226. Id. at 34–35, 44–45.
227. Id. at 38–39. The Board’s view of the relationship between statutory rights and individual employment contracts was inherent in depriving yellow dog contracts of any legal effect, which was clearly a major aim of the Act.
Steamship violated § 8(5) of the Wagner Act by its persistent refusal to recognize and bargain with the NMU. The Board held further that both the July 18 and July 25 strikes were legal and "protected" within the meaning of § 7 of the Act. As such, the company's discharges, because motivated by the workers' participation in those protected strikes, were unfair labor practices under § 8(1) and (3) of the Act and, along with the § 8(5) violation, subject to remedy under § 10(c). With only minor alterations, the Board then upheld the trial examiner's remedies ordering Southern Steamship to cease and desist from its unfair labor practices, to recognize and bargain with the NMU, and to reinstate all of the discharged strikers with back pay—all standard remedies for the unfair labor practices the company was found to have committed.\footnote{228}{Id. at 44-45. The most important change made by the Board was to order that the fifth seaman, John Pfuhl, Jr., whom the trial examiner had denied reinstatement because of his alleged inefficiency, be offered this remedy as well.}

In April 1940, Southern Steamship appealed the Board's decision to the Third Circuit.\footnote{229}{Transcript of Record at 1-13, S. S. S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320).} A year later the court issued a ruling on the matter in which it not only agreed with the Board on every important point, but substantially followed the Board's reasoning.\footnote{230}{S. S. S. Co. v. NLRB, 120 F.2d 505 (3d Cir. 1941).} On the issue that would be central to the Supreme Court—the legality of the July 18 strike—the court admitted that the issue was "still an open one," with the law's traditional prohibition of shipboard strikes running up against an expanding regime of labor rights from which seamen were not obviously excluded. Other courts, the majority noted, had recently decided the issue in seemingly conflicting ways.\footnote{231}{Id. at 510.} But upon closer analysis the court discerned a consistent theme in these cases that clearly supported the Board's decision. While shipboard strikes that were violent, that involved taking possession of the ship or otherwise substantially interfering with its operations, that occurred at sea or in a foreign port, or that otherwise put the ship in jeopardy, had all been found illegal and unprotected—and in the court's view, quite properly so—strikes such as the one aboard the City of Fort Worth, which were in every way different, were treated very differently by the courts.\footnote{232}{Id. at 509-11. In particular, the court contrasted the results in Weisthoff v. Am. Hawaiian S.S. Co., 79 F.2d 124 (2d Cir. 1935) and Black Diamond S.S. Corp. v. NLRB, 94 F.2d 875 (2nd Cir. 1938), with Rees v. United States, 95 F.2d 792 (4th Cir. 1938) and Peninsular & Occidental S.S. Co. v. NLRB (5th Cir. 1938).} Furthermore, although the court took note of Fansteel, it followed the Board in refusing to declare the City of Fort Worth strike a sit-down strike within the meaning of that decision. Instead, it referred to the Fansteel decision only for the proposition that "[i]f the strikers had been guilty of criminal acts of violence or of forcible detainer of the vessel" their discharge would be
warranted.\textsuperscript{233} Inasmuch as the \textit{Fansteel} strikers had taken control of their factory for over a week, had held off the police in open combat, and were eventually convicted of various crimes of violence, this distinction seems quite apt.\textsuperscript{234} Further, the court held, if the July 18 strike had indeed taken place in a manner that imperiled the vessel—for example at sea or in an "unsafe port"—then perhaps the strike "might well have transcended the bounds of action in a labor dispute and have constituted a revolt or mutiny."\textsuperscript{235} In the absence of this or any other reason to deem the strike illegal, the court upheld the Board's unfair labor practice findings as well as its remedies.

The \textit{en banc} panel of the Third Circuit that decided \textit{Southern Steamship} consisted of five judges, of whom only one dissented. The dissent is interesting on several points. Judge William Clarke deemed the decision "untimely in view of present world conditions" (the Second World War had begun) and a "disservice to wise industrial relations." He went further and suggested that the right to strike aboard ship should give way to the right of ship owners "to carry on business," the general need aboard ship "for discipline at all times," and the real power over their employers that the shipboard strike gave seamen, as the key reasons it must be restrained.\textsuperscript{236}

Southern Steamship appealed the Third Circuit's decision to the Supreme Court, which granted \textit{certiorari} in October 1941,\textsuperscript{237} heard oral arguments on February 9 and 10, 1942, and decided the case on April 6, 1942. Southern Steamship, with the support of the American Merchant Marine Institute, asked the Court to overturn the Third Circuit's ruling and set aside the Board's reinstatement and bargaining orders.\textsuperscript{238} The company's arguments to the Court closely resembled its arguments before the Board and the Third Circuit.\textsuperscript{239} In one major respect, though, its brief deserves special mention.

The company's brief candidly challenged seamen's right to strike

\textsuperscript{233} S. S.S. Co. v. NLRB, 120 F.2d 505, 509 (3rd Circuit 1941).

\textsuperscript{234} On the events that led to the \textit{Fansteel} decision, see, for example, Henry M. Hart, Jr. & Edward F. Prichard, Jr., \textit{The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board}, 52 HARV. L. REV. 1275, 1289–91 (1939).

\textsuperscript{235} S. S.S. Co., 120 F.2d at 509.

\textsuperscript{236} Id. at 511–14.

\textsuperscript{237} S. S.S. Co. v. NLRB, 314 U.S. 594 (1941).


\textsuperscript{239} As below, Southern Steamship argued that the shipping articles must be dispositive of the seamen's contractual relationship; therefore, the company had not actually discharged any of the seamen. Moreover, Southern Steamship claimed an unconditional right as employer to observe the shipboard representation elections and that having been denied this right, it had no obligation to recognize the NMU. Brief for Petitioner at 27–33, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320).
altogether and did so by invoking a traditional view of shipboard authority. Appealing to tried and true notions of shipboard paternalism, the company argued that seamen enjoy a "special relationship" to their "master," one that "has not materially changed notwithstanding the vast changes in industrial pursuits on shore." As a natural reflection of this relationship, the ship must be a "disciplined organization." And discipline must be maintained "at all times wheresoever the ship may be—in port or at sea." For this reason a strike aboard ship could never be countenanced, except possibly in the vessel's home port. Even more remarkably, Southern Steamship specifically described mutiny law as designed to preserve traditional authority against the threat of shipboard strikes and the expansion of worker rights in the workplace generally.

The Board, as well as the NMU, which had intervened in the case, focused their arguments on countering the notion that the strike was illegal. Both took issue with Southern Steamship's paternalistic premise that seamen are a group deserving this kind of special treatment. In their briefs, the Board and the NMU pointed out that Congress had every opportunity to incorporate such an exceptional view of seamen into the Wagner Act—for example, by excluding them from coverage, as it had done with several other categories of workers—and obviously declined to do so. This suggested a broad intent to give seamen the same labor rights as other, shoreside workers. Turning to the notion that the July 18 strikers had committed mutiny and that this negated their right to strike, the respondent parties raised several very plausible arguments. The Board noted that recent case law revealed a growing reluctance among courts to treat peaceful, safe shipboard strikes aboard dockside ships as mutinies. This contention was advanced with even more force by the NMU, which observed that every one of the cases cited by Southern Steamship for the notion that peaceful, dockside shipboard strikes are mutinous—or at least every one that clearly supported this notion—was not only distinguishable on the facts but also was an archaic decision decided before labor of any

240. Id. at 12.
241. Id. at 25.
242. Id. at 23–24 & n.21.
243. For good measure, the company also suggested that shipboard strikes would undermine the country's vital interest in a strong merchant marine, a matter whose importance was underscored by the country's entrance into the Second World War. Id. at 9–27.
244. No doubt appreciating the weakness of Southern Steamship's claims on these issues, neither the Board nor the NMU focused much on the representation question or the shipping articles. Their arguments essentially repeated those made before the Board and the Third Circuit. Brief of Respondent at 59–61, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320); Brief of the Nat'l Mar. Union at 13–21, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320).
246. See Brief of Respondent at 23–24, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320).
247. Id. at 41–52.
kind enjoyed meaningful rights of protest.\textsuperscript{248}

The Board also observed that while the law once contained provisions that did seem explicitly to criminalize peaceful, dockside strikes—the "willful disobedience" provisions of the 1872 Shipping Commissioners Act—Congress in 1898 had amended these provisions in such a way that they clearly no longer applied to the strike in question.\textsuperscript{249} If Congress had intended the mutiny law to apply to strikes like the one aboard the \textit{City of Fort Worth}, the Board argued, there would have been no need to enact these provisions of the Shipping Commissioners Act in first place—let alone to repeal them.\textsuperscript{250}

Litigating in the wake of \textit{Fansteel}, the Board and the NMU were also keen to show that the July 18 strike was not a sit-down strike and was not as a matter of course illegal under that ruling. In their briefs, both emphasized the points they and the Third Circuit had raised below in distinguishing this strike from \textit{Fansteel}: that the strike was non-violent and did not involve taking possession of the ship; that the ship was never endangered; that the ship's interests were not substantially prejudiced; and that the strikers were never even ordered to leave the ship.\textsuperscript{251} Indeed, as the Board's brief was especially concerned to underscore, the real issue in \textit{Fansteel} had little to do with the workers sitting down as such and instead involved the "illegal seizure and retention of the plant by force and violence and the refusal of the strikers to permit the owner to enter its property."\textsuperscript{252}

In essence, both the union and the Board argued, all that the \textit{City of Fort Worth} strikers did was refuse to work at a time not critical to the well-being of the ship or its crew; and rather than sitting down on the job, let alone seizing control of the workplace, what they really did was tantamount simply to staying home.\textsuperscript{253} On the other hand, they noted that if such a strike was illegal under the mutiny law, and if Southern Steamship's argument that the shipping articles alone determine tenure of employment


\textsuperscript{249} Section 51 of the Shipping Commissioners Act had created several crimes of "willful disobedience," including one that specifically referred to willful disobedience by "combining with others." \textit{See supra} note 40. The Maguire Act of 1898 eliminated the last of these altogether and amended the other provisions such that they applied only to conduct occurring "at sea." Brief of Respondent at 28–29, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320).

\textsuperscript{250} Brief of Respondent at 36–38, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320). The Board also noted that § 20 of the Clayton Act seemed to express the intent by Congress that mutiny law not be applied in labor disputes in the first place. \textit{Id.} at 36 & n.21.


\textsuperscript{252} Brief of Respondent at 20, S. S.S. Co. v. NLRB, 316 U.S. 31 (1942) (No. 320).

\textsuperscript{253} Indeed, the Board pointed out that had the seamen left the ship they would have committed the offense of desertion and that Southern Steamship had conceded this would have been far worse for its interests than the strike. \textit{Id.} at 21 & n.12.
prevailed, seamen would be left with no meaningful right to strike at all. Moreover, even if the strike was illegal under *Fansteel* or the mutiny statute, the issue here was whether it was nonetheless protected—and technical or minor violations of the law need not be taken to cause strikers to forfeit their rights under the labor law.

The Supreme Court decided *Southern Steamship* by a five-to-four vote, with the majority opinion written by Justice James Byrnes, a Franklin D. Roosevelt appointee from South Carolina who served only one term on the Court. Byrnes began his opinion by summarily rejecting Southern Steamship’s argument that it had a right to be present during voting and that the denial of that right vitiated the election results. He just as quickly dispensed with the company’s claim that the shipping articles established the seamen’s tenure of employment. On each point, Byrnes refused to set aside the Board’s and the Third Circuit’s rulings. Indeed for Byrnes, the only real question was whether the Board had exceeded it remedial authority under § 10(c) in ordering the reinstatement of the July 18 strikers. As Byrnes understood the case, reaching an answer to this question required the Court to determine first, whether the strike was legal and protected under § 7, and second, whether the discharges were therefore violations of § 8(1) and (3).

Byrnes began his analysis of that issue by expressing a view of seamen that might have come straight from Justice Story a century earlier and that left little doubt as to the way the Court would rule.

> Ever since men have gone to sea, the relationship of master to seamen has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master’s care. Every one and every thing depend on him. He must command and the crew must obey.

For Byrnes, as for Story and indeed many other Nineteenth Century jurists, this obligation to obey was justified by the fundamentally paternalistic notion that “workers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by the limits upon their ability to help themselves.” “It is in this setting of fact and law,” he continued, “that we must test the validity of the Board’s order of

256. Byrnes, who served only a year on the court (from October 1941 to October 1942), is little known as a Justice. Before taking a seat on the Court he was a Congressman and then Senator from South Carolina. After leaving the court he served as Director of Economic Stabilization and Director of War Mobilization under Roosevelt, Secretary of State under Truman, and, finally, Governor of South Carolina. See DAVID ROBERTSON, SLY AND ABLE: A POLITICAL BIOGRAPHY OF JAMES BYRNES (1994).
258. *Id.* at 38.
259. *Id.* at 39.
reinstatement.” That part of this “extraordinary legislative solicitude” might include the Wagner Act, which was being flouted by Southern Steamship in this very case, was of no apparent concern to the Justice. Neither was the fact that the ability of seamen to “help themselves” under the Wagner Act was precisely the issue at hand.

Byrnes turned from here straight to the question of mutiny and promptly concluded that the strike aboard the *City of Fort Worth* on July 18 constituted both mutiny as such as well as conspiracy to commit mutiny. Again begging a key question, Byrnes concluded that “[I]t may hardly be disputed that each of the strikers resisted the captain and other officers in the free and lawful exercise of their authority and command, within the meaning of § 293, or that they combined and conspired to that end, within the meaning of § 292.” In his view, the strikers “undertook to impose their will on the captain and officers.” And while he acknowledged that the strike may not have been violent or otherwise interfered with the ship’s functions, he saw no grounds to draw a distinction along these lines. The strike prevented the ship from sailing, and this was sufficient.

Citing the Board’s concession that if the strike had taken place on the high seas it would no doubt be mutinous, Byrnes allowed his analysis of the mutiny question to focus on only one additional issue: the propriety of distinguishing between a shipboard strike such as this one, and other situations already deemed by the courts mutinous. Although Byrnes cited a number of Nineteenth Century cases (including several authored by Story), as well as two Twentieth Century cases, for the proposition that shipboard strikes on the high seas, “in harbor,” or in foreign jurisdictions were properly deemed mutinous, he admitted that no authority spoke to the issue of a strike on a ship tied to the dock in domestic waters. In order to contend with this ambiguity, he then pointed to recent, unsuccessful attempts to amend the mutiny statutes that they might clearly permit shipboard strikes as evidence of prevailing legislative purpose. Finally, summoning up various speculative scenarios, Byrnes argued that a ship is never safe, even in port, and that therefore the same considerations that rendered at-sea strikes mutinous should also apply to in-port strikes. For

260. *Id.*
261. *Id.* at 40.
262. *Id.* at 41.
263. *Id.* at 40–41.
264. *Id.* at 41.
265. *Id.* at 42 & n.14.
266. *Id.* at 43–44. The bills to which Byrnes refers, H.R. 3427, 76th Cong. 1st Session (1939) and H.R. 3428, 76th Cong. 1st Sess. (1939), were not introduced until January 30, 1939. 84 CONG. REC. H967 (1939).
267. *Id.* at 46. Byrnes argued that “it is by no means clear that a ship moored to a dock is “safe” if its crew refuses to tend it.”
Byrnes, these were more than sufficient reasons to hold that all shipboard strikes, except perhaps those occurring in the vessel's home port, are mutinous and illegal.

There remained the Board's alternative argument that even if the strike were mutinous, it should still be protected by § 7 and the discharges subject to Board remedy. The Board had raised two interconnected reasons to support this position: first, that the employer had engaged in a serious unfair labor practice; and second, that the mutiny, if one existed at all, was merely "technical." To the first reason, Byrnes responded that, "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." The Board, he continued, had undertaken what must be a "careful accommodation of one statutory scheme to another" in an incorrect way; it had placed "excessive emphasis on its immediate task." To the Board's second reason, which referenced the strike's placid, unthreatening nature, Byrnes again speculated widely as to the possible dangers posed by the strike. He suggested that the strike's lack of violence was but a "fortunate feature of the affair" and that "as a practical matter, the City of Fort Worth was definitely wrested from the control of its officers." Indeed, Byrnes not only rejected the idea that strikes should remain protected when merely technically violating other laws, he actually held that where the Board's use of its remedial power impinged on any other federal statute or policy which the Board itself—in the Court's view—had insufficient expertise to interpret, the Board's remedial power must yield completely.

As a final matter, Byrnes attempted to address the concern so clearly raised by the NMU that the majority's ruling would deprive seamen of any real right to strike. Articulating one of Southern Steamship's more important themes, Byrnes steered the seamen away from the strike to the courts. He proposed that "[a]t any time following the certification of the NMU in January, 1938, the union and the Board could have secured the assistance of the courts in forcing petitioner to bargain." Had the union done this, he surmised, the "unfortunate occurrence at Houston might have been averted."

Justice Stanley Reed authored a brief dissent, in which he was joined by Justices Hugo Black, William O. Douglas, and Frank Murphy.
Perhaps the most notable feature of Reed’s dissent is that it does not challenge the majority’s view that the strike was an act of mutiny. Instead Reed assumed this to be true and focused his entire argument on criticizing the majority’s notion that such an unlawful act negates the Board’s remedial authority. By so ruling, he argued, the majority “unduly expands judicial review of the Board’s discretionary power.” To bolster this point, Reed also emphasized that Fansteel was concerned with violent seizure of the plant, not with a peaceful, non-possessory strike; it dealt with a serious criminal act of which strikers were actually convicted, not a technical violation of the law that featured no attempt at prosecution. For that reason, there was “no justification for an iron rule that a discharge of a striker by his employer for some particular, unlawful conduct in furtherance of a strike is sufficient to bar his reinstatement as a matter of law.”

C. Critiquing the Supreme Court’s Decision

The majority’s decision in Southern Steamship rests on rather questionable legal grounds, only one or two of which are mentioned by the dissent. Perhaps the most important shortcoming in the Court’s reasoning is its determination that mutiny law continued to apply in this case as it did in the Nineteenth Century, unchanged by the Wagner Act. In reaching this conclusion, on which depended the characterization of the strike as illegal, the Court discounted completely the dramatic changes in labor policy that had occurred since the interpretation of mutiny law that it cited was established. As was noted not only by the Board and the NMU, but also by several commentators in the late 1930s who anticipated this issue, when the law of mutiny was developed along these lines, so favored by Justice Byrnes, it was essentially illegal for all industrial workers to organize unions, to demand collective bargaining, or to strike. The Wagner Act, as well as the Norris-LaGuardia and Lafollette acts, had transformed the law in this area, suggesting the need to re-conceptualize and subordinate mutiny law, not labor law. At the same time, as the Court itself admitted, the application of mutiny law to a strike such as the one aboard the City of Fort Worth had not been endorsed by appellate courts. In combination, these points call very much for the subordination of mutiny law to labor law, not vice versa.

A similar point can be made about the obsolescence of the Court’s role in the sit-down strikes, see, for example, James Wolfinger, The Strange Career of Frank Murphy: Conservatives, State-Level Politics, and the End of the New Deal, 65 HISTORIAN 377 (2002); J. Woodward Howard Jr., Frank Murphy and the Sit-Down Strikes of 1937, 1 LAB. HIST. 103 (1960).

275. Id. at 51.
276. See Saprio & Franks, supra note 173, at 44.
277. S.S.S. Co., 316 U.S. at 42.
view of contract. While the Court did not allow the shipping articles to
determine the tenure of employment question, it did specifically rest its
determination that the strike was mutinous, and therefore unprotected, on
the promise made by the seamen in the articles to obey lawful commands. In so doing, the Court in effect construed the articles as a waiver, by
individual contract, of the right to strike. This, which the Board had
criticized in its brief, is problematic in at least two ways. For one thing, §
8(3) of the Wagner Act on its face outlaws yellow dog contracts—precisely
because such contracts are inconsistent with the meaningful exercise of
labor rights. For another, this use of the articles seems to have also
violated § 3 of the Norris–LaGuardia Act, which specifically prohibits
federal courts to rely on any contractual promise not to join a labor union or
not to strike as a “basis for granting legal or equitable relief.”

A related problem with the Court’s reasoning is that it did not invoke
anything resembling a traditional rule for constructing conflicting statutes.
The only thing in the way of statutory construction in Byrnes’ opinion is the
reference to an unsuccessful effort in Congress to amend the mutiny law to
specifically allow dockside strikes. For Byrnes the failure of this
legislation—which was proposed, in 1939, after the Southern Steamship
controversy commenced, and which sought to craft a broader exception
than the one at issue in this case—tended to prove Congressional intent to
prohibit all shipboard strikes. This exercise, though, did not confront the
obvious, facial conflict between mutiny law and the labor law. If the
seamen’s conduct was indeed mutinous as the Court believed, it was also,
without question within the apparent protections of § 7 and § 8 of the
Wagner Act. And the general rule for interpreting such conflicting
statutes—that in the absence of clear legislative intent (which was certainly
true in this case), the latter of two conflicting statutes should prevail—
would clearly have supported the Board’s position. Of course, this doctrine
should apply only when the statutes are in actual conflict; but it seems this
is precisely what the Court thought to be the case.

Even if the Court were correct in its view that mutiny law had

278. Id. at 38–39.
279. Section 8(3) of the Wagner Act provides, in relevant part, that it shall constitute 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.”
of the Wagner Act on this issue would be authorized by the Supreme Court one year later in a case
involving the relationship between individual contracts and union representation. J.I. Case Co. v.
NLRB, 321 U.S. 332 (1944).
281. S. S.S. Co., 316 U.S. at 43–44. The opinion refers to Sections 292 and 293 of the federal
mutiny statutes, as originally enacted in 1835 and amended in 1909. Act of March 3, 1835, ch.40, § 1, 4
remained unchanged and that the strikers were in effect mutineers, it is not at all clear that this fact alone justified denying the Board the power to remedy the strike. This was the dissent’s major argument and it is one the majority hardly acknowledges. In fact, this issue once again presented the Court with a conflict between the mutiny law and the labor law. And once again, the Court was satisfied simply to subordinate the terms and policies of the Wagner Act, passed by Congress only seven years before, to archaic judicial interpretations of a vague statute enacted exactly 100 years before the Wagner Act. Even more problematic is that it rendered this as a general rule that labor law should never be enforced in a way that conflicts with other federal statutes or policies.

It is also critical to note in this connection that the accommodation sought by the Board did not in the Board’s view foreclose application of the mutiny law. The Board specifically recognized a scenario under which mutiny law would remain available to punish the seamen—who in this case, it should be noted, were not even charged—at the same time that the employer remained liable for its unfair labor practices. From this vantage, it is not at all clear that a genuine conflict actually existed between mutiny law and labor law in the first place—much less a conflict requiring subordination of labor law. It is not clear either that what the Board proposed to do in this connection actually involved a derogatory “construction” of the mutiny statute so much as an acknowledgement of its significance.

Another difficulty with the Court’s decision inheres in its attempt to identify this case with Fansteel. This maneuver, which is implicit in Byrnes’ view of Southern Steamship as an appropriate extension of Fansteel, is unfounded. The Court does not really engage arguments by the Board, the NMU, and (to some extent) the dissenting justices that tend to distinguish the City of Fort Worth strike in a fundamental way from the true sit-down strike in Fansteel and the unique concerns raised by that strike. The ship, unlike the Fansteel factory, was without any doubt the crew’s home. The crew of the City of Fort Worth, unlike the Fansteel strikers, engaged in no violence, made no attempt to seize the ship or displace the captain, did not defy orders in remaining aboard, and were never actually charged with, let alone convicted of, any crimes at all. By the same token, the Fansteel majority had been careful to avoid holding that any unlawful conduct would prevent the Board from remedying a discharge, particularly where the underlying strike was motivated by the employer’s unfair labor practices. The Southern Steamship majority was not so discerning.

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Moreover, while Fansteel focused on the unlawfulness of the sit-down strike as part of a broader analysis of its unprotectedness—one attuned to the strike's violence and the like—the Southern Steamship Court took unlawfulness as such, combined with a brief speculation on the risks of such strikes, as a sufficient basis to leave the strikers unprotected.

Even to the extent that couching Southern Steamship in the logic of Fansteel was appropriate, this only raised the larger question whether Fansteel itself was rightly decided. The most trenchant critique of that decision remains one offered in 1939 by Henry Hart and Edward Prichard. In Fansteel as in Southern Steamship the primary cause of the strike was the employer's violation of § 8(5): its refusal to bargain with a union that enjoyed representative status. The Fansteel Court, per Justice Charles Evans Hughes, recognized this as "reprehensible" conduct, but nonetheless upheld the employer's property rights and deferred to the general virtues of law and order. This, in turn, cast the strike as illegal and unprotected, and put the discharges of the strikers beyond the power of the Board to remedy. For Hart and Prichard, the main defect in this reasoning was its short-sighted, overly formalistic, and altogether unrealistic view of the Act's aims. The Court's reasoning, they observed, converts the actual problem of the effect of misconduct as a qualification upon the Board's remedial power to correct actual wrongs by employers into a hypothetical problem of the employer's punitive power to obtain redress for hypothetical wrongs by employees. The Court's approach omits from consideration the provocation to the employees. It omits from consideration the effect of reinstatement upon the future of collective bargaining in the plant. It omits from consideration, finally, the importance of discouraging unfair labor practices which is the prime function of the Act.

In these respects, Fansteel, in the guise of discouraging serious labor unrest, actually left unremedied the very causes of such unrest and unfulfilled the Wagner Act's main purpose: to rely on the prospect of a strike as a way of compelling collective bargaining. On the other hand, had the Court allowed the Board's remedies to stand, the Fansteel employer would have "felt the full deterrent effect of the federal remedies provided for violation of federal law." By this route, the Wagner Act's aims would

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284. See generally, Hart & Prichard, supra note 234.
286. Hart & Prichard, supra note 234, at 1316.
have been better achieved and any serious misconduct could still be dealt with by the criminal law.\textsuperscript{287}

For reasons we have already touched on, the very same criticisms can made with even more effect of \textit{Southern Steamship}. Like the strike in \textit{Fansteel}, the \textit{Southern Steamship} strike was in protest of an egregious unfair labor practice that struck at the heart of the Wagner Act's legislative agenda. Having unsuccessfully appealed to their employer and then taken equally unsuccessful steps to enforce their right to recognition and collective bargaining before the Board, the seamen resorted to a logical and effective fall back. And unlike the \textit{Fansteel} strikers, they conducted themselves in an altogether non-threatening, non-violent fashion. Still the Court found their actions unprotected and beyond the Board's remedial powers. In so doing, it seriously weakened the Board's ability to enforce the Act and dramatically diminished the Act's meaning for workers.

\section*{VI. \textit{Southern Steamship}'s Transformation of the Wagner Act}

At the outset of this Article, I quoted Karl Klare's insight that by its interpretations of the Wagner Act, the Late New Deal Court "shap[ed] the ideological and institutional architecture of the modern capitalist workplace."\textsuperscript{288} This is as true of \textit{Southern Steamship} as it is of \textit{Fansteel}, \textit{NLRB v. Mackay Radio},\textsuperscript{289} or any other labor decisions of theLate New Deal Court. For \textit{Southern Steamship} transformed the labor law in very important ways. In some respects, this transformation involved the labor rights of seamen and \textit{Southern Steamship}'s dramatic limitation of those workers' rights under the law. In other respects, \textit{Southern Steamship} also limited the labor rights of workers in general—and with this the broad meaning of the Wagner Act. In either case, these transformations, which may be described in both jurisprudential and doctrinal terms, lend \textit{Southern Steamship} a significance that far transcends the matter of whether it was wrongly decided on simple doctrinal grounds. Even if it were simply a close case that was plausibly decided—and I believe this is the very best that can be said of it—\textit{Southern Steamship} must be understood critically for its effect on the labor law.

\subsection*{A. Southern Steamship in Historical Context}

It must be said that to describe \textit{Southern Steamship} in these ways does not imply an attempt to explain all the forces that influenced the Court's
decision. That aspiration lies well beyond the scope of this Article. Nevertheless, a few remarks are appropriate. On this point, I have already disclaimed any attempt to couch the decision in the personalities of the justices. It is useful, though, to situate Southern Steamship in its economic and political context, if only to expose the substructure of its jurisprudence. Southern Steamship was decided in the first year of the United States’ formal involvement in the Second World War. No doubt anxieties generated by the war influenced the Court’s decision. This seems particularly likely given, if I may retreat for a moment from my earlier injunction, Byrnes well-documented militarism. What can be doubted, though, is whether such anxieties were well founded in this case. The war did not suspend class conflicts, as is sometimes falsely assumed. But the NMU, whose members died by the hundreds aboard ship during the war, earnestly pledged itself to avoid wartime strikes and otherwise to support the war effort—in fact, it did so even before direct American involvement in the war commenced.

Southern Steamship was also decided amidst a larger shift to the political right that characterized the federal government’s economic policy of the late 1930s and early 1940s—a shift that reflected a number of factors, including the continued strength of the business lobby, the resiliency of the AFL, and the instability of the New Deal coalition. This may be seen as consistent with the overall consolidation of a corporate Keynesian agenda—and the development of a regime of labor relations consistent with this agenda—that marked the late New Deal. Indeed by the time Southern Steamship was decided, it was not clear that the New Deal as such remained a defining political experience at all, having been overtaken by the Second World War. In this light, it is not so surprising that the Court, which in the late 1942 had only just abandoned its outright opposition to the New Deal, would find it desirable to take an unsympathetic attitude towards the labor movement’s CIO-led push to the left, towards a Board that seemed unduly activist and pro-labor, and towards the kind of labor militancy represented by the Southern Steamship strike.

290. Byrnes, who, as Secretary of State, played a key role in encouraging Harry Truman to drop the atomic bombs on Japan, was also an early proponent of aggressive Cold War policies. On this point, see, for example, ROBERT L. MESSER, THE END OF AN ALLIANCE: JAMES F. BYRNES, ROOSEVELT, TRUMAN, AND THE ORIGINS OF THE COLD WAR (1982), pp. 105–107, 188–194. For what it is worth, Byrnes was also a proponent of racial segregation. Thomas S. Morgan, James F. Byrnes and the Politics of Segregation, 56 HISTORIAN 644, 655 (1994).

291. See, e.g., C.I.O. Backs Foreign Policy in Rout of the Lewis Forces, N.Y. TIMES, Nov. 19, 1941, at 1; No–Strike Pledge Voted, N.Y. TIMES, Oct. 1, 1944, at 36 (CIO unions, the NMJ included, re-affirming no-strike pledge); NMU Reaffirms ‘No Strikes’, N.Y. TIMES, July 19, 1945, at 24.

292. On the rightward trend in late New Deal labor policies and the forces behind this development, see, for example, JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937–1947 (1981).
B. Southern Steamship and the Rights of Shipboard Labor

For seamen, Southern Steamship's key implication was its affirmation of the view that they remained a "special" class of workers, still subject to the paternalistic logic of Nineteenth Century labor relations, rather than the New Deal's much more modern regime. Practically, this meant that seamen would have no meaningful right to strike at all. The Court did suggest that seamen could still strike aboard ship in the vessel's home port—and this has become the clear legal rule on the matter. But this exception did not and could not amount to much. For one thing, there is every reason to think that under Southern Steamship, even in the ship's home port, its captain could simply order the strikers to either work or get off the ship and then discharge them as trespassers if they refused. Likewise, while Southern Steamship did not limit the right of seamen to strike on the dock, such a strike, if undertaken during the period that the shipping articles were in effect would appear under the Court's view of the shipping articles and their relationship to the Wagner Act to constitute desertion, for which offense the seamen would forfeit their wages and effects and presumably render themselves subject to discharge just as if they had mutinied. In any case, such a dockside strike could not prevent the ship's owners simply replacing the crew within its rights under Mackay Radio—temporarily, if their strike was in protest of an unfair labor practice; permanently, if their strike was motivated by anything else. The Court, it will be recalled, also urged seamen to take their issue to the courts in lieu of striking. But aside from proposing a manifestly less effective approach to dealing with recalcitrant employers, this advice merely begged the question whether seamen could or should enjoy the right to militant protest at the point of production in the first place.

As we shall see, the practical effects of these changes have been significant. Not least, they have left American seamen with few ways to mount effective protests to the steady erosion of their numbers by the combined force of labor-saving technologies and owners' resort to foreign

293. See, e.g., NLRB v. Sea-Land Servs., Inc., 837 F.2d 1387 (5th Cir. 1988) (Because of the unique nature of shipboard service and the threat of mutiny, the Board may not order a remedy of the discharge of a radio operator for refusing to reveal to the captain the nature of his communication from the ship with the NLRB).
294. See, e.g., In the Matter of License No. 164172 and Merchant Mariner's Document No. Z-226580, Issued to: Richard Klattenberg, Chief Engineer, Decision of the Commandant, United States Coast Guard, March 12, 1958 (upholding suspension of licenses for engineers' shipboard strike).
crews serving on ships registered in foreign countries. Just as importantly, by limiting their right to engage in direct action, these changes have also deprived seamen of the ability to embrace the kind of militancy that seems essential to maintaining labor's organizational vitality.

C. Southern Steamship and the Rights of Labor Generally

Southern Steamship's implications were not limited to seamen. The Court limited the Wagner Act in broader ways, too, which would affect its meaning for all workers. Some of these implications are rather general and may be mentioned briefly. For example, key to Southern Steamship's reasoning is a broad affirmation of traditional notions of private property and contract against the Wagner Act's more reformist tendencies. The Court's appeal to private property is oblique. The Court implied that had the strikers refused a command to disembark the ship, the strike's illegality would have been obvious. With this, the Court totally rejected the view, which was consistent with the Wagner Act, but already called into serious question by Fansteel, that the Wagner Act required any real compromise of employer's private property rights to effectuate the right to strike—even a strike in protest of an employer's unfair labor practices. Indeed, in many ways Southern Steamship makes the point more clearly than Fansteel, as the Southern Steamship Court elevated private property over the right to strike not only where strike was motivated by a serious unfair labor practice, but in a peaceful, almost risk-free context, where the workplace doubled as the strikers' home, and where quitting the ship would have exposed the workers to quasi-criminal desertion charges. With this, the Court affirmed an inflexible view of private property of the sort that had formed the doctrinal mainstay of anti-labor jurisprudence in the pre-Wagner Act world, and that would gradually limit §7 rights through the second half of the Twentieth Century.

The Court's appeal to contract is more direct. Although the Court did not find the shipping articles dispositive of the seamen's tenure of

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297. Byrnes makes much, for example, of the prospect that the strikers may not have voluntarily left the vessel if explicitly ordered to do so. "It is difficult to imagine they would have surrendered their jobs and their quarters without a struggle." S. S. S. Co. v. NLRB, 316 U.S. 31, 34, 48 (1942).

298. As the law stands today, workers are presumptively without any right to strike on an employer's private property. See, e.g., Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 202 (1978). Only in exceptional circumstances where workers lack viable alternatives and impingement of an employer's private property rights are minimal (e.g., shopping malls) do workers have any hope of gaining access to private property for this purpose. And even there, the Court seems to have imposed even more restraints. Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) (denying access to private property to non-employee organizers despite a lack of public property or alternative means to communicate with workers). On the relationship between private property jurisprudence and rights under the labor law, see, for example, Cynthia L. Estlund, Labor, Property, and Sovereignty after Lechmere, 46 STAN. L. REV. 305 (1994).
employment, it did invoke the crew’s implicit promise in the articles not to strike. As I mention above, this seems to have constituted the enforcement of yellow dog contracts in apparent violation of both the Wagner Act and the Norris–LaGuardia Act. It also affirmed in a general way the authority of contract to limit the right to strike. For while the shipping articles and limits on the right to strike that run with them are limited to seafaring labor, the logic behind the Court’s view of their proper relationship is not. The Board and the NMU, it may be recalled, did not ask that the articles be rendered completely irrelevant, only that their effect be qualified on this issue. In refusing to do this, the Court demonstrated a commitment to the sanctity of contract over the rights of labor protest that would resurface in other contexts.299

Another very important respect in which Southern Steamship affected the rights of all workers concerns its view that the shipboard strike was unprotected because it was “unlawful.” As mentioned above, Southern Steamship articulated a general view that the unlawfulness of a strike, rather than its substance or context, determined its protectedness. To be sure, the unlawful character of the sit-down strike had been a concern of the Court in Fansteel.300 But on this issue, Southern Steamship went well beyond Fansteel. The Court in Fansteel, it may be recalled, denied the Board’s power to reinstate the sit-down strikers not simply because they acted unlawfully in the abstract—committed trespass and various assaults—but because of the great violence and the overt seizure of property evident in these unlawful acts. In other words, the Fansteel Court focused on the unlawful character of the sit-down strike only in the course of a broader analysis of the nature of the strikers’ violence and the magnitude of their affront to the employer’s private property rights.301 For the Court in Southern Steamship, however, the mutinous character of the seamen’s strike rendered it unprotected not because of what that mutiny actually constituted

299. While shipping articles remain the only individual employment contracts that limit employees’ fundamental rights under the Act, the Taft–Hartley Act and subsequent courts would pursue this contractarian theme with respect to collective bargaining agreements to the point that contract has come to dramatically limit the right to strike for most workers covered by collective bargaining agreements. Under § 301 of the Taft–Hartley Act, no-strike clauses in collective bargaining agreements are generally enforceable against labor unions and may be enforced by damages and injunctive relief. Labor–Management Relations Act, 29 U.S.C.A. § 185 (West 2004). Even more notably, the Court gradually developed a set of doctrines by which an agreement not to strike may be inferred from the existence of an arbitration clause on the matter and enforced against a union by injunction if necessary—even where a no-strike clause is totally absent from the collective bargaining agreement. The key cases on this point are Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962), where the Court held generally that an agreement not to strike over an issues is implied by the existence of an arbitration clause, and Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970), where the Court authorized the use of injunctions to enforce such implied provisions.

301. Id. at 252–53.
in this case—for example, that it was manifestly violent or unsafe, which it of course it was not—but rather because mutiny is unlawful and unlawful strikes are necessarily beyond the statute’s protections.\textsuperscript{302}

This determination, that unlawfulness equals unprotectedness, features a number of problems. For one thing, this position rests on a peculiar, and problematic, jurisprudential orientation. It does not go without saying that the putative unlawfulness of the strike should control the issue in lieu of the kind of contextual analysis proposed by the Board and consistent with \textit{Fansteel}. As Hart and Prichard’s analysis of \textit{Fansteel} suggests, even the slightest concern for realist—let alone radical—considerations would have mandated precisely such a contextual approach. Indeed, as noted above, the Board’s view was, very reasonably, that the strike could be protected at the same time that the mutiny law remained available to enforce. This seems all the more apt, given that even if mutinous, the strike hardly constituted a serious crime; but the employer’s conduct was clearly an egregious violation of the labor law and by the Court’s own admission, contrary to the most fundamental aim of the Wagner Act.

In a somewhat similar way, it is not at all obvious what “unlawfulness” means or what significance should follow from this. Does unlawfulness contemplate, for example, a \textit{conviction} for mutiny or, alternatively, a formal charge, which are both lacking in this case? Does it contemplate the Board’s view? Or, does it contemplate the Supreme Court’s distant application of the facts combined with an at best tenuous interpretation of mutiny law? Ultimately the concept can mean any number of things and the Court itself actually does very little to clarify the matter other than to impose its own view over that of the Board. In fact, as this very case also well illustrates, the law—and with this the meaning of unlawfulness—has a deeply contingent meaning which is dependent on precisely the kinds of contextual analysis that the Board is so much better suited than any court to perform. The Board’s interpretation of the law and the facts was at least as reasonable as the Court’s, and considerably more grounded in the peculiarities of this dispute.

Finally, this notion of unlawfulness inevitably compromises only the labor law. To say that unlawfulness describes the limits of Board authority and § 7 protections must actually mean that the Wagner Act must yield to other laws—and never the opposite nor any attempt at compromise. Indeed, the Court was careful to note this is exactly what it means: the Board’s authority and the Act’s protections must yield where they come into conflict with \textit{any other} federal statutes or policies.

Perhaps sensing some of the difficulties, Byrnes tries, in a rather

\textsuperscript{302} As Byrnes puts it: “We cannot ignore the fact that the strike was unlawful from its very inception.” S. S.S. Co. v. NLRB, 316 U.S. 31, 48 (1942) (Byrnes, J.).
dubious way, to bolster his argument. Byrnes does not simply cite mutiny's unlawfulness; he attempts to discern, in the crime of mutiny, inherent and intolerable risks, such that even this strike, the mildest possible expression of mutiny, must go unprotected. The ship might meet with disaster; the captain's authority might be undermined; the strike might become violent. 

All of this is true, but at the same time so utterly speculative that it could be said of virtually any strike. By invoking such risks, Byrnes reveals his commitment to a particular kind of formalist bias: that the law, as defined by the courts, provides a legitimate indicator of acceptable levels of social risks and, overall, a legitimate index of acceptable social order. Just as problematically, this speculative appeal to risks conjures up a key theme in pre-New Deal labor jurisprudence—the theme on which the most notorious exercises in anti-labor judicial activism were based.

This doctrine, with its intensely derogatory view of labor law and labor policy, has become an important precedent of Southern Steamship. Courts have relied on it, in lieu of any other method for reconciling conflicting statutes, to subordinate labor law and labor policy to other statutes and the polices that these statutes represent. In some cases, this logic has been applied with respect to conflicts involving strike activity. In particular, Southern Steamship has been called on by lower courts to deny the Board the power to reinstate workers simply because they had used vulgar or profane language or had engaged in relatively minor acts of picket-line violence, even where no criminal convictions were ever obtained. In other cases, this logic has been applied more broadly. Southern Steamship has been invoked to preclude Board remedies that in the view of courts, impinge on the Interstate Commerce Act, antitrust law, bankruptcy law, the Davis–Bacon Act, as well as foreign affairs.

303. Id. at 45–48.

304. Speculative appeals to the risks that supposedly inhered in labor protests are fundamental to the reasoning of a number of infamous labor injunction cases. See, e.g., Plant v. Woods, 176 Mass. 492, (1900); Vegelahn v. Gunter, 167 Mass. 92, (1896).

305. NLRB v. Trumbull Asphalt Co., 327 F.2d 841 (8th Cir. 1966) (strikers' minor damage to property, verbal abuse and heckling, and "lying down in front of a moving truck" disentitle them to Board remedy); NLRB v. Longview Furniture, 206 F.2d 274 (4th Cir. 1953) (employees use of vulgar and profane language was a basis on which to deny reinstatement); NLRB v. Kelco Corp., 178 F.2d 578 (4th Cir. 1949) (assault, even without conviction, must be considered by the Board before it orders reinstatement). The Board and the courts subsequently developed specific rules for determining the limits of the Board's remedial authority in cases involving "misconduct" by strikers—rules that refer more often to the Taft–Hartley amendments to the Wagner Act than to Southern Steamship. The case continues to be cited for this proposition. See Clear Pine Mouldings Inc., 268 N.L.R.B. 1044 (1984). Cf. NLRB v. Thayer Co., 213 F.2d 748 (1st Cir. 1954). See also Albin Renauer, Note, Reinstatement of Unfair Labor Practice Strikers Who Engage in Strike–Related Misconduct: Repudiation of the Thayer Doctrine by Clear Pine Mouldings, 8 INDUS. REL. L. J. 226, 235–36 (1986).

To be sure, for a long time other courts and the Board were not always inclined to follow this implication of *Southern Steamship* too strictly.\(^\text{307}\) That may well be changing, though. In *Hoffman Plastic Compounds Inc. v. NLRB*, decided in 2002, the Court called on *Southern Steamship* to limit the protections of the labor law to undocumented alien workers.\(^\text{308}\) In *Hoffman Plastic*, the Court took up the question whether the Board could order an employer to pay back pay to an undocumented worker under any circumstances. Relying primarily on *Southern Steamship*, the Court, per Chief Justice William Rehnquist, ruled that a back pay award was beyond the Board’s authority because it would conflict with the policies reflected in the Immigration Reform and Control Act of 1986 (IRCA).\(^\text{309}\) According to Rehnquist, “[s]ince *Southern S.S. Co.*, we have... never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statues and policies unrelated to the NLRA.”\(^\text{310}\) Like the Court in *Southern Steamship*, Rehnquist ignored the fact that neither the IRCA nor labor law spoke in any way to the propriety of back pay in such a situation. For him, the decisive concern, which is as speculative as Byrnes’ concerns about mutiny, was that such a remedy would “encourage the successful evasion” of the immigration laws, which criminalize illegal employment on the part of both the employee and the employer; awarding back pay would “subvert” the immigration laws.\(^\text{311}\)

Writing for four dissenters, Justice Stephen Breyer raised a number of trenchant counter-arguments. He contended, quite plausibly and in line with the position of “all the relevant agencies,” that the Board’s resort to back pay in this case, which was narrowly tailored to avoid creating an

\(^{307}\) In a few cases, courts have found appeals to *Southern Steamship* inadequate to limit the Board’s remedial powers. See Atl. Limousine, Inc. v. NLRB, 243 F.3d 711, 715–17 (3d Cir. 2001); NLRB v. Lee Hotel Corp., 13 F.3d 1347 (9th Cir. 1994) (in both cases, tax policy does not prohibit inclusion of unreported tips in back pay awards).

\(^{308}\) *Hoffman Plastic* was anticipated to some degree by *Sure-Tan Inc. v. NLRB*. *Sure-Tan* involved an employer who reported undocumented workers to an immigration official in retaliation for their support of the union, which caused them to leave the country. The issue for the Court was whether the Board’s remedies for such clear violations of § 8(a)(3), as modified by the Seventh Circuit, were legal. In particular, the Seventh Circuit had ordered that in order to effectuate the aims of the labor law in the case of such workers, the workers should be allowed four years in which to claim reinstatement and six months of back pay. While a majority of the Court endorsed the Board and the Seventh Circuit’s position that undocumented workers are properly considered employees under the labor law, it also invoked *Southern Steamship* to reject the remedies as modified. *Sure-Tan*, Inc. v. NLRB, 467 U.S. 883 (1984).


\(^{310}\) *Id.* at 144.

\(^{311}\) *Id.* at 149–51. In spite of the favorable implications of a “last in time” argument for Rehnquist’s position in *Hoffman Plastics*, he still invokes *Southern Steamship’s* more expansive, anti-labor law logic to justify the decision.
incentive to violate the law, would actually deter violations of both the labor law and the immigration laws.\textsuperscript{312} Moreover, Breyer, unlike Rehnquist, drew on the legislative history of the IRCA, which suggests no Congressional intent to limit the Board’s remedial power relative to undocumented workers.\textsuperscript{313} Finally, Breyer persuasively distinguished both \textit{Southern Steamship} and \textit{Fansteel}—on which Rehnquist relied somewhat more generally—from the case at hand. While those earlier cases concerned the power of the Board to remedy discharges occasioned by the employees’ own “unlawful acts,” the discharge of the undocumented employee in this case was motivated by his exercise of a right unquestionably protected by the law.\textsuperscript{314}

The point in reviewing \textit{Hoffman Plastic} is not to critique the Court’s rulings in that case—a task that others have already accomplished.\textsuperscript{315} Rather, \textit{Hoffman Plastic} is worth mentioning for the way it illustrates \textit{Southern Steamship}’s enduring significance in undermining the Board’s remedial power, and with this undermining the protections that the labor law offers to workers. In \textit{Hoffman Plastic} as in \textit{Southern Steamship} the Court showed no interest in an equitable or rational balancing of the respective statutes and policies. And it was certainly not concerned in either case—or for that matter in a number of other cases that follow this logic—to prefer the labor law and its policies over that of the ostensibly conflicting statute. Inasmuch as this reasoning informed \textit{Hoffman Plastic}, and \textit{Hoffman Plastic} is widely thought to effectively deny the protections of the labor law to the millions of undocumented aliens who work in this country today, it may constitute \textit{Southern Steamship}’s most enduring and most problematic legacy.

\textbf{VII.

CONCLUSION}

\textit{Southern Steamship} left no doubt that seamen would remain wards of a paternalistic regime of shipboard labor relations. It left no doubt either that

\textsuperscript{312} \textit{Id.} at 153–56 (Breyer, J. dissenting) (emphasis omitted).

\textsuperscript{313} \textit{Id.} at 156–57.

\textsuperscript{314} \textit{Id.} at 158–59.

a conventional regime of private property and contract would survive the Wagner Act and the challenge put forth by radical and militant elements of New Deal labor. Strikes at the point of production, which had proven so effective in the mid and late 1930s at revitalizing the labor movement and giving real meaning to the labor law, would no longer be tolerated, regardless of whether they were non-violent or justified by employer unfair labor practices. Indeed, the case made clear that at least in instances of unlawful conduct, even an appreciable risk of social disorder, however, speculatively grounded, would substantially limit the right to strike and the overall protections of the labor law. For all these reasons Southern Steamship should be seen as one of the clearest expressions of the Court’s refusal to allow of any truly reformist agenda of workplace democracy—or, as it was so often expressed in the 1930s, industrial freedom—to follow from the Wagner Act.

Of course many will be tempted to defend the Court in Southern Steamship, either its narrow holding or its broad implications. It may be tempting, for example, to underscore the incompatibility of the shipboard strike or some analogous kind of labor protest with a proper, peaceful regime of labor relations. One might wonder what of the rights to capital and property would survive the normalization of such strikes. It may be tempting as well to recoil at the substantial industrial disorder implicit in such labor protests. But like Byrnes’ analysis of mutiny law, such concerns beg the most critical questions: What is a proper regime of labor law? And what is the value of traditional notions of private property and contract, or of industrial peace, against the right to effective union representation and the right to a more equitable distribution of power and control in the workplace? These were precisely the questions exposed by the passage of the Wagner Act and the upsurge in labor activism that both inspired and accompanied this legislation. There are no obvious, purely legal answers to these questions. To suppose that there are, as the Court does, reveals more in the way of formalist, authoritarian, and fundamentally capitalist ideology than it does any kind of airtight legal analysis.

As noted at the outset, this Article does not mean to suggest that Southern Steamship alone, or even primarily, accounted for the long decline of the American labor movement. To suggest as much would not only rest on an impractical logic; it would also far overstate the significance of the law in general and the courts in particular to the evolution of social structures. At the same time, though, it does seem likely that Southern Steamship both symbolized and abetted the decline of militancy and radicalism in the American labor movement. Of course, the exact effect of Southern Steamship on the course of labor relations must remain a matter of speculation. It is clear, though, that there were very few shipboard strikes after the decision came down—and few point of production strikes in other
contexts either. Indeed, in a few documented instances, the threat of mutiny was used to ward off planned shipboard protests. As with Fansteel, Mackay Radio, or for that matter the Taft–Hartley Act, labor largely accommodated itself to the new rule of law once the rule was established. In the case of Southern Steamship and the NMU, this accommodation was surely abetted by the Second World War and the NMU’s consolidation of its position. But it is only reasonable to assume that the Court’s decision—which not only left all point of production strikes unprotected by the labor law, but also opened the door to actual criminal mutiny prosecutions for shipboard strikes—did much to deter these kinds of militant protests. And with militancy goes the practical essence of labor radicalism, its foil and its source of legitimacy.

Just as Southern Steamship represented the Court’s rejection of militant, radical labor, so too does the fate of the NMU capture the institutional decline of leftist unionism. Having initially won over such a huge membership in the late 1930s and early 1940s, the union soon found itself struggling to fend off resurgent successors to the ISU, which among other things resorted to red and race baiting to pry away members. The war then claimed the lives of hundreds of members; casualty rates were higher for seamen in the first part of 1943 than for all American services combined. Yet it also marked the NMU’s most glorious period. Merchant seamen in general were acclaimed as heroes. And icons of the American left such as Woody Guthrie (who was also an active member and survived two sinkings) and Studs Turkel lent their assistance to the NMU’s organizing effort, helping to push membership to near 100,000. During this time, too, the NMU continued to show its commitment to radical and progressive causes. In addition to continuing to break down barriers erected by its predecessor to black shipboard service, the NMU was also, for example, one of the major institutional contributors to a fund to solve the last mass lynching in America.

The post–war years, which resulted in an inevitable glut in shipping,
brought renewed economic conflict, including a number of large scale strikes. Of more lasting consequence, this period was also marked by a tragic purge of communist members—tragic not least because these were the men who had done so much to build the union as a vibrant, progressive organization in the first place. Although eventually mandated by provisions of the Taft-Hartley Act, the purge was initiated by Curran himself, who likely saw the handwriting on the wall. This would unfold amidst a broader, more complicated movement away from radicalism within the maritime labor movement. In any case, as a former NMU member would accurately surmise in a letter to the New York Times some forty years later, this development permanently deprived the union of its radical impulses and, one might say, its ideological soul.

By the early 1960s, the NMU began to feel the effects of runaway shops as American ship owners registered their vessels in foreign jurisdictions. Shorn of its radicalism but not yet all of its militant tendencies—at least not on an issue as critical as this—the union joined other seafarers in a messy strike in the summer of 1961 to protest these changes. The strike featured charges of desertion rather than mutiny; and it did garner the union some concessions. But obviously such protest did

322. The NMU's post-war strikes were part of a broader surge of union militancy in this period, focused on but not limited to CIO unions. The most notable strike, which occurred in the summer of 1946 after weeks of anticipation, lasted a very short time. Ship Unions Vote Quick End to Strike in Most U.S. Ports, N.Y. TIMES, June 16, 1946, at 1. See also Crews Quit Ships in Drive to Halt Traffic on Lakes, N.Y. TIMES, Aug. 15, 1946, at 1; NMU Group Backs New Ship Tie-Up, N.Y. TIMES, Nov. 7, 1946, at 63. Among the issues over which the NMU struck after the war was the speedy repatriation of troops. NMU Protest Goes On as 1-Day Strike Ends, Dec. 5, 1945, at 20.


324. This period was marked by the demise of Committee on Maritime Unity, an attempt, led by leftist leader of the International Longshoremen and Warehousemen Union Harry Bridges, to coordinate maritime labor. GOLDBERG, supra note 27, at 257–61.


327. Amidst chaotic and bitter attempts at settlement and numerous court injunctions, several NMU represented crews were charged with mass desertion and contempt of court for walking away from their ships. N.M.U. Is Accused in 2 Strike Cases, N.Y. TIMES, July 14, 1961, at 46; Issues Unsettled in Desertion Case, N.Y. TIMES, Aug 11, 1961, at 44; Desertion Funds of Court Double, N.Y. TIMES, Aug. 12, 1961, at 40. These charges were eventually dismissed. Court Dismisses Desertion Case, N.Y. TIMES, Aug. 22, 1961, at 58.
little to arrest this process in the longer term. Another notable strike in 1970, which was aimed at the sale of ships to foreign owners, met with similarly ambiguous results.\textsuperscript{328} By the 1970s the NMU represented a number of shoreside industrial workers as well as seamen. In fact, in New York, it even came to represent some stockbrokers.\textsuperscript{329} This expansion eventually included successful—and ultimately shameful—raiding in the meatpacking industry, which consistently presented workers with less effective, more concessionary representation.\textsuperscript{330} Through all of this, the NMU showed how completely and quickly after the Second World War it had traded its radicalism for a conventional “bread-and-butter” agenda. In fact, the union’s political affiliations moved decidedly to the right of center. The fall of 1973 saw the union that had once so mightily championed the Soviet cause in the Second World War boycotting Soviet ships to protest that country’s support for Arab states.\textsuperscript{331} Perhaps even more tellingly, this union, which had stood well to the left of Franklin Roosevelt, endorsed Ronald Reagan for president.\textsuperscript{332}

Today, there are only about 30,000 seafarers of all ranks and types in the American labor force. Far fewer still are the deep water sailors of the kind who served on the \textit{City of Fort Worth} and formed the mainstay of the NMU’s membership.\textsuperscript{333} But while there are few jobs for American seamen, the hardships that so affected them through the 1930s, have not disappeared. They have simply followed the ship’s registries, or “flags,” to workers from the developing world. Like their American predecessors of seventy or more years ago, these largely Chinese and Filipino “crews of convenience” working on “flag of convenience” vessels, have not yet achieved meaningful union representation. The law’s protections, whether of the flag state or international, mean little for them. Neither do they enjoy the protections of American labor law; as forty years ago the Supreme

\begin{itemize}
\item \textsuperscript{328} Word of Ship’s Sale Spurs 5 Walkouts, N.Y. TIMES, Jan. 24, 1970, at 1.
\item \textsuperscript{329} Stock Brokers’ Group Says it Affiliated with Maritime Union, WALL ST. J., May 28, 1970, at 11.
\item \textsuperscript{330} Some readers may in fact be familiar with the NMU only though a most unflattering mention of its “representation” of Midwest meat packers in the early 1980s which appears in Erich Schlosser’s recent and very popular expose, \textit{FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL} 157–58 (2002). \textit{See also} JEREMY RIFKIN, \textit{BEYOND BEEF: THE RISE AND FALL OF THE CATTLE CULTURE} 126–27 (1993).
\item \textsuperscript{331} Philip Shabecoff, \textit{Ship Unions Plan Boycott of Soviet to Halt Traders Until Aid to Arabs is Stopped}, N.Y. TIMES, Oct. 21, 1973, at 31.
\item \textsuperscript{333} There remain only 6,000 to 9,000 seafaring jobs on oceangoing vessels in the United States. \textit{See, e.g.,} \textit{STATISTICAL ABSTRACT OF THE UNITED STATES}, tbl.1073, p.690 (Bureau of Census 2003); \textit{OCCUPATIONAL OUTLOOK HANDBOOK: WATER TRANSPORTATION OCCUPATIONS} 582–83 (Dept. of Labor 2003). The state of the American Merchant Marine in this season of decline is tellingly and entertainingly described by popular writer JOHN MCPHEE in his \textit{LOOKING FOR A SHIP} (1990).
\end{itemize}
Court, in another blow to the NMU organizing efforts, ruled that labor law did not apply to flag of convenience crews, even where the ship was American owned.\(^{334}\) These crews of convenience serve for little pay on unsafe vessels under arduous, often brutal conditions that sometimes approach outright slavery.\(^{335}\)

For his part, Curran became, like Furuseth, virtual president for life of the NMU. He retired from the union in 1973 after thirty-six years as president amidst a rather significant controversy over the hefty size of his compensation package. Curran, the humble boswain’s mate once widely accused of being a communist, owned two homes and a yacht and earned over $85,000 a year when he retired (more than any union leader at the time except for James Hoffa Sr.); he traveled in a custom limousine and stood to receive another million in pension benefits.\(^{336}\) Sadly, the flap over Curran’s compensation was not the only indication of corruption and self-dealing in a union that emerged out a rank-and-file rebellion against many of these very things. In 1973, a candidate for the union’s presidency who had been shot credibly ascribed this to an attempt to run him out of the race.\(^{337}\) In 1975, a New Jersey grand jury investigated the NMU leadership on allegations of kickbacks, payoffs, and tax evasion.\(^{338}\)

Curran died in August, 1981, aged 75. The union he helped found has survived him, but not very well. In 1988 the NMU, moribund, wracked by scandals, and unable to deal with the massive loss of jobs through foreign flagging, “merged” with the Marine Engineers Beneficial Association. But amidst continuing charges of corruption, this agreement was dissolved only four years later.\(^{339}\) For the next several years, the NMU seemed headed for oblivion. Membership fell to only 2,000, and in 1997 its president, Louis Parise, was convicted in federal court of several charges of racketeering and

\(^{334}\) The NMU had tried to organize crews of Honduran registered vessels wholly owned by an American corporation. But the Court ruled that absent some clear congressional mandate, it could not validate Board jurisdiction. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).


embezzlement. Salvation, of a sort, arrived in 1998, when the NMU entered an arrangement with the Seafarers International Union which would culminate, three years later, in a complete merger. Even more than the earlier merger with the Marine Engineers, this was no merger of equals, as the NMU's few thousand members joined ranks with nearly 80,000 Seafarers International members. There is more than a little irony, too, in the NMU joining in this one-sided way with the successor to the very union, the ISU, out of which it had so boldly emerged over sixty years earlier. All the same, for members and for union pensioners, the merger was no doubt an act of salvation. And the NMU name lives on.

Would things have gone differently for the NMU had Southern Steamship merely been decided differently? It is easy to say they would not have, given all the other adverse forces at play. But it is certainly useful to wonder whether the normalization of militant, point of production labor protest, which a different outcome in Southern Steamship would have entailed, would have offered the NMU and other unions much more effective ways to fight runaway shops, to sympathize in meaningful ways with other strikers, perhaps most importantly to assert a limited right of property in their jobs and right of control over their workplaces. And while militancy does not necessarily equal radicalism, it is surely easier for a union to embrace radicalism when it is able to involve its members in a project greater than their own immediate interests and to assert rights that are, if not sufficient to a radical agenda, essential to it all the same.

342. As an affiliate of the Seafarers International Union of North America, AFL-CIO, the NMU is now referred to as the Seafarers International Union of North America—Atlantic, Gulf, Lakes & Inland Waterways District/NMU. See http://www.seafarers.org/about/affiliates.xml.