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THE STATE OF UNIONS IN AMERICA: "CHIPPING" AWAY AT THE UNION "BLOCK"

"Since . . . 1959, there have been only minor modifications in statutory labor law. . . . It is time to consider overhauling the Wagner Act [NLRA] . . . it is preferable for the major decisions to be made by Congress, the branch accountable to the parties and the public."

INTRODUCTION

With the passage of the National Labor Relations Act\(^2\) ("NLRA") in 1935, unions first derived the authority to represent employees in the workplace. Despite opposition by both employers and the courts to unions early in the labor movement,\(^3\) the passage of the NLRA enabled unions to survive in America. Recently, however, unions began losing the power they once derived from the NLRA.

The very legislation which gave unions the authority to represent employees in the workplace is now being construed by the courts so as to undercut union authority.\(^4\) Congress enacted the NLRA in an effort to give unions the authority to represent employees collectively. Congress intended the NLRA to assist and promote union activity, not to contribute to its downfall.\(^5\)

1. Mikva, The Changing Role of the Wagner Act in the American Labor Movement, 38 STAN. L. REV. 1136 (1986) (Judge Mikva, U.S. Court of Appeals for the District of Columbia Circuit). Mikva further stated that although the Wagner Act is not dead or dying, the current problems of labor demands an additional remedy. Id. at 1139. "The remedy starts with the recognition that what was satisfactory in 1935 is no longer enough. It is time to recalibrate the power balance between employers and employees." Id.


3. See infra notes 28-34 and accompanying text for a discussion of the courts' initial opposition to labor unions.


5. Currently, unions are becoming dissatisfied with the recent operation of the NLRA and therefore, union membership is on the decline. See Van, Wezel & Stone, Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities, 55 U. ILL. L. REV. 73 (1988); Mikva, supra note 1, at 1123. There are various
Despite Congressional intent to safeguard union power, recent court decisions, interpreting various sections of the NLRA, have continued to limit union authority under the Act. It is the NLRA's ambiguous language which has enabled the courts to reinterpret the Act so as to "chip away" at unions' authority. Because the NLRA is unclear on its face, the courts are left with the opportunity to reinterpret sections of the Act.

Specifically, courts are taking a new approach in interpreting sections 8(b)(1)(A) and 8(a)(3) of the NLRA. Courts recently interpreted section 8(b)(1)(A) as prohibiting unions from fining strike-breakers, whereas earlier courts approved of these fines under the Act. Today, the courts also take the view that section 8(a)(3) au-
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authorization of agency shop agreements, and therefore employees are only required to pay the portion of union dues attributed to collective bargaining. As illustrated in the following analysis, these decisions are contrary to the legislative intent of the NLRA.

If action is not taken to counter these recent reinterpretations of the NLRA, the courts will effectively overrule the Act, section by section, “chipping away” at what once was a strong union “block.” If the NLRA becomes unenforceable, employees will suffer great hardships in their relations with employers. Once employees lose the union, they lose their ability to bargain on equal footing with their employer. The NLRA gives unions the power to improve working conditions for employees through collective action. Without the NLRA, unions will be unable to aid employees in collective bargaining. Therefore, employees will lose the ability to secure important rights in the workplace.

12. For an explanation of agency shop agreements, see infra note 96 and accompanying text.

13. See infra notes 102-04 and accompanying text for an analysis of recent court decisions requiring proportionment of agency dues.

14. For the specific discussions regarding the legislative intent of sections 8(b)(1)(A) and 8(a)(3) see infra notes 75-80 and notes 110-16 and accompanying text.

15. For a further discussion of the need to amend the NLRA to prevent future reinterpretations of section 8(a)(3) in a less favorable light to union activity, see infra note 127 and accompanying text.

16. Unions use collective bargaining to obtain the following: higher wages for union members, formal grievance procedures, protection from arbitrary discipline, and more frequent break periods. A. Goldman, Labor Law and Industrial Relations in the United States of America 130 (1984).

17. Collective action is more commonly referred to as collective bargaining. Collective bargaining is defined as “negotiation between an employer and organized employees as distinguished from individuals, for the purpose of determining by joint agreement the conditions of employment.” Black’s Law Dictionary 239 (5th ed. 1979). Employers are required to collectively bargain with unions which are chosen by the majority of the employees. 29 U.S.C. § 158(a)(5) (1982).

Through collective action, unions play a vital role in labor relations, securing important rights for employees which they could not bargain for or obtain on their own. Even under the NLRA, individual action against employers is not protected. Cf. NLRB v. Office Towel Supply Co., 201 F.2d 838 (2d Cir. 1953) (concerted activity does not protect individual complaints regarding working conditions even if other members agree); NLRB v. Interboro Contractors, Inc., 157 N.L.R.B. 1295 (1966), enforced, 388 F.2d 495 (2d Cir. 1967) (the employee dealing individually must be advancing a condition of employment of mutual concern of all the employees). But see NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971) (individual activity by an employee will be protected as concerted activity if it is “looking toward group action”).

Individually, employees lack the bargaining power to secure important rights in the workplace. “The right to bargain collectively is at the bottom of social justice for the worker . . . the denial or observance of this right means the difference between despotism and democracy.” H. Mills & E. Brown, From the Wagner Act to Taft-Hartley 3 (1950) (quoting address by Sen. Wagner, May 8, 1937). “Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity, and mutual commitment. This concept is of particular force during a strike.” NLRB v. Textile Workers, 409 U.S. 213, 221 (1973).

18. The majority of the employees must vote for union representation. Flana-
This comment will discuss the impact of unions in the United States and the courts' recent trend toward limiting the unions' power. Part I will examine the history of the union to emphasize its importance on worker's rights in America. This part is divided into three sections to illustrate the economic, political, and working conditions prevalent during the evolution of unionism. The first section discusses the conditions before the development of the union. Section two explains the government's initial hostility to unions' organizing efforts. The third section examines the government's eventual embrace of unions which culminated with the enactment of the NLRA.

In an effort to explain the recent attempt to break down the union, Part II discusses the specific areas where the courts are limiting union authority. This part consists of two sections: The first section examines recent court decisions limiting intra-union discipline. The second section discusses the collapse of the union shop into the agency shop and "fair share" issues. Part III summarizes the effects of these recent court decisions on the NLRA. Finally, Part IV proposes that Congress amend the NLRA to counter the courts' recent treatment of unions.

I. THE UNION: A HISTORICAL PERSPECTIVE

A. Fertile Ground for Union Development

The Industrial Revolution served as the catalyst to the growth of unions in the United States.19 The economic and political climate of the era favored rapid business expansion. The government, eager to see the United States become a highly competitive industrialized

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19. Most historians would predict that the Great Depression and the Industrial Revolution would have put the labor union near extinction because of its growing weakness in a time of unprecedented national prosperity. Raskin, Elysium Lost: The Wagner Act at Fifty, 38 STAN. L. REV. 945 (1986). On the contrary, however, "the severest economic collapse in the country's history had precisely the opposite impact on the strength of the labor movement, even though unemployment reached levels that condemned one-quarter of the work force to idleness." Id. In the 1930's, workers joined unions by the millions, and mass production industries "found their private armies of goons and labor spies feeble defense against the onrushing tide of unionism." Id.
nation, allowed businesses to carry on virtually unregulated. Because the government was reluctant to interfere with business operations and employer/employee relations, employers were in a position to take unfair advantage of their employees. In addition, employees lacked the bargaining power to improve their working conditions.

Inexperience in employment negotiation was one factor which contributed to this lack of bargaining power. A second factor contributing to employees' inferior bargaining position was the absence of job security. This was due in great part to the improvement in transportation facilities. As transportation facilities improved, people were able to move about more freely. This, in turn, created fierce competition for jobs. Local journeymen found themselves competing with the flood of unskilled workers who were willing to work for lower wages. Employers were not reluctant to displace the higher paid skilled workers with unskilled workers.

Employees soon realized it was necessary to join forces to strengthen their bargaining position with employers. Based on this realization, skilled workers began organizing into groups in an effort to deal with the employers collectively. This collective activity led to the creation of associations now referred to as unions.

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20. This is referred to as the "hands off" approach of government. Laissez-faire "expresses a political-economic philosophy of the government of allowing the marketplace to operate relatively free of restrictions and intervention." BLACK'S LAW DICTIONARY 788 (5th ed. 1979).

21. Employees realized that individually they were powerless to bargain with the employer because they were forced to compete with each other for wages. B. JUSTICE, UNIONS, WORKERS AND THE LAW 1 (1948). Therefore, the employees did not have the power to complain about the working conditions. Id. "First, the Wagner Act was a piece of economic legislation, enacted as a direct response to the economic challenge of the times: the Great Depression." Mitchell, supra note 18, at 1065.

22. See E. HERMAN & A. KUHN, COLLECTIVE BARGAINING AND LABOR RELATIONS 3 (1981). Another reason for the loss in bargaining power was that when workers became journeymen they bought their own tools. Id. However, when the Industrial Revolution brought about machinery in the workplace, the journeyman and his tools were no longer needed. Id.

23. When machines replaced tools, the skilled journeyman lost his freedom to be his own boss. Id. at 3-4. This loss of freedom resulted in a severe decrease in the worker's ability to locate work. Id.

24. See A. GOLDMAN, supra note 16, at 22 (labor law contributes its existence to combined industrial development with territorial expansion).

25. "A higher union/nonunion wage differential creates incentives for employers to substitute nonunion labor for union labor and for consumers to substitute products made by nonunion labor." Flanagan, supra note 7, at 958.

26. Employees realized that individually, they were too weak to bargain with the employers and that collectively, the employer would be forced to bargain with them for fear that the company would suffer economic hardship if the employer was required to replace all of the employees. E. HERMAN & A. KUHN, supra note 22, at 4.

27. A union is defined as "an organization of workers, formed for the purpose of negotiating with employers on matters of wages, seniority, working conditions, and the like. BLACK'S LAW DICTIONARY 1374 (5th ed. 1979).
B. The Unions’ Reception by the Courts and Congress

Employers fought vigorously to prevent their employees from acting collectively through unions.\(^2\) Given the United States government’s desire to foster industrial growth, employers were able to enlist the government’s assistance in their attempts to squelch the unions.\(^2\) This was initially achieved by bringing criminal conspiracy\(^3\) charges against those employees engaged in collective activities.\(^4\)

In the early 1880’s, the courts became active in repressing union activity. Criminal charges were replaced with civil remedies as courts began enjoining collective activity.\(^5\) Congressional approval

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2. In early periods of development, unions were very unstable. B. MELTZER & S. HENDERSON, LABOR LAW 2 (1985). Union organization was early defeated by employers in most cases. Id. One reason for the disappearance of union organizing early on was the employers’ initial hostility towards the employees who began the organization. Id.

3. The reason behind the government’s initial allegiance with the employers was due to the desire to build a better industrial America. Hartley, The Framework of Democracy in Union Government, 32 CATH. U.L. REV. 13 (1982). The United States government wanted to be in a better position to compete with other countries in the manufacturing of goods. Id. Consequently, the government refused to stifle such growth by imposing regulations which would increase businesses’ expenses and discourage companies from manufacturing goods. Id. The public resentment over the unions’ adverse impact on the employers’ success was a great influence on the public opinion that political action against worker groups was needed. Id. at 27. See also Barres, The Origins of Modern Labor Law, 22 AM. J. ECON. & SOC. 279, 286 n.47 (1963).

4. Before 1850, the courts aided employers in their fight to suppress union activity. B. JUSTICE, supra note 21, at 8. Employers and the courts resorted to the common law criminal conspiracy doctrine to keep the workers in line because it was difficult to replace skilled workers. A conspiracy is the combination of two or more people to join together to harm society or other citizens. Id. Employees who joined forces to change their working conditions was considered as serious of a crime as robbery under criminal conspiracy laws. Id.

In 1806, the Supreme Court held in a conspiracy trial that “[a] combination of workmen to raise their wages may be considered in a two-fold point of view: one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both.” Commonwealth v. Pullis, Philadelphia Mayor’s Court (1806); 3 J. COMMONS & GILMORE, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (1910). See also E. LIEBERMAN, UNIONS BEFORE THE BAR 3-15 (rev. ed. 1960); Nelles, The First American Labor Case, 41 YALE L.J. 165 (1931).

The courts began to take a more sympathetic view towards unions in 1842 when the Massachusetts Supreme Court held that union activity was not per se a crime but stated that courts should apply a means/end test to determine if the union’s methods were legal. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842).

For discussions of the criminal conspiracy doctrine applied to unions see generally W. SAMPSON, TRIAL OF THE JOURNEMEN CORDWAINERS OF THE CITY OF NEW YORK 6-141 (1810); Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393 (1922); Witte, Early American Conspiracy Cases, Their Place in Labor Law, 35 YALE L.J. 825 (1926).

5. See infra notes 57-58 and accompanying text for a discussion of collective activities including collective bargaining.

32. In the decision known as the Danbury Hatters case, the United States Supreme Court upheld a civil suit for treble damages against a union based on the theory that the union violated provisions of the Sherman Anti-Trust Act in promoting a
of the Sherman Anti-Trust Act in 1890 provided the courts with another vehicle to stifle union activity.\textsuperscript{33} Although Congress passed the Sherman Act to prohibit businesses from restraining trade, the courts applied the Act to unions, charging them with restraint of free trade.\textsuperscript{34}

C. The Change in the Government's Attitude Towards Unions and the National Labor Relations Act

In the early 1900's Congress softened its view towards union activity.\textsuperscript{35} In 1914, unions won Congress' support through lobbying efforts.\textsuperscript{36} In an attempt to exempt labor unions from the Sherman Anti-Trust Act, Congress passed the Clayton Anti-Trust Act\textsuperscript{37} ("CAA"). The CAA stated that "the labor of a human being is not an article of commerce."\textsuperscript{38} Because the CAA's language was unclear in not specifically stating that unions were exempt from anti-trust legislation, the United States Supreme Court was able to construe the CAA narrowly.\textsuperscript{39}

In *Duplex Printing Co. v. Deering*,\textsuperscript{40} the Supreme Court held boycot against a manufacturer who refused to recognize and bargain with the union as if it were the employees' representative in collective bargaining. *Loewe v. Lawlor*, 208 U.S. 274, 283 (1908).


34. The Sherman Anti-Trust Act was first upheld to apply to union activity in *Loewe v. Lawlor*, 208 U.S. 274 (1908). This is also referred to as the Danbury Hatters case. In *Loewe*, the United States Supreme Court affirmed a civil suit awarding treble damages against a union for violating the Sherman Anti-Trust Act in promoting a boycott against a hat manufacturer who refused to bargain with the union. *Id.*

35. Due to the discontent of workers and the impact of their votes in government elections, Congress began softening its view towards unions. See B. JUSTICE, supra note 21, at 11.

36. Organized labor obtained Congressional support after intensive lobbying efforts in 1914. *Id.* at 11. Due to these lobbying efforts, Congress passed the Clayton Anti-Trust Act which was intended to exempt unions from the Anti-Trust laws. *Id.*

37. 29 U.S.C. § 52 (1982). The Clayton Anti-Trust Act was Congress' attempt to modify the Sherman Anti-Trust Act by exempting unions from the Anti-Trust laws. Hartley, supra note 29, at 38. Congress intended to declare in the Clayton Act that an employees' labor was not an article of commerce and therefore, courts lacked the power to regulate labor activity through the Sherman Anti-Trust Act. See A. GOLDMAN, supra note 18, at 48. Section 6 of the Clayton-Anti Trust Act specifically states that:

[T]he labor of a human being is not a commodity. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.


38. See supra note 37 for the precise language of the Clayton Anti-Trust Act.


40. 254 U.S. 443 (1921). In *Duplex*, the Court held that a union's request to
that the CAA did not exempt labor's collective activity from the anti-trust injunction. By failing to specifically state that all union activity was exempt from the anti-trust laws, Congress gave the courts room to interpret the CAA in a manner inconsistent with the drafters' true intent.

Unions finally won the battle, however, with the passage of the Railway Labor Act ("RLA") in 1926. Congress enacted the RLA to establish the rights of railroad employees to form and join unions. Because Congress used very precise language, making its intent clear, the Supreme Court was forced to uphold the drafters' intent when interpreting the Act.

Potential customers to boycott the product of the employer and also a request that the workers not install or repair that product, such pressure also affected employers that were only indirectly related to the dispute. Id. Therefore, the Court held that the action was properly brought under the Clayton Act to enjoin the activity of the union as it was in restraint of trade. Id. The Duplex Court held that the Clayton Anti-Trust Act did not prevent injunctions against this type of union activity as it did relates to interstate commerce. Id.

In refusing to exempt labor unions from injunctions under the Act, the Duplex court stated, "[b]ut there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade." Id. at 469.

Because the language of the Clayton Anti-Trust Act was vague, the Supreme Court held that it did not intend to make unlawful the regulation of any activity that was provided for in the Sherman Anti-Trust Act. "However, the Clayton Act was vaguely written and did not provide what labor hoped for - that is, an outright exemption. The Supreme Court proved unwilling to allow Congress to legislate away its role as the protector of the status quo." B. JUSTICE, supra note 21, at 11.


The purposes for the Railway Labor Act are:

1. To avoid any interruption to commerce or to the operation of any carrier engaged therein; 2. to forbid any limitation on freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; 3. to provide for the complete independence of carriers and of employees in the manner of self-organization to carry out the purposes of this Act; 4. to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; 5. to provide for the prompt and orderly settlement of all disputes growing out of interpretation or application of agreements covering rates of pay, rules, or working conditions.


In Texas & New Orleans R.R. Co. v. Brotherhood of Ry. and S. Clerks, 281 U.S. 548 (1930), the United States Supreme Court upheld the Railway Labor Act stating that Congress' power to protect the free flow of trade in interstate commerce includes Congress' power to assure a means of settling labor-management disputes by
After the passage of the RLA, Congress enacted additional legislation dealing specifically with employee rights to act collectively. In 1932, Congress passed the Norris-LaGuardia Act which denied federal courts the power to issue injunctions in labor disputes. Congress also passed the Wagner Act (now referred to as the NLRA) in 1935. The NLRA mandated that employers bargain with employee representatives.

As union activity prevailed under the NLRA, Congress became aware of the need for more comprehensive legislation which would balance union, employer, and employee interests. In 1947, attempting to effect this balance, Congress passed the Taft-Hartley Act ("THA") as an amendment to the NLRA. The THA prohibited secondary boycotts by unions and gave employees the right to protecting the right of unions to bargain collectively. Id.

46. Norris-LaGuardia Act, Pub. L. No. 72-65 § 4, 47 Stat. 70 (1932). The current version is located at 29 U.S.C. §§ 101-115 (1982). This anti-junction statute was brought about because of the public's outcry for government to help unions secure rights for employees in the workplace. Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921). "A single employee was helpless in dealing with an employer . . . unable to leave the employ and to resist arbitrary and unfair treatment . . . [u]nion was essential to give laborers opportunity to deal on equality with their employer." Id. at 186.

47. In an effort to promote economic recovery in the New Deal era, President Roosevelt passed the National Industrial Recovery Act in 1933. This Act proposed to regulate the prices and production of industry in an effort to provide an express departure from the anti-trust laws. See B. JUSTICE, supra note 21, at 14; Mitchell, supra note 18, at 1071.

However, the Supreme Court interfered again with the government's attempt to promote unionism by overruling the National Industrial Recovery Act, stating that it permitted federal regulation of what the Court considered purely local issues. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Court declared the Act unconstitutional in Schechter only months before the Wagner Act (NLRA) was adopted. Id.


49. The NLRA is often referred to as the Wagner Act after Senator Robert F. Wagner who proposed it in 1935 to solely regulate union and management relations. See A. GOLDMAN, supra note 16, at 52. See also Raskin, supra note 19, 945 (a historical look at the Wagner Act and the force of it today, over fifty years later).

50. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158 (a)(5) (1982).

The United States Supreme Court upheld the NLRA in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In Jones & Laughlin Steel Corp., the Supreme Court for the first time held that Congress' power to regulate commerce included the power to regulate labor-management activity. Id.

51. See S. PETRO, POWER UNLIMITED - THE CORRUPTION OF UNION LEADERSHIP 246 (1959) for a discussion of the main objective of the Taft-Hartley Act of outlawing monopolistic strikes and secondary boycotts by unions.

52. 29 U.S.C. §§ 151-186 (1982). For a discussion of the Taft-Hartley amendments, see Mikva, supra note 1, at 1127. "Congress passed Taft-Hartley to counteract what many saw as the excessive power of the post-Wagner unions. Id. The amendments allowed the government to use injunctions against unions, and outlawed closed shops upon the awareness of the substance of collective bargaining agreements. Id.
refrain from union activities.\textsuperscript{53} Congress further amended the NLRA with the passage of the Labor Management Reporting and Disclosure Act\textsuperscript{54} ("LMRA") to curb union corruption.\textsuperscript{55}

Today, the NLRA remains the core legislation regulating employer/employee relations. The NLRA gives employees the right to form, join, or assist unions in collective activity, as well as the right to refrain from such collective activity.\textsuperscript{56} These collective rights are often referred to as section 7 rights.\textsuperscript{57} The union is an essential mechanism through which employees have an opportunity to assert their section 7 rights under the NLRA.\textsuperscript{58}

II. Specific Areas of Union Break-Down

Unions are presently suffering from a number of court decisions which are effectively "chipping away" at the unions' authority to represent employees collectively. Part II of this comment analyzes two specific areas of employer/union relations which the courts recently addressed, which lay at the heart of the union break-down.

A. Restricting Union's Authority to Discipline Members

Section 8(b)(1)(A)\textsuperscript{59} of the NLRA forbids unions from restraining or coercing employees in the exercise of their section 7 rights to exercise collective activity, provided the labor organization has the right to "prescribe its own rules with respect to the acquisi-

\textsuperscript{53} Congress passed the Taft-Hartley Act over President Truman's veto, to make closed shops illegal, and to outline for the first time union unfair labor practices. Raskin, supra note 19, at 949. Organized labor created a harsher name for the Taft-Hartley Act: "Slave Labor Act." Id. at 949.

\textsuperscript{54} Congress passed the LMRA in 1959 which is commonly referred to as the Landrum-Griffin Act. Raskin, supra note 19, at 950. Congress also passed the Landrum-Griffin amendments in an attempt to protect innocent third parties from union activity. See Comment, supra note 42, at 1033-34.


\textsuperscript{57} Id. The union derives its authority to aid employees in securing their section 7 rights under the NLRA through section 9. See 29 U.S.C. § 159 (1982). The representatives voted by the majority of the employees "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." Id.

\textsuperscript{58} Without the union, the employees would not have a means to collective action. Medoff, The Public's Image of Labor and Labor's Response, 3 DET. C.L. REV. 609 (1987). The union speaks as the "voice" of all the employees so that they are not required to deal with the employer on an individual basis. Id. Unions have two faces, one is the monopoly face and the other is the voice face. R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? (1984).

tion or retention of membership therein." Courts recently narrowed the unions' authority to prescribe such rules in disciplining their members. Specifically, courts have limited the unions' power to impose fines on those members who resign during strike periods.

These recent court decisions contravene the Supreme Court's initial interpretation of the section 8(b)(1)(A) proviso as it deals with unions' intra-disciplinary powers. In NLRB v. Allis-Chalmers Mfg. Co., the United States Supreme Court held that unions have the authority to fine their members for refusing to participate in an economic strike. Writing for the majority, Justice Brennan noted

60. Id. Section 8(b)(1)(a) of the NLRA makes it an unfair labor practice for a union to restrain or coerce employees in exercising their rights under section 7 "provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158 (1982).

61. For a discussion of these cases see Comment, Section 8(b)(1)(A) from Allis-Chalmers to Pattern Makers' League: A Case Study in Judicial Legislation, 74 Calif. L. Rev. 1409 (1986) (hereinafter Case Study).

62. Union discipline in strike resignations is an important area in the field of labor law. Many legal commentators have discussed the recent changes in this area of labor law. See generally Abraham, supra note 55, at 1268 (examination of the tensions between individual rights and theories of collective action in the context of union resignations and strikebreaking); Comment, supra note 4, at 127 (analysis of union discipline and Justice Brennan's theory of refusing to regulate internal union affairs as collective group); Comment, supra note 61, at 1409 (examination of the legislative history of the Taft-Hartley Amendments); Note, A Union's Right to Control Strike-Period Resignations, 85 Colum. L. Rev. 339 (1985) (examination of Pattern Makers' and the controversy over union discipline); Wellington, Union Fines and Workers' Rights, 85 Yale L. J. 1022 (1976) (examination of Allis-Chalmers and union discipline).

63. 388 U.S. 175 (1967). In Allis-Chalmers, the union represented employees of two Allis-Chalmers' plants voted for an economic strike. Id. A few of the union members crossed the picket lines and worked during the strike. Id. The union fined those strikebreakers in amounts of $20 to $100 according to the collective bargaining agreement which required each employee to become, and remain a union member. Id. The strikebreakers refused to pay the fines, therefore, the union sued them in state court. Id. In response, Allis-Chalmers brought unfair labor practice charges against the union for violating section 8(b)(1)(A). Id. The NLRB held that the discipline imposed by the union on the strikebreakers was valid under the section 8(b)(1)(A) proviso. Id. The United States Supreme Court upheld the Board's decision by holding that Congress did not intend section 8(b)(1)(A) to prohibit the imposition of fines on union members who refuse to honor an authorized strike. Id. at 178-95.

64. 388 U.S. 175 (1967). The Court held that it is essential to labor policy that the union be able to protect against erosion of its members and status through reasonable discipline of those members who violate the union rules. Id. "That power is particularly vital when the members engage in strikes." Id. at 181. See, e.g., Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951); P. TAFT, THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS 117-80 (1954).

65. Justice Brennan authors more labor law decisions than any other United States Supreme Court Justice. See Dorman, Justice Brennan: The Individual and Labor Law, 58 Chi.-Kent L. Rev. 1003 (1982). See also Comment, supra note 4, at 127. "[A]n examination of Justice William J. Brennan's treatment of internal union affairs reveals a primary concern for unions and union self government." Id. at 127. "Justice Brennan has generally upheld union attempts to discipline union members, balancing a union's need for authority over its members and national labor policy."
that because the economic strike is a vital weapon to the union in achieving its goals, it is essential that all members participate in the strike activity.\textsuperscript{66} Brennan further stated that in order to insure membership participation, it is necessary that the union have authority to "fine or expel strikebreakers."\textsuperscript{67}

Eighteen years after \textit{Allis-Chalmers}, the Supreme Court struck a major blow to the unions' ability to fine strikebreakers in \textit{Pattern Makers League v. NLRB}.\textsuperscript{68} The Court in \textit{Pattern Makers} held that a union could not fine employees for resigning from the union before or during a strike regardless of a contrary rule in the union constitution.\textsuperscript{69} The Court further held that the rule forbidding resignation before or during a strike is not a "rule with respect to the retention of membership"\textsuperscript{70} protected under the section 8(b)(1)(A) proviso.

The United States Court of Appeals for the Sixth Circuit broadly interpreted the \textit{Pattern Makers} holding in \textit{Auto Worker's Local 449 v. NLRB}.\textsuperscript{71} In \textit{Auto Worker's}, the court held that the union violated section 8(b)(1)(A) by maintaining a provision in the union's constitution restricting members' rights to resign and for refusing to accept strikebreakers' resignations.\textsuperscript{72} The court further held that section 8(b)(1)(A) prohibited any restriction on a union

\textsuperscript{66} "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . .'" NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967) (quoting Summers, supra note 64, at 1049).

\textsuperscript{67} Id. See supra notes 62-66 and accompanying text for a discussion of the unions' right to fine strikebreakers.

\textsuperscript{68} 473 U.S. 95 (1985).

\textsuperscript{69} Id. In October of 1976, the League, a national union comprised of local associations, adopted an amendment to the union constitution which provided, "No resignation or withdrawal from an Association or from the League shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent." Id. at 97. Subsequent to adopting this amendment, two local unions went on strike and 11 of the union members tendered resignations and returned to work, refusing to participate in the strike activity. Id. When the union sought to fine those strikebreakers, the Rockford-Beloit Pattern Jobbers' Association filed unfair labor practices charges under § 8(b)(1)(A) against the League. Id. at 98. The United States Supreme Court held that § 8(b)(1)(A) prohibits unions from fining employees who tender resignations during strike periods. Id. at 115. "Therefore, imposing fines on employees for returning to work 'restrain[s]' the exercise of their § 7 rights." Id. at 101.

\textsuperscript{70} Id. at 110. See supra note 8 for the specific language of § 8(b)(1)(A). "Accordingly, we find no basis for refusing to defer to the Board's conclusion that League Law 13 is not a 'rule with respect to the retention of membership' within the meaning of the proviso." \textit{Pattern Makers}, 473 U.S. at 110.

\textsuperscript{71} 865 F.2d 791 (6th Cir. 1989). In \textit{Auto Workers}, the United States Court of Appeals for the Sixth Circuit held that the unions who maintain a provision in its constitution which restricts the member's right to resign violates § 8(b)(1)(A). Id. at 797. Furthermore, the court held that any restriction on a union member's right to resign restraints and coerces the member and impairs the ideal of voluntary unionism. Id.

\textsuperscript{72} Id.
member's right to resign.

These decisions are an unwarranted restriction on unions' rights to intra-union discipline for three reasons. First, legislative history indicates that section 8(b)(1)(A) was not intended to restrict unions' authority to prohibit members from resigning and fining them for doing so. Second, unionism is a democratic process where all members are required to abide by the majority decision to strike. Third, it is unfair to permit union members to forego participation in the strike but reap the benefits such as wage increases which result from the strike.

The Taft-Hartley amendments' legislative history reveals that Congress did not intend to interfere with internal union affairs. More specifically, the legislative history demonstrates that Congress did not intend to prohibit unions from fining their members for resigning. This is evidenced by the changes made before Congress enacted the bill. The House bill contained a provision which made it an unfair labor practice for a union to deny its members the right to resign. The Senate, however, failed to adopt this provision.

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73. Id. The provision in the union constitution in Auto Workers specifically states: "A member may resign or terminate membership only if s/he is in good standing, is not in arrears or delinquent in the payment of any dues or other financial obligation to the International Union or to the Local Union and there are no charges filed and pending against her/him." Auto Workers Local 449 v. NLRB, 865 F.2d 791, 793 (6th Cir. 1989).


75. Id. The right to refrain from union activity provided for in section 8(b)(1)(A) was not intended to give the NLRB the right to interfere with and regulate internal union affairs, including the imposition by unions of disciplinary fines against members who violate the union constitution. Pattern Makers v. NLRB, 473 U.S. 95, 119 (1985) (Blackmun, J., Brennan, J., and Marshall, J., dissenting); NLRB v. Boeing Co., 412 U.S. 67, 71 (1973); Scofield v. NLRB, 394 U.S. 423, 428 (1969).

76. "Because a majority of the Board has interpreted the terms of the NLRA in a manner inconsistent with the congressional purpose clearly expressed in the legislative scheme and amply documented in the legislative history, the Court's deference is misplaced." Pattern Makers, 473 U.S. at 130-31. (Blackmun, J., Brennan, J., and Marshall, J., dissenting).

77. Section 8(b) of the NLRA governs union unfair labor practices. See 29 U.S.C. § 158(b) (1982).

78. The House bill contained a detailed "bill of rights which declared that it is an unfair labor practice for a union to deny any of its members the right to resign from the union at any time." H.R. 3020, 80th Cong., 1st Sess., 93 Cong. Rec. 6443 (1947).

79. The Senate bill generally proposed that it is an unfair labor practice to "restrain" or "coerce" employees in the exercise of their section 7 rights, but did not specifically set forth any particular employee rights. Id. It also refused to adopt the Houses' provision declaring it an unfair labor practice for unions to deny members the right to resign. Id. The Taft-Hartley Act contains the Senate's general language. See 29 U.S.C. § 158(b) (1982).
Therefore, the fact that the Senate considered this provision and expressly excluded it demonstrates that Congress did not intend section 8(b)(1)(A) to be used as a means of preventing unions from fining members for refusing to strike.\textsuperscript{80}

The second reason unions should possess the authority to fine members for resigning before or during a strike is imbedded in the principle of democracy underlying unionism.\textsuperscript{81} The union process is democratic.\textsuperscript{82} A majority of a company's employees must vote in favor of union representation.\textsuperscript{83} Similarly, a majority of employees must vote in favor of a strike.\textsuperscript{84} Because the majority of employees choose to strike, all the members should abide by that majority decision. It is unfair to both the union and the other striking members to allow some members to "jump ship" when the going gets rough.

The third reason for allowing unions to discipline members for resigning is characterized as the "free rider" problem.\textsuperscript{85} It is unfair to allow union members to refrain from striking by resigning, and then reap the benefits from the strike.\textsuperscript{86} These ex-union members are "free riders."\textsuperscript{87} They do not suffer the same economic hardships as their fellow employees during the strike, yet they enjoy the same benefits derived from the strike.\textsuperscript{88} The restriction of fining strike-breakers is just one area where the courts are undermining the authority of unions.

\textsuperscript{80} If Congress intended it to be an unfair labor practice for the union to fine or otherwise discipline members for strike-breaking activity, it would have adopted the House bill proposal. Because Congress decided not to specifically state this type of union discipline as prohibited, it is obvious that Congress intended to permit unions to fine members for refusing to strike.


\textsuperscript{82} Under section 9 of the NLRA, in order for a union to represent employees for the purposes of collective bargaining, it must be elected "by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. § 159(a) (1982).

\textsuperscript{83} Section 9 of the NLRA provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes . . . ." 29 U.S.C. § 159(a) (1982) (emphasis added).

\textsuperscript{84} Dorman, \textit{supra} note 65, at 1003.

\textsuperscript{85} For a definition of the "free rider" problem, see \textit{infra} note 87.

\textsuperscript{86} These benefits are those obtained by the union for the employees in the collective bargaining agreement. The strike is used as an economic weapon, forcing the employer to meet the union's demands regarding wages, hours, and other conditions of employment. See Dorman, \textit{supra} note 65, at 1023.

\textsuperscript{87} Free riders are those non-union member employees who do not join the union or pay dues, but benefit from the unions' collective bargaining. NLRB v. General Motors, 373 U.S. 734, 741 (1962). Congress passed section 8(b)(1)(A) with the intent to deal with the free rider problem by allowing union security agreements. \textit{Id.} at 740-41.

\textsuperscript{88} \textit{Id.} at 741.
Another area where the courts are undermining union authority involves union security agreements. Security agreements are agreements between the union and the employer which condition employment on joining the union. Section 8(a)(3) of the NLRA gives labor organizations the right to bargain with employers for these security agreements. That section specifically states that, "the act shall not prohibit the employer from agreeing with the union to require as "a condition of employment membership therein." This "membership" requirement can be interpreted as either of two types of security agreements: union shop or agency shop. A union shop requires, as a condition of employment, that the employee join the union and that he begin paying dues after working for thirty days. An agency shop agreement does not require the employee to join the union. However, employees are required to pay union fees and dues.

89. Union security agreements are, in effect, agreements which mandate union membership on all the employees even if they did not vote in favor of union representation. "A union security agreement is a negotiated contract provision requiring some form of union membership or payment to a union as a condition of employment." B. JUSTICE, supra note 21, at 98.
90. See infra note 95 for a short discussion of three different types of union security agreements.
92. Section 8(a)(3) of the NLRA specifically provides:
(a) it shall be an unfair labor practice for an employer- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day of such agreement. . . .
94. The union shop is the most restrictive type of union security allowed under section 8(a)(3) of the NLRA. UNION SECURITY, CHECKOFF, AND HIRING ARRANGEMENTS, [Oct.] Lab. Rel. Rep. (BNA) No. 660, at LRX 730:301 (October, 1988). The United States Supreme Court has also interpreted section 8(a)(3) as allowing agency shops. NLRB v. General Motors, 373 U.S. 734, 743 (1963). The court held that employment could be conditioned upon membership but membership only required the payment of dues. Id.
95. Union shop agreements require employees to join the union within a certain period from time of hiring. R. GORMAN, BASIC TEXT ON LABOR LAW 639, 641-42 (1976). There are three types of union security agreements: (1) the closed shop where only union members are hired; (2) the union shop where the employee must join the union within a period of time; and (3) the agency shop where the employee must pay union dues without having membership in the union. Comment, supra note 2, at 493 n.5.
96. An agency shop agreement conditions employment on the paying of union dues. NLRB v. General Motors, 373 U.S. 734, 742 (1962). For a discussion of the
When first construing section 8(a)(3), the courts interpreted that proviso to authorize the union shop. This changed, however, in 1962 when the United States Supreme Court in *NLRB v. General Motors* held that the section 8(a)(3) proviso authorizes the agency shop, rather than union shop security agreements. The Court held that interpreting the proviso to authorize agency shops furthers the intent of Congress by requiring all employees to pay for bargaining activity. The Court reasoned that "membership" as used in the 8(a)(3) proviso, only referred to paying dues, not to actually joining the union.

In the more recent case of *Communication Workers v. Beck*, the Supreme Court broadened the *General Motors* holding by stating that under an agency shop agreement the employee is only required to pay dues for those activities directly related to collective bargaining. The Court reasoned that although the intent of sec-

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97. Prior to *NLRB v. General Motors*, 373 U.S. 733 (1962), courts construed the section 8(a)(3) provisos to only allow the union shop, not the agency shop agreements. The Supreme Court ended the confusion of whether section 8(a)(3) authorized the union shop or the agency shop in *General Motors*. Comment, *Communication Workers v. Beck: Supreme Court Throws Unions Out on Street*, 57 *Fordham L. Rev.* 665, 670 (1989). Therefore, after the Court interpreted section 8(a)(3) as authorizing the agency shop, the question remained as to whether union expenditure of nonunion fees for non-collective bargaining purposes violated the non-members' right to free speech under the first amendment. *Id.*

98. 373 U.S. 733 (1962).

99. *Id.* at 742. The Supreme Court held that the section 8(a)(3) proviso conditions employment only on the payment of initiation fees and monthly dues. *Id.* "It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues." *Id.* See *Radio Officers' Union v. Labor Bd.*, 347 U.S. 17 (1961). It is evident from the legislative history that Congress clearly intended union security agreements to only authorize the compelling of paying union dues and fees. *Id.* at 41.

100. NLRB v. General Motors, 373 U.S. 734, 740 (1962). Congress realized that a union security agreement was necessary to make employees pay the cost of obtaining collective bargaining agreements. *Id.* A representative sample of agency fee cases holding that section 8(a)(3) authorizes agency shop agreements include: Public Serv. Co. of Colorado v. NLRB, 89 N.L.R.B. 418 (1962) (requires union members to pay to the union $2 a month for support of the bargaining unit); Garner v. Teamsters Union, 346 U.S. 485 (1961) (section 8(a)(3) merely disclaims a national hostility towards closed shop or other forms of union-security agreements); Algoma Plywood Co. v. Wisconsin Bd., 336 U.S. 301 (1960) (the proviso to section 8(a)(3) affirmatively protects the maintenance of membership agreement).


103. *Id.* at 2655. In *Communication Workers*, employees who did not join the union brought suit challenging the union's agency agreement because the union used the agency fees for purposes other than collective bargaining. *Id.* at 2645. The employees contended that the expenditure of these fees was for lobbying for labor legislation and participating in charitable and political events violated the union's duty of fair representation and the first amendment. *Id.* at 2645. The Supreme Court held that the expenditure of the agency fees beyond those necessary to finance collective bar-
tion 8(a)(3) was to afford unions protection under security clauses, this goal is achieved by requiring employees to only pay those dues related to collective bargaining agreements. Thus, nonunion employees only had to pay their "fair share" of the union benefits.

This comment asserts that the fair share requirements proposed in Communications Workers are an unwarranted limitation on the unions' section 8(a)(3) rights to security. First, section 8(a)(3)'s legislative history demonstrates that Congress intended to authorize union shop rather than agency shop security agreements. The legislative history further demonstrates that Congress did not intend to limit the unions' use of collected dues. Second, some union activities, while indirectly related to collective bargaining, result in improved working conditions. Third, requiring unions to account for costs directly related to collective bargaining is unrealistic and places an undue burden on unions.

Gaining agreements violated the duty to fair representation and the employee nonmember's first amendment rights. Id. For an analysis of the Communication Workers decision, see Comment, supra note 97, at 665; Note, Section 8(a)(3) Limitation to the Union's Use of Dues-Equivalents: The Implications of Communication Workers of America v. Beck, 57 U. Cin. L. Rev. 1567 (1989).

104. Id. at 2656-57. "We conclude that section 8(a)(3) ... authorizes the exacting of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employees in dealing with the employer on labor-management issues.'" Communications Workers, 108 S. Ct. at 2657 (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984)).

105. In order to remedy the free rider problem, Congress intended that employees be required to pay for those expenditures which are reasonably related to the purpose of performing the duties of the bargaining representative. Communication Workers, 108 S. Ct. at 2652. In holding that an agency shop agreement only provides for paying those dues directly related to collective bargaining, the Supreme Court looked to both the decision in International Assoc. of Machinists v. Street, 367 U.S. 740 (1960) and the legislative history of § 8(a)(3). Communication Workers, 108 S. Ct. at 2648-53. In Machinists, the Supreme Court interpreted section 2 of the Railway Labor Act as prohibiting a union, over the objections of a nonmember to expend compelled agency fees on political causes. Id. at 2648. Because the Railway Labor Act and the NLRA are similar, the Court in Communication Workers applied the Machinists reasoning to the NLRA. Id. at 2648-49.

Second, the Communication Workers court held that the legislative history of the NLRA provided that agency shop fees be expended only for collective bargaining purposes. Communication Workers, 108 S. Ct. at 2652. The Senate Report which accompanies the Taft-Hartley Act states that such a provision "remedies the alleged abuses of compulsory union membership ... yet makes possible the elimination of the 'free rider' and the sharing of the burden of maintenance by all of the beneficiaries of union activity." Hearings on H.R. 7789 Before the House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess. 253 (1950). The Communication Workers court held that this language means that Congress only required that nonmembers, agency fees be allocated to activity directly related to collective bargaining. Communication Workers, 108 S. Ct. at 2651.

106. See supra note 95 for an explanation of union security agreements.

107. See infra note 110 and accompanying text for a discussion of the legislative history of section 8(a)(3).

108. See supra note 105 and accompanying text for a discussion of the directly related test.

109. For a further discussion of this burden placed on the union, see infra note
Both the plain language and the legislative history of section 8(a)(3) support the argument that Congress intended security agreements to authorize union shops. The clear language provides for "membership" in the union which means actually "joining" the union to become part of that organization. In addition to the clear language, the legislative history reveals a desire by Congress to abolish closed shops. The legislative history never mentions the creation of agency shops. Therefore, Congress did not contemplate that courts use section 8(a)(3) to authorize agency shops as opposed to union shops.

Furthermore, if Congress intended section 8(a)(3) to authorize agency shops, it failed to specifically state how a union may use the money it collects from its members. If however, Congress did intend to authorize the agency shop, it is necessary to look to the legislative history to ascertain how much of the union fees a person must pay. The legislative history reflects the fact that Congress considered adding a provision to the NLRA which would have prohibited unions from spending dues for non-collective bargaining purposes.

122 and accompanying text.

110. In adopting section 8(a)(3) Congress intended it to cover two purposes: (1) to prohibit closed shop agreements which conditioned hiring on being a union member; and (2) to deal with the "free rider" problem. See S. Rep. No. 105, 80th Cong., 1st Sess., at 6 (1947). The plain meaning of the term "membership" stated in the statute requires an employee to join the union, not merely pay dues. See Comment, supra note 97, at 672.

Furthermore, the debates never mention the idea of agency shop agreements, they were only concerned with abolishing the closed shop. "Under section 8(a)(3), the closed shop is abolished, and a man can get a job with an employer and can continue in that job if . . . he joins the union and pays dues." See 93 CONG. REC. 4886 (1947) (statement by Senator Taft) (emphasis added). Because the history requires joining and paying dues, Congress intended the union shop, not the agency shop. See also Hopfi, The Agency Shop Question, 49 CORNELL L. REV. 478, 484 (1964).


112. Algoma Plywood Co. v. Wisconsin Employment Relations, 336 U.S. 301, 307-11 (1949). A closed shop security agreement provides that only union members be hired to work for that particular "closed shop." Id.

113. See supra note 110 and accompanying text for a discussion of Congress' failure to mention agency shop agreements as permitted union security agreements under section 8(a)(3).


115. The legislative history of section 8(a)(3) reveals that Congress was aware of unions' use of the political arena to obtain benefits for workers. See United States v. UAW, 352 U.S. 567, 579-80 (1957); H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947). The House bill, which the Senate did not adopt, contained a bill of rights for workers which had a provision declaring that "[m]embers of any labor organization shall have the right to be free from unreasonable . . . financial demands of such organization," H.R. 3020, 80th Cong., 1st Sess. (1947).

Therefore, the fact that Congress specifically considered adopting a provision to make agency fees to apply only to collective activities, but decided not to adopt such a provision clearly states that Congress did not intend nonmembers to only be re-
However, Congress decided to only prohibit unions from spending dues on federal elections, and not to limit the use of dues for lobbying and non-collective bargaining purposes.\textsuperscript{116} This clearly demonstrates that Congress did not intend section 8(a)(3) to forbid non-collective bargaining expenditures, except for those related to federal elections.

A second reason the so called "fair share" requirements are in fact "unfair" goes to the heart of the "free rider" problem discussed earlier.\textsuperscript{117} Congress intended that section 8(a)(3) would prevent employees from receiving union benefits without paying for them.\textsuperscript{118} However, by holding that non-member dues can only be used to pay for costs directly related to collective bargaining, the courts are allowing this to occur. The "directly" related\textsuperscript{119} requirement interferes with the purpose underlying section 8(a)(3) by failing to recognize that employees are greatly benefited from union activities which are indirectly related to collective bargaining.\textsuperscript{120}

For example, union funds spent lobbying for certain working conditions, such as an increase in the minimum wage, are not considered by the courts as directly related to collective bargaining.\textsuperscript{121} However, in fact, an increase in the minimum wage does directly affect collective bargaining. An increase in the minimum wage puts the union in a better bargaining position for securing higher wages.

\textsuperscript{116} Section 304 of the LMRA prohibits the use of agency fees by unions in connection with federal elections. LMRA, ch. 120, 61 Stat. 136, 159-60 (1947) (codified as amended at 2 U.S.C. § 441(b) (1982)).

\textsuperscript{117} For a discussion of the free rider problem, see supra note 87 and accompanying text.

\textsuperscript{118} "[M]any employers sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost." S. Rep. No. 105, 80th Cong., 1st Sess., 6 (1947) Congress intended the amendments to the NLRA to remedy the abuses of the closed shop but give employers and unions stability by eliminating the "free riders." NLRB v. General Motors, 373 U.S. 734, 741 (1962).

\textsuperscript{119} Communication Workers v. Beck, 108 S. Ct. 2641, 2648 (1989). For an explanation why Congress did not intend to limit the amount of agency fees or "dues equivalents," see Communication Workers, 108 S. Ct. at 2658 (Blackmun, J. dissenting).


It is difficult to determine what expenditures only deal with the "core" of collective activity. This gray area includes union institutional expenses such as journals, building union halls, unions' organizing costs, expenditures for community services aimed at promoting union public relations, and maintenance of strike funds. Cantor, supra note 96, at 77.

\textsuperscript{121} See Communication Workers v. Beck, 108 S. Ct. 2641 (1989) (union expenditures to lobby for political issues are not directly related to collective bargaining).
Therefore, what the courts classify as an indirect relationship is in reality, directly related to securing favorable collective bargaining agreements.

The third reason fair share requirements are unwarranted is the burden placed on unions to account for their expenditures. Because the courts failed to articulate guidelines for unions to follow, a great deal of uncertainty exists as to the nature and detail of documentation necessary to account for time spent on collective bargaining. Is the union required to keep track of every hour, minute, or second? Absent any workable guidelines, this places an undue burden on union representatives. Furthermore, how does the union classify the time spent recording time spent for collective bargaining? Would the courts consider this directly or indirectly related to collective bargaining?

III. The Effect of the Recent Decisions on the NLRA

The recent court decisions construing sections 8(b)(1)(A) and 8(a)(3) are effectively working to break-down union authority. Taken separately, the courts' recent interpretations of these sections are insufficient to weaken unions' powers. However, when these decisions are combined, they are likely to have synergistic effects which will lead to the eventual destruction of union solidarity and collective representation. If the courts are allowed to continue to reconstrue the NLRA to undermine union authority, they will eventually render it a useless piece of legislation. Such court action is not without precedent in the area of labor legislation. As previously discussed, the Supreme Court virtually overruled the intent of the Clayton-Anti Trust Act when it failed to apply it to labor organizations as Congress had intended. Because Congress enacted the Clayton Act to exempt labor organizations from the anti-trust laws, the courts' contrary interpretations completely abrogated the legis-

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122. In Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), the Supreme Court held that a union's procedure for accounting for collective bargaining fees was constitutionally inadequate because it failed to minimize risk that nonunion employees' contributions might be temporarily used for non-collective purposes. The Court held that procedural safeguards are necessary to protect the employees' funds from being allocated for non-collective purposes. Id. at 294. However, the Court failed to specifically state what these procedural safeguards are.

The Chicago Teachers Union Court further held that although the union did not have to provide the objecting non-members with a detailed list of the expenditures, the union was too slow in getting a decision by an impartial decision maker, and the first two steps of the review procedure were inadequate. Id.

123. Solidarity is defined as when, "several persons bind themselves towards another for the same sum, at the same time, and in the same contract . . . ." BLACK'S LAW DICTIONARY 1249 (5th ed. 1979).

124. See supra notes 40-42 and accompanying text for a discussion of the Supreme Court's overruling of the intent of the Clayton Anti-Trust Act.
ative intent. This resulted from Congress' failure to use clear and precise language when drafting the Act. The same is true of the NLRA. The NLRA is vague on its face. Thus, the courts have begun reinterpreting the Act so as to severely limit union authority. These interpretations contravene the underlying reason for enacting the NLRA - to safeguard union solidarity.  

IV. SOLUTION: CONGRESSIONAL ACTION

To prevent the courts from effectively overruling the NLRA, Congress must amend and clarify the statute. Congress should

125. See supra note 123 and accompanying text for a discussion of the meaning of union solidarity.

126. It is important to note that many commentators do not believe that there is a need to prevent unions from collapsing. See M. REYNOLDS, POWER AND PRIVILEGE, 28 (1984); Kerr, Industrial Relations Research: A Personal Retrospective, Industrial Relations, May 1978, at 142; Strauss, Industrial Relations Research: A Critical Analysis, Industrial Relations, October 1978, at 259. These commentators of the union assert that the breakdown will benefit society because unions stagnate both the economy and productivity in America. Id.

Those opposed to the union most frequently attribute such opposition to the corruptness of unions. See Detroit College of Law Review's 1987 Labor Law Symposium on the State of the Unions: Perspectives on Organized Labor 3 DET. C.L. REV. 605 (1987). Generally, the public's image of the union is that they are run by dishonest and unethical leaders. Id. Many union leaders have been subject to criminal charges due to the mismanagement of union funds. Id. Therefore, the general reputation of unions has been severely tarnished because of a few "bad seeds."

This author is of the opinion that the argument that unions are corrupt is overused and often without basis. Unions have a bad name due to the unethical behavior of just a handful of union leaders. Congress has dealt with this problem by enacting the Taft-Hartley Act which provides for the punishment of those who abuse union power. 29 U.S.C. §§ 151-66 (1982). Therefore, because only a few of the union leaders are unethical, this is not reason enough to insinuate that all unions are bad. Even though unions have some faults, they continue to serve employees who might suffer without them.

Another major reason for the opposition to unions may be attributed to economist theories which blame inflation on union demands for wage increases. See Comment, Inflation, Unemployment, and the Wagner Act: A Critical Reappraisal 38 STAN. L. REV. 1065 (1986). These critics argue that the increasing cost of labor due to union demands forces the price of labor up, and therefore, increases the price of products. Id. Those opposed to unions also claim that the costs of collective bargaining and union strikes contribute to inflation. Id.

On the contrary, unions tend to stabilize inflation by keeping the wage rate at expected levels. C. MOSER, LABOR ECONOMICS AND LABOR RELATIONS 121 (1986). Most union members receive a cost of living raise every year to keep up with the cost of goods. Id. Consequently, if it were not for the union and the cost of living raises, employees would individually demand more money for their work, and the employer would lose the predictability of the prevailing wage rate and his overhead costs. Id.

A final reason for union opposition which is posed by this author is the recent trend of employers to implement Human Resource Departments to take care of employee needs. Such departments may be used by employers to improve communication with employees in an attempt to improve the relationship with employees. C. HUGHES, MAKING UNIONS UNNECESSARY 15 (1976). Another approach taken by employers to prevent unions from entering into the picture is implementing employee value systems. Id. at 43. Therefore, because the employer has realized the importance of keeping employees content, anti-unionists believe that there is no need for the
amend both sections 8(b)(1)(A) and 8(a)(3)\textsuperscript{127} to clarify the original intent.\textsuperscript{128} By clarifying congressional intent on the face of the Act, Congress will prevent the courts from imposing their will on the future of unionism in America.

First, Congress should amend the NLRA to clarify the circumstances where intra-union discipline is permitted. Specifically, Congress should amend section 8(b)(1)(A) to clearly state that unions are permitted to discipline their members for failing to abide by majority decisions. Congress could achieve this by amending the section 8(b)(1)(A) proviso to read: it shall be an unfair labor practice for a union to restrain or coerce employees in exercising their section 7 rights “\textit{provided that this paragraph shall not impair the right of a labor organization to prescribe and enforce its rules, including rules against tendering resignations during strikes, or other union activities which are authorized by a majority vote.“} By adopting this, or similar language, Congress will ensure that the courts will not misinterpret the Act's legislative history by declaring that unions cannot fine their members for refusing to strike.\textsuperscript{129}

Second, Congress should amend section 8(a)(3) to expressly provide for the union shop. Section 8(a)(3) should state: Provided that nothing in this Act shall prohibit the employer to bargain with the union regarding as a condition of employment that the employee must join the union after thirty days if that union was selected by the majority of the employees. This language would make it clear that section 8(a)(3) does not permit agency shops.\textsuperscript{130}

third-party intervener, the union. \textit{Id.} at 117.

This author believes that this third reason to abolish the union is also without merit. The human resource departments of companies do not serve the employee in the same manner as the union. People must not forget who signs the human resource employees' checks. Because the company pays these people to deal with the other employees, the companies' best interests are always the bottom line, not the employees' interests. This logic of human resource departments replacing the unions is as unrealistic as putting the fox in charge of the hen house.

\textsuperscript{127} For a further discussion of the need to amend the NLRA see Mikva, \textit{supra} note 1, at 1135. “Even if the Act cannot cure all the sins of the world, this does not mean that nothing can be done." \textit{Id.}

\textsuperscript{128} If the statute is clear on its face, courts would not be afforded the opportunity to interpret it in an inconsistent manner. \textit{See Comment, Communications Workers v. Beck: Supreme Court Throws Unions Out on Street, 57 FORDHAM L. REV. 665, 671 (1989).}

\textsuperscript{129} For a discussion of the legislative history showing that Congress did not intend to prohibit unions from fining strikebreakers, see \textit{supra} notes 74-80 and accompanying text.

\textsuperscript{130} Congress must put the burden on the nonunion minority employee to determine which of the unions' expenditures specifically should not be paid for. This burden should make it difficult for the nonmember because most union expenditures by the union are in some form related to the collective bargaining process which the majority of the employees voted the union to deal with. \textit{See Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986),} for the Supreme Court's decision that the burden of accounting for collective activity should be placed on the union.
If Congress amends sections 8(b)(1)(A) and 8(a)(3), courts will have to abide by the original intent. Thus, future courts will be prevented from further restricting union authority. Because the NLRA has only been amended a few times since its passage in 1935, it is time for a change to prevent the courts from effectively overruling the statute altogether. In addition to fulfilling congressional intent, amending the NLRA will prevent the inequalities which have resulted from the courts' recent interpretations of the Act. More specifically, Congress can help to eliminate the "free rider" problem if sections 8(b)(1)(A) and 8(a)(3) are amended to require all the employees to abide by the union rules and pay for all union benefits. Also, the democratic process of unionism will be preserved because the Act will require all employees represented by unions to adhere to all majority decisions. Furthermore, NLRA amendments will take the undue burden of accounting for collective activity off the union.

CONCLUSION

Unions must be preserved from their eventual collapse in the same manner they achieved their authority at the outset - through congressional legislation. If the NLRA is not amended in the near future, unions may cease to exist. Without unions, the disparity between employee and employer bargaining power will greatly increase. Deprived of their collective voice, employees will again be forced to bargain individually with employers for rights in the workplace.

The remedy begins with Congress recognizing that the courts are undermining the purpose for which the NLRA was enacted. Subsequent to this recognition by Congress, it must inform the courts of their diversion from the intent of the Act. To accomplish this, Congress must amend the NLRA to send the message to the courts that the United States will not allow the courts to destroy union solidarity.

Reneé L. Powell

131. Mikva, supra note 1, at 1136.
132. For Justice Brennan's contract theory of unionism see Dorman, supra note 65, at 1003.
133. For a discussion of the burden placed on unions to account for collective bargaining activity, see supra note 122 and accompanying text.