

The Evolving Definition of the Immigrant Worker: The Intersection Among Employment, Labor, and Human Rights Law.

Putting Hoffman Plastics in its Place – Equality at Last for Immigrant Workers

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*Hoffman Plastics*² has become the poster child of immigration cases and law gone wrong. Often forgotten, though, is that *Hoffman Plastics* is a case under the National Labor Relations Act (NLRA), a case in which the workers organizing a union happened to be immigrants. Even when it is recalled that this was a case in which an employer committed unfair labor practices under the NLRA, there is an assumption that the way the workers in *Hoffman Plastics* were treated is unique to immigrant workers. For example,

[A]fter Hoffman, employers are now de jure exempt from ordinary labor liability in many circumstances (previously, employers were at best de facto exempt, in light of the reluctance of some undocumented workers to file labor complaints). Even legislative proposals to "fix" Hoffman by restoring immigrant eligibility for backpay under labor and employment laws are inadequate, because so long as immigration law forbids the employment of unauthorized immigrants, the traditional make-whole remedy of reinstatement will be unavailable.³

While it is true that after *Hoffman Plastics* undocumented worker status means their employer is not required to pay them backpay as a remedy, the sad truth is that this is the case also for many workers, immigrant and nonimmigrant. Indeed, the one area in which immigrant workers are treated equally with other workers is in the American tradition of judicial hostility to unions and labor law. This is not to say that immigration issues, law, and policy played no role in the case's outcome. However, the way that *Hoffman Plastics* affected immigrant workers can neither be understood – nor their situation addressed – without understanding the dynamic of judicial decisions that led to *Hoffman Plastics*. Put another way, it is no exaggeration to say that we know nothing about *Hoffman Plastics* unless we understand how the courts have historically treated all workers in the United States – immigrant and native. That judicial tendency is a venerable one that stretches back to the earliest days of the National Labor Relations Act and

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² *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); see also *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683 (1994).

³ Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 216.

beyond.⁴ It is a tradition in which judges have repeatedly “judicially amended” the NLRA and other workplace statutes, by overturning clear congressional language and intent. Indeed, under this tradition every American workplace law has been weakened by judicial decision making.

In our own day, we live with workplace laws that have been “judicially amended” to undermine their clear language and purpose. In some cases, Congress has, in turn, legislatively over-ruled the judicial amendments in order to restore the original intent of the law. Amendments to restore the statutes’ original intent are the congressional equivalent of telling the courts they have failed in their most basic duty when interpreting statutes. Congress amended Title VII in 1991 and 2009 and the Americans with Disabilities Act (ADA) in 2008 in order to overturn judicial amendments and reinstate the laws Congress originally wrote.

This dynamic has long been recognized.⁵ In the early decades of the Twentieth Century, the process of judicial amendments affecting labor was common.⁶ For example, Congress passed the Clayton Antitrust Act⁷ in order to reverse judicial amendments of the Sherman Antitrust Act of 1890.⁸ The Clayton Act was itself judicially amended when federal courts interpreted § 20 so as to remove limitations Congress had included in order to remove labor disputes from antitrust jurisdiction.⁹ Congress overturned this judicial amendment in 1932 through the Norris-LaGuardia Act.¹⁰

⁴ See JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); CHARLES O. GREGORY, *LABOR AND THE LAW* (2d rev. ed. 1961); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1977-1978).

⁵ In 1935, the Senate found that “the tendency of the courts to narrow the application of the antitrust laws” had “intensified” the relative weakness of the wage earner. 2 Legislative History of the National Labor Relations Act 1935 2302 (1949) Senate Report 573 (74th Cong., 1st Sess.), Report to Accompany S. 1958, Filed May 1 (Calendar Day, May 2), 1935 (79 Congressional Record 6749).

⁶ J. Louis Warm, *A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation*, 23 MINN. L. REV. 256, 354-56 (1938-1939) (describing judicial amendments of the Sherman, Clayton, Norris-LaGuardia, and National Labor Relations Acts); Osmond K. Fraenkel, *Judicial Interpretation of Labor Laws*, 6 U. CHI. L. REV. 577 (1939) (discussing history of judicial amendments of progressive labor laws). Fraenkel describes various methods by which judges amend laws, such as declaring that the statute merely embodies the common law or that the legislature has no power to take away powers inherent in judges and that such an interpretation would be unconstitutional, *id* at 592; see also Judge Stephen Adler, *The National Labor Relations Board in Comparative Context: Further Reasons for the NLRB's Inability to Guarantee American Workers the Freedom to Organize and Bargain Collectively: Comment on Autonomous and Politicized: the NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 261 (2005).

⁷ 15 U.S.C. §§ 15, 17, 26; 29 U.S.C. § 52 (*).

⁸ 15 §§ 1-7 (*).

⁹ Lewis H. Van Dusen, *The Progress of Labor Law*, 14 TEMP. L.Q. 1, 13 (1939-1940). (“Section 20 of the Clayton Act was intended to deprive the federal courts of the power to issue such sweeping injunctions in labor disputes. That section of the Clayton Act defined “labor disputes” as “controversies involving terms or conditions of employment.” This definition was so interpreted by the courts as to remove from its scope cases where all of the contesting parties were not in the proximate relation of employer and employee”.)

¹⁰ 29 U.S.C. §§ 101-15 (*).

Most laws, however, are not amended because the cost of restoring them to their original purpose is too great, so most linger on, hobbled, ineffective, and despised. Title VII was amended in 1991 and 2008 to reverse a number of Supreme Court decisions.¹¹ The ADA was successfully amended in 2008 only because of the personal stake and strong support of Representative F. James Sensenbrenner (R-WI), one of the ADA's original authors. Unions have spent years lobbying for the enactment of the Employee Free Choice Act, legislation that is a response to judicial amendments. EFCA and the ADA Restoration Act demonstrate that such amendments require costly lobbying and / or powerful supporters. Most judicially amended laws, however, do not have sufficiently powerful partisans and thus linger in their weakened state. Thus, the enervated Family and Medical Leave Act (FMLA) and the Occupational Safety and Health Act (OSHA) fail to achieve their purposes but have had no partisans with the power and commitment to amend them to restore them to their original purpose.

The National Labor Relations Act, enacted just three years after the Norris LaGuardia Act, in 1935, suffered from judicial amendments almost immediately. Even people familiar with the NLRA are unaware of events in this period and how they laid the legal foundation for the outcome in *Hoffman Plastics*. This process is not merely history; it is a force that is active and alive today. Recovering the history is necessary to understand the dynamics of the judicial amendments that led to the outcome in *Hoffman Plastics*. Only by understanding this longstanding – and continuing – judicial dynamic can we develop strategies to restore and protect can we have meaningful worker rights.

The Promise of a Nation Under Law and How Judges Have Subverted that Promise

The promise of the United States is fair treatment and the opportunity for a good life – and not just in the economic sense. Unions have been essential in ensuring that workers have the power to demand fair treatment and a fair share in the wealth of this nation. Thus, to the extent that a major driver of migration to the United States is seeking a better material and civic life, work and union membership are key to achieving that goal. Ironically, both immigrants and unions are often accused of being un-American and of undermining the economic welfare of the United States.¹² The recent discussion around bailouts for American automobile companies included attacks on the wages and benefits of unionized workers and claims that they were the driving forces for the automobile industry's woes.¹³ High percentages of immigrants to the U.S.

¹¹ The Civil Rights Act of 1991 and the Lily Ledbetter Act of 2008?*. The text of the former includes statements naming specific cases that were reversed.

¹² Prime proponents of anti-union positions are the National Right to Work Foundation <http://www.nrtw.org/> and the National Right to Work Committee. <http://www.right-to-work.org/> According to the National Right to Work Legal Defense Foundation's website, "No force is inflicting more damage on our economy, citizenry, and cherished democracy than the union bosses." <http://www.nrtw.org/hcih/> * cites re unions

¹³ See, e.g., Micheline Maynard, *U.A.W. at Center of Dispute Over Bailout*, N.Y. TIMES Dec. 12, 2008 <http://www.nytimes.com/2008/12/13/business/13uaw.html>

join and support unions and unionization,¹⁴ risking the jobs they came for and deportation. *Hoffman Plastics* is a case in which immigrant workers took that risk and lost. It is a case in which an employer benefitted by hiring and then firing those workers, abetted by the Supreme Court.

Citizenship status mattered only in the detail as to what the employee lost. The cases that led to *Hoffman Plastics* had long before created a doctrine that even trivial employee wrongdoing relieves the employer of obligations under the NLRA. That “interpretation” directly violated the NLRA’s provisions that require remedies to promote the policies of the Act.¹⁵ Those express policies include promoting employee freedom of association, equality of bargaining power, mutual aid or support, forming and joining unions, collective bargaining, and the right to strike,¹⁶ policies intended to overturn decades of court decisions that had reinforced and strengthened employer and corporate power.¹⁷ Instead of promoting those policies, the decisions that led to *Hoffman Plastics* destroyed employee freedom of association, equality of bargaining power, mutual aid or support, forming and joining unions, and promoting collective bargaining, thus violating the express command of Congress.

Furthermore, by relieving the employer of an obligation to pay backpay to the illegally fired worker the majority decision made it doubly attractive for an employer to hire workers it suspects are not legally in the country. The workers’ fear of sanctions for violating immigration laws may make them timid about organizing. If they dare, firing them defeats union organization and the Supreme Court frees the employer from any financial penalty.¹⁸ The majority was not unaware of these consequence. Rather, it was dismissive of their import. It rejected the views of the two expert agencies – the National Labor Relations Board (NLRB) and the Immigration and Naturalization Service (INS) – the federal agencies most affected by the outcome of the case – that denying a monetary remedy would undermine the enforcement of both immigration and labor laws.¹⁹ Its concern was not rewarding the employee for violating immigration law.

Essentially the same result is reached in NLRA cases that involve citizen employees, even though the wronged employee’s “wrong” is trivial and may even involve no legal violation. The courts have continually created barriers to remedies of reinstatement and backpay. In the case of backpay, they have long required that fired workers engage not only in a job search to “mitigate” damages, a contract doctrine inappropriately applied to a remedy for a civil violation, but that the

¹⁴ MMANUEL NESS, IMMIGRANTS, UNIONS, AND THE NEW U.S. LABOR MARKET (2005 (immigrant support for unions has not always been met with union support for immigrant members)).

¹⁵ NLRA § 10(c); 29 USC § 160(c).

¹⁶ 29 USC § 151, 157, 163.

¹⁷ See Warren Woods & Altha Connor Wheatley, *The Wagner Act Decision – A Charter of Liberty for Labor?* 5 GEO. WASH. L. REV. 846, 854-857 (1936-1937).

¹⁸ Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 216-17.

¹⁹ cites to briefs *

job search be adjudged adequate.

Recently, the Bush NLRB appointees joined in what had heretofore been the territory of the courts by overturning longstanding precedent as to how backpay for employer violations was to be calculated. Among these “amendments” were three cases handed down in September 2007²⁰ that limited or eliminated backpay by (1) placing the burden on the unlawfully discharged employee and the NLRB to produce evidence that illegally fired employee had engaged in a reasonable job search; (2) reducing backpay awards by crediting “statements or omissions from unsworn compliance forms that the [NLRB] General Counsel gives discriminatees for internal purposes, forms used to help the Board’s Regional Offices keep track of the discriminatees’ efforts to find employment” over sworn and credited testimony by the discriminatee; and (3) finding that engaging in lawful picketing to protest one’s own illegal firing – an act that is protected by the NLRA – meant that the employee had not begun a search for new employment with sufficient speed, on the grounds that “any other result would reward ‘idleness.’”²¹ As the dissent pointed out in one of the cases:

To begin, the Board’s requirement that a respondent come forward with facts to substantiate affirmative defenses to backpay, including an alleged failure to mitigate, is consistent with the general rule that a party asserting an affirmative defense has the burden of producing evidence to support it. . . . The Board’s approach is also consistent with the Supreme Court’s oft-quoted observation that the “most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).²²

The point here is that it is not just immigrant workers – but rather workers as a whole – whom the courts repeatedly – and now the NLRB itself – have put at a disadvantage. Understanding this dynamic, as well as knowing what and who is being attacked and by whom and for what reason, is essential if a successful strategy is to be constructed to overcome this longstanding trend.

To return to *Hoffman Plastics*, the Supreme Court majority’s dismissal of the unanimous positions of expert agencies meant substituting the Court’s judgment for theirs. This is something the Supreme Court itself had long ago forbidden in the case of the NLRA. In 1941, the Supreme

²⁰ *St. George Warehouse*, 351 N.L.R.B. 969 (2007); *Domsey Trading Corp*, 351 N.L.R.B. 824 (2007); *Grosvenor Resort*, 350 N.L.R.B. 1197 (2007). There are other cases handed down by the Bush Board that also limited or eliminated backpay for employees whose rights had been violated but outside the September 2007 period. For example in *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007), the Bush Board place on the NLRB General Counsel the burden to present affirmative evidence in union salting cases as to how long the union salt who was not hired for anti-union reasons, would have worked for the employer.

²¹ Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers’ Rights Under the National Labor Relations Act*, American Constitution Society Issue Brief 11-12 (May 2008). <http://www.acslaw.org/node/6664>

²² 351 N.L.R.B. at 969.

Court said:

A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. . . . In the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. *The exercise of the process was committed to the Board, subject to limited judicial review.*²³

Sixty years ago, the Supreme Court endorsed the obligation of courts to defer to the NLRB's expertise and, more recently in *Chevron*, took the same position as to general agency decision making. However, the *Hoffman Plastics* decision and the transcript of the oral argument demonstrates contemptuous skepticism that the NLRB and the INS could understand the impact that giving employers a "get out of jail free card" would have on enforcing the law.

Oral Argument in *Hoffman Plastics* – Shifting Blaming to the Victim

At oral argument in *Hoffman Plastics*, Justice Rehnquist expressed concern – and even zeal – for ensuring that wrongdoers not be rewarded.²⁴ However the wrongdoer that concerned him and other justices was not the one in the docket. Indeed, he and other justices strove to free the employer from its obligations under the NLRA by shifting blame elsewhere in order not to "reward" a wrongdoing employee:

Our decision in *Sure-Tan* followed this line of cases and set aside an award closely analogous to the award challenged here. There we confronted for the first time a potential conflict between the NLRA and federal immigration policy, as then expressed in the Immigration and Nationality Act (INA). . . . For example, the Board was prohibited from effectively rewarding a violation of the immigration laws by reinstating workers not authorized to reenter the United States.²⁵

Justice Scalia took up the theme by musing on the legal problem created by the illegally fired employee's inability to mitigate damages by working, in order to cut the amount of backpay the employer would owe as a remedy, without further violating the law. In doing so, he makes an employer's affirmative defense to a remedy into something akin to a bar to finding a violation. He even suggests that the backpay remedy is flawed because it is money an employer pays to an

²³ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (emphasis added); see also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

²⁴ Oral argument in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* may be found at http://www.oyez.org/cases/2000-2009/2001/2001_00_1595/argument/

²⁵ *Hoffman* p. ***

employee who has not worked for it.

In most back pay situations where the employer has committed an unfair labor practice and dismisses an employee improperly, the *amount he's going to be stuck with for back pay* is limited by the fact that the person unlawfully fired has to mitigate.

He has to find another job. If he could have gotten another job easily and doesn't do so, the employer doesn't have to pay. *Now, how is this unlawful alien supposed to mitigate?* . . . Mitigation is quite impossible, isn't it?

. . . I mean, but what you're saying is when both the employer and the employee are violating the law, we're going to – you're asking the courts to give their benediction to this stark violation of United States law by awarding money that hasn't even been worked for. I – it's just something courts don't do. (emphasis added).

Throughout the oral argument, all parties treated the obligation to mitigate damages and the limited palette of remedies under consideration as if they were part of the NLRA, thus tying the court's hands. They could have considered and even created other remedies under the command of § 10(c) that requires only that remedies promote the NLRA's policies. Instead, their creativity was focused on narrowing options. Rather than considering the policies and requirements of the law, Justice Scalia saw mitigation of damages as a way to prevent a wily discriminatee from taking advantage of a hapless employer: "If [the discriminatee is] smart he'd say, how can I mitigate, it's unlawful for me to get another job. . . . I can just sit home and eat chocolates and get my back pay." Of course, under the NLRA the only intent that is supposed to matter is that of the discriminator. Under the Court's "rewriting" of the NLRA, that inquiry shifts to vilifying the victim of the anti-union discrimination and concern for the violator.

Justice Kennedy's contribution to this discussion of ways to blame anyone other than the actual violator was to blame the union for the employer's problems. He constructed an entrapment defense based on assumptions about the union's conduct and speculated that the imagined union conduct might violate the law:

Justice Kennedy: Well, when the Board makes its calculus and when the Government made its calculus, did it give any consideration to the fact that a union ought not as a matter of policy to use illegal aliens for organizing activity, or do you think the union can do that?

. . .

Is it consistent with the labor laws of the United States for the union to say it knowingly uses an alien for organizing activity?

Mr. Wolfson: I don't know that the board has addressed the point of knowingly using illegal aliens. I do know that the board has concluded that undocumented aliens may be included within the bargaining unit, and indeed, in both Sure-Tan – in Sure-Tan itself I believe they were included in the bargaining unit.

Justice Kennedy: And that doesn't induce illegal immigration?

... Here, what you're saying is that a union can, I suppose even knowingly, use illegal aliens on the workforce to organize the employer, knowing that by doing that the alien will still be entitled to back pay.

That seems to me completely missing from any calculus, from any equitable calculus in your brief. I just – and since it's a more direct link, I'm quite puzzled by it.

In short, as a result of a judicial amendment from the dawn of the NLRA, the Supreme Court created the doctrine that, in the case of NLRA remedies, two wrongs means that the NLRA wrongdoing employer is off the hook, while the NLRA wronged employee has no remedy. As in the case of undocumented workers fired for their union activities and who face sanctions for violating immigration law, it is irrelevant that there are other laws that will ensure that the wrongdoing employee is sanctioned. All *Hoffman Plastics* did was tweak existing “law”. Indeed, as Justice Scalia put it, since “Mitigation is quite impossible, isn't it?”, the employer receives two windfalls. Not only need it pay no backpay, it will have no disincentive to hiring employees who are barred from working or being in the United States or engaging in other behaviors that might violate the law.

The Supreme Court Treated Jose Castro as any Employee, No Better and No Worse

The majority Supreme Court opinion at least has a more appropriate tone of seriousness than the oral argument. Nonetheless, the decision makes abundantly clear that this is a case about punishing – or at least not rewarding – workers who have violated a law. As the majority sees it, even legal sanctions elsewhere for the employee’s law breaking do not free judges to focus on sanctions for the employer’s violations. Immediately after he finishes reciting the facts and procedural history of the case, Justice Rehnquist says:

This case exemplifies the principle that the Board’s discretion to select and fashion remedies for violations of the NLRA, though generally broad, . . . is not unlimited . . . Since the Board’s inception, we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment. In *Fansteel*, the Board awarded reinstatement with backpay to employees who engaged in a “sit down strike” that led to confrontation with local law enforcement officials. We set aside the award, saying:

“We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct – to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer’s property, which they would not have enjoyed had they remained at work.” 306 U.S., at 255.

Though we found that the employer [Fansteel] had committed serious violations of the NLRA, the Board had no discretion to remedy those violations by awarding

reinstatement with backpay to employees who themselves had committed serious criminal acts. Two years later, in *Southern S. S. Co.*, the Board awarded reinstatement with backpay to five employees whose strike on shipboard had amounted to a mutiny in violation of federal law. We set aside the award, saying:

“It is sufficient for this case to observe 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 [c]ongressional objectives.”²⁶

. . . Since *Southern S. S. Co.*, we have accordingly never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA. . . .

Justice Rehnquist was correct in his observation that the courts have persisted in their refusal to defer to the Board’s remedial “preferences”. He was, however, wrong about which body was enforcing Congress’ intent. The Senate Report on the NLRA, introduced on May 2, 1935, stated:

Nor can the committee sanction the suggestion that the bill should prohibit fraud or violence by employees or labor unions. The bill is not a mere police court measure. The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. The Norris-LaGuardia Act does not deny to employers relief in the Federal courts against fraud, violence or threats of violence.

Racketeering under the guise of labor-union activity has been successfully enjoined under the antitrust laws when it affected interstate commerce. . . .

In addition, the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of such fraud and violence. Deliberations and hearings by the Board, followed by orders that must be referred to the Federal courts for enforcement, are methods of procedure that could never be sufficiently expeditious to be effective in this connection.

The only results of introducing proposals of this sort into the bill, in the opinion of the committee, would be to overwhelm the Board in every case with countercharges and recriminations that would prevent it from doing the task that needs to be done. There is hardly a labor controversy in which during the heat of excitement statements are not made on both sides which, in the hands of hostile or unsympathetic courts, might be construed to come under the common-law definition of fraud, which in some States extends even to misstatements innocently made, but without reasonable investigation. And if the Board should decide to dismiss such charges, its order of dismissal would be subject to review in the Federal courts.

²⁶ Hoffman, at **

Proposals such as these under discussion are not new. They were suggested when section 7 (a) of the National Industrial Recovery Act was up for discussion, and when the 1934 amendments to the Railway Labor Act were before Congress. In neither instance did they command the support of Congress.²⁷

The two cases Justice Rehnquist relies on in *Hoffman Plastics – NLRB v. Fansteel Metallurgical Corp.*²⁸ and *Southern S. S. Co. v. NLRB*²⁹ – were decided in 1939 and 1942 just a few years after the NLRA’s enactment. They are cases in which the Board respected Congress’ view on not undermining the NLRA by making it a general remedy for all ills related to the workplace and in which the Supreme Court overturned that will. Employees in both cases reacted to serious employer mistreatment and legal violations.³⁰ In both cases, the employees engaged in strikes. Of strikes, the NLRA says: “The right to strike shall no be abridged, interfered with or limited ****” < get full quote.

The events in *Fansteel* arose within the period of the NLRA’s enactment. Fansteel employees who were overjoyed by the rights given them by the new law rapidly began to organize a union and then to request bargaining with their employer. They were met with outright refusals to meet and to bargain, while the employer engaged the aid of an anti-union employer group to create a company union and to hire an industrial spy and provocateur. Finally, in frustration, the workers struck by occupying two buildings. Efforts to dislodge them included the use of force and violence and a state court injunction. The strikers finally left when emetic gas was used, and some were found guilty of contempt, trespass, and related acts under state law. Several served jail sentences.

Meanwhile, the employer continued its refusal to obey the NLRA. It installed a dominated union and offered reinstatement to all strikers as long as they were willing to abandon their rights under the NLRA. Those reinstated included workers who had been found in contempt

²⁷ 2 Legislative History of the National Labor Relations Act 1935 2316-17 (1949) Senate Report 573 (74th Cong., 1st Sess.), Report to Accompany S. 1958, filed May 1 (Calendar Day, May 2), 1935 (79 Congressional Record 6749) (citations omitted). See Warren Woods & Altha Connor Wheatley, *The Wagner Act Decision – A Charter of Liberty for Labor?* 5 GEO. WASH. L. REV. 846, 859-61 (1936-1937). For an example of discussions related to these issues shortly before the Wagner Act was introduced into Congress, see Note, *The Decisions of the National Labor Relations Board*, 48 HARV. L. REV. 630, 653-54 (1934-1935).

²⁸ 306 U.S. 240 (1939).

²⁹ 316 U.S. 31 (1942) .

³⁰ In connection with the pendency of the NLRA, the Senate noted that 50,242,000 working days were lost every twelve months to labor disputes and that a”at least 25 percent of all strikes have sprung from failure to recognize and utilize the theory and practices of collective bargaining. 2 Legislative History of the National Labor Relations Act 1935 2300-01 (1949) Senate Report 573 (74th Cong., 1st Sess.), Report to Accompany S. 1958, Filed May 1 (Calendar Day, May 2), 1935 (79 Congressional Record 6749).

of the injunctive order and of state law.³¹ *Fansteel* is an easy case in terms of requiring reinstatement of employees who have misbehaved, because the employer was willing to reinstate workers who had violated state laws and injunctions, but only as long as they were willing to forsake their union. It was not an easy case for the Supreme Court. Even though the employer was unconcerned about re-employing employees who had violated the court order and state law, the Supreme Court majority was zealous about this misbehavior on the part of the reinstated strikers only.

The second case the *Hoffman Plastic* majority points to *Southern Steamship*, also involved workers striking in reaction to their employer's labor law violations. As in *Fansteel*, serious employer violations of labor law, including refusal to recognize and bargain with their union led to a one-day peaceful sit-in strike aboard their ship. When the ship reached its destination, the employer fired five of the crew who had been most active in the strike, acts that in themselves violate the same section of the NLRA as in *Hoffman Plastics*.

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. 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.³²

Similarities with *Fansteel* included the Supreme Court's treatment of the employer labor law violator and the employees.

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 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

³¹ These facts are drawn from Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275 (1939) and the state court decision; see also Nathaniel L. Nathanson & Ellis Lyons, *Judicial Review of the National Labor Relations Board*, 83 ILL. L. REV. 749 (1938-1939).

³² Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275, 279 (2004).

or policies.³³

Thus, each was a case in which the Court judicially “amended” the NLRA’s clear demand that NLRA remedies promote its policies. In doing so it “amended” the law to include provisions Congress had just rejected when it drafted the law. In its place, the Court created a quasi-equitable doctrine that refused any remedy for an employee who lacked what the Court saw as clean hands. Accompanying that innovation was a haphazard decision-making process based more in speculation than in a careful grounding in facts.

To these two cases must be added a third case, *Consolidated Edison*,³⁴ a 1938 case in which the employer illegally refused to recognize its employees’ choice of representative and in its place recognized another union. Over time, the employees were brought to see the advantage of accepting the union preferred by their employer. In *Consolidated Edison*, the Supreme Court judicially amended § 10(c) of the NLRA, in what can only be characterized as a brief aside, by claiming that in giving the NLRB the power to require affirmative action, Congress had limited the NLRB’s remedial power to include anything punitive. Though not the point of the case, *Consolidated Edison* is today known only for forbidding remedies that could be punitive toward the employer.³⁵

Thus, by the time *Hoffman Plastics* was before the Supreme Court, it could call on nearly seventy years of courts’ misreading the statute so as to create rights for employers that effectively overwrote Congress’ words. A contemporaneous analyst of *Fansteel* optimistically observed:

No single decision ever shapes inflexibly the judicial approach to a complex and genuinely troublesome problem. The emotion-ridden issues of employee misconduct, packed as they are with implications for so many of the basic conflicts of society, are least of all susceptible to solution at one stroke. If the analysis here made is accepted, it is unfortunate that the Court – confronted with those issues – appeared to treat the mere fact of violation of state law as so nearly conclusive a touchstone of judgment.³⁶

Seventy years later, the force of those early decisions appears more inflexible than we might have thought. In a footnote in *Hoffman Plastics*, Justice Rehnquist speculated as to ways that this line of NLRA judicial amendments freed the law-breaking employer of any obligation to remedy its

³³ Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275, 280-281 (2004).

³⁴ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). Justice McReynolds and other justices who dissented from the decision upholding the constitutionality of the NLRA in *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1936), were in the majority in cases such as *Consolidated Edison* and *Fansteel*. Thus, even the NLRA’s constitutionality was a foregone conclusion, they were able to issue decisions that made the NLRA less effective.

³⁵ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938); see also *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940).

³⁶ Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1327 (1939).

violations.

Because the NLRB is precluded from imposing punitive remedies, it is an open question whether awarding backpay to undocumented aliens, who have no entitlement to work in the United States at all, might constitute a prohibited punitive remedy against an employer. . . . Because we find the remedy foreclosed on other grounds, we do not address whether the award at issue here is “ ‘punitive’ and hence beyond the authority of the Board.”³⁷

Thus, when this decision was made, the outcome was overdetermined as a result of a number of early judicial amendments to the NLRA that created doctrines that today continue to enforce the law in ways that defy the intent of Congress.

The Judicial Amendments upon Which *Hoffman Plastics* Is Built

The results in *Hoffman Plastics*, created by judicial decision and in spite the NLRA’s clear language, happened to coincide with amendments employers had sought to the NLRA immediately after its enactment. As a contemporaneous commentator on these amendments put it:

Some of the proponents of amendments show misunderstanding, or nonacceptance, of these basic postulates of the Act by attempting to recast in terms of unfair practices by labor the whole of existing local and federal labor law. Thus among current proposals are restrictions on the right to strike, and attempts to narrow the protection given by the Act or to modify severely its remedial provisions.³⁸

Ironically, the subject of many of these judicial amendments had been proposed while the NLRA was pending in Congress and rejected by it and / or were being proposed after the NLRA was enacted.³⁹ In cases such as remedies, judges gave employers what Congress had refused.

³⁷ *Hoffman Plastics* pp. * fn 6

³⁸ Note, *The Proposed Amendments to the Wagner Act*, 52 HARV. L. REV. 970, 970 (1938-1939).

³⁹ Note, *The Proposed Amendments to the Wagner Act*, 52 HARV. L. REV. 970, 970 (1938-1939). Among the legislative restrictions sought were:

Prohibiting, e.g., sitdown strikes, general strikes, sympathetic strikes, strikes without prior presentation of demands, strikes accompanied by systematic violence and intimidation, strikes for a closed shop, jurisdictional strikes, strikes for the checkoff, strikes to prevent the use of materials, equipment or services, strikes to compel an employer to deal collectively with supervisory officials, strikes to cause the commission of an illegal act or the omission of a legal duty, *violation of local civil or criminal laws during the course of a labor dispute, and interference with the omnibus rights of any person enjoyed by him under the Constitution or laws of the United States.*

Law review authors in the 1930's discussed and criticized these phenomena as “judicial amendments”.⁴⁰ They were also acutely aware of the tendency of judges to reinsert common law concepts into laws, such as the NLRA, that had been expressly enacted to displace those very concepts. Their writings expose the dynamics of judicial amendments related to remedies that eventually lead to the outcome of in *Hoffman Plastics*.

These judicial amendments were more easily made, because judges have tended to see the NLRA as providing individual rights, rather than as a statute whose purpose is to promote the well being of society as a whole.⁴¹ Justice Thurgood Marshall observed: “These are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife ‘by encouraging the practice and procedure of collective bargaining.’”⁴²

In *Fansteel*, the Supreme Court did more than fail to enforce the NLRA as written. By denying remedies and protections for workers involved in sitdown strikes, strikes accompanied by systematic employer violence and intimidation, because of employee violation of local civil or criminal laws during the course of a labor dispute, the Court established as law provisions Congress had rejected when it enacted the NLRA.

[T]here were proposals in Congress to give the Board power to punish unlawful acts of labor unions. The proposals were refused: "Nor can the committee sanction the suggestion that the bill should prohibit fraud or violence by employes or labor unions. The bill is not a mere police court measure. The remedies against such acts in the state or federal courts and by the invocation of local police authorities are now adequate as arrests and labor injunctions in industrial disputes throughout the country will now attest. . . . The only result from introducing proposals of this sort into the bill in the opinion of the committee would be to overwhelm the Board in every case with counter-charges, and

Id. at 970 n.9. (emphasis added). In its May 1, 1935 report, the Senate reviewed a number of proposals that would later become “law” through the process of judicial amendment and that Congress rejected for a number of reasons. 2 Legislative History of the National Labor Relations Act 1935 2316-17 (1949) Senate Report 573 (74th Cong., 1st Sess.), Report to Accompany S. 1958, Filed May 1 (Calendar Day, May 2), 1935 (79 Congressional Record 6749). Congress concluded: “Proposals such as these under discussion are not new. They were suggested when section 7(a) of the National Industrial Recovery act was up for discussion, and when the 1934 amendments to the Railway Labor Act were before Congress. In neither instance did they command the support of Congress.” Id. at 2317.

⁴⁰ See, e.g., Note, *The Proposed Amendments to the Wagner Act*, 52 HARV. L. REV. 970, 973 n.28 (1938-1939); Edward Scheunemann, *The National Labor Relations Act Versus the Courts*, 11 ROCKY MT. L. REV. 135, 145 (1939); J. Louis Warm, *A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation*, 23 MINN. L. REV. 256 (1938-1939). For an extended history of the process of judicial amendments, see Charles O. Gregory, *Labor and the Law* (2d rev. ed. 1961).

⁴¹ Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 Berkeley J. Empl. & Lab. L. 223 (2005).

⁴² *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, ___* (1975).

recriminations that would prevent it from doing the task that needs to be done."⁴³

Indeed, at the time *Fansteel* was decided, some were advocating that Congress amend the NLRA by adding those same provisions that Congress had just rejected.

[T]he Burke amendment would make any unfair practice by the complaining union or employee a complete defense to a charge of unfair practices against an employer. Proceeding on the analogy between Board proceedings and a private employee-employer suit, this proposal ignores the fact that the Board is a public body representing the interest of the public in preventing employer practices which tend to promote industrial strife. . . . Where industrial strife is most bitter, and both sides are likely to be provoked into overstepping the bounds, these proposals withdraw the Act and throw the situation back to the anarchy of the pre-Wagner Act period.⁴⁴

Thus the decision in *Fansteel* achieved what lobbying during and after the pendency of the NLRA had not and eliminated the necessity for further lobbying. It also reinforced a view of NLRA rights as individual rights and failed to consider the decision's impact on the NLRA's purposes and policies.⁴⁵

⁴³ Edward Scheunemann, *The National Labor Relations Act Versus the Courts*, 11 ROCKY MT. L. REV. 135, 145-46 (1939); see also Note, *The Proposed Amendments to the Wagner Act*, 52 HARV. L. REV. 970, 970 n.12 (1938-1939); Note, *The Proposed Amendments to the Wagner Act*, 52 HARV. L. REV. 970, 975-76 (1938-1939) (referring to *Fansteel* and Remington Rand).

⁴⁴ Note, *The Proposed Amendments to the Wagner Act*, 52 HARV. L. REV. 970, 974-75 (1938-1939).

⁴⁵ Although not a concern in *Hoffman Plastics*, the Supreme Court in *Fansteel* also judicially amended the NLRA's definition of employee.

As soon as the strike took place the company announced that the striking employes were fired, and therefore contended before the Board and the courts that they were no longer employes, could obtain no benefit from the Wagner Act, and therefore could not be reinstated. The act provides "the term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." To the casual observer and to the Board that seems to dispose of the contention of the company, for there was no question but that the strike here was in consequence of a series of unfair labor practices on the part of the employer. Nevertheless, the Court reversed the ruling of the Board and sustained the contention of the company on the grounds that Congress had not intended to include within the definition of employee, anyone who engaged in unlawful conduct, even though his conduct was engendered by unfair labor practices of an employer in the first place. It is submitted that the decision reads a restriction into the act which was not placed there by Congress. In that sense the decision represents on this point a "judicial amendment."

Edward Scheunemann, *The National Labor Relations Act Versus the Courts*, 11 ROCKY MT. L. REV. 135, 146 (1939). In 1939, Professor Chester C. Ward observed:

Bizarre interpretations of the Act indicate that the courts sometimes read generally rather than specifically. [In one case, among other examples,] the court amazingly misconstrued the Board's jurisdiction to depend upon the existence of a "labor dispute" as defined in § 2(9), and then, more amazingly, misconstrued that

Thus, the cases that led to *Hoffman Plastics* is a but one chapter of the story of how courts have distorted the functioning of the National Labor Relations Act and thus weakened its ability to protect workers – immigrant or not. The doctrines and ways of applying the law that courts have created that lead to these results include: refusal to defer to NLRB decisions, “reverse preemption” of the NLRB, that is, creating legal conflicts and then allowing federal or state law conflicts to trump the NLRA; ignoring NLRA policies and misreading, including by limiting types of remedies available and requiring that NLRA remedies not be punitive; expanding the negative impact of any employee wrongdoing.

None of these trends is new. As an early commentator of the courts’ treatment of the NLRA observed of the Supreme Court’s *Fansteel* decision:

This reasoning would be satisfying except for the fact that there was a strike, and there were unfair labor practices. It 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. By imagining that there has been no strike it forecloses consideration of the genuinely difficult question whether the employer has actually "discharged" the employees to redress their wrongs to him or whether he is merely using those wrongs as a pretext to consummate his wrongs to them.⁴⁶

In cases from *Fansteel* through *Hoffman Plastics* – and continuing today – the courts have done more than just refuse to defer to the NLRB’s expertise. They have created a type of reverse preemption of the NLRA. Preemption is based in the Constitution’s Supremacy Clause, which says that federal law shall be the supreme law of the land. Thus, federal law preempts state law. However, the Court has created a special doctrine in the case of this nation’s most basic labor law. It has allowed the NLRA to be preempted by other laws – state or federal – when those other laws are the source for legal misdeeds by employees. The result is freeing a law-breaking employer from remedying its unfair labor practices. In effect, although the Constitution says that federal laws shall be the supreme law of the land,⁴⁷ the Court has judicially amended the

definition to require a proximate relation of employer-employee, after quoting the words of the statute, which are exactly the reverse.

Chester C. Ward, “*Discrimination*” *Under the National Labor Relations Act*, 48 YALE L.J. 1152, 1154-1155 n.21 (1938-1939)

⁴⁶ Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1315 (1939).

⁴⁷ U.S. Const. art. VI, cl.2.

Constitution to add “except for the NLRA.”

The Court’s decision in *Hoffman Plastics* is the scion of a lineage of ignoring and misreading NLRA policies. In *Fansteel*, the Court displaced what would have been an appropriate focus from the appropriate remedy for the discharged workers to whether they retained their status as employees. As a result, the Court was able to ignore the NLRA’s provision on remedies, § 10(c). As drafted by Congress, judgment as to the remedy to be ordered “under Section 10(c) must be a disciplined judgment, guided and confined by the necessity of giving a reasoned explanation of the relation between the grounds of judgment and the effectuation of the policies of the Act.”⁴⁸ Just as the *Fansteel* majority ignored the command of § 10(c), so too did the *Hoffman Plastics* majority, in order to meander through our nation’s immigration law and policy. While those issues might have some relevance to the decision, they should not have displaced the one provision that spoke to the issue of remedy. In cases that do not involve immigrants. Unruly actions the courts have taken action to limit include strikes, refusals to acquiesce in employer bargaining demands, and complaining about working conditions or employers actions, which the courts labeled disloyal and unprotected.⁴⁹ Each of these actions is specifically protected in the NLRA, in §§ 7 and 13 or implicitly protected in the NLRA policies and definitions set out in §§ 1, 2(3), and 2(9).

Limiting and Limited Remedies

The extent to which *Consolidated Edison*⁵⁰ led to a hobbling of NLRA remedies was apparent immediately after the case issued,⁵¹ even though the brief dictum in *Consolidated Edison* that led to the current view of NLRA remedies was not nearly as broad as has been claimed. Nonetheless, by the time *Hoffman Plastics* was decided, sixty years later, the courts had effectively transformed the NLRA into a law limited to a few specific weak remedies – even though this language in the NLRA is unchanged from that Congress wrote in 1935.. Thus, because *Hoffman Plastics* involved discrimination against workers for their union activities, the remedies considered were (1) issuing a cease and desist order that the employer not violate the NLRA in the future, (2) ordering the employer to post a notice telling employees about their NLRA rights for a brief period of time, (3) ordering reinstatement of illegally discharged

⁴⁸ Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1318-19 (1939). The Supreme Court in *Fansteel* not only judicially amended the NLRA to release employers from remedies when employees had engaged in misconduct, it also attempted to amend the definition of employee by finding that once the sitdown strikers were discharged, they were no longer employees and thus were not entitled to a remedy. *Id.* at 1309-16. It did so, even though the Senate Report on the NLRA clearly took the contrary position. *Id.* at 1311.

⁴⁹ Matthew W. Finkin, *Disloyalty! Does Jefferson Standard Stalk Still?* 28 Berkeley J. Emp. & Lab. L. 541 (2007).

⁵⁰ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

⁵¹ Ralph M. Goldstein, *Effectuating the Policies of the National Labor Relations Act*, 20 B.U. L. REV. 74 (1940).

employees, and (4) making illegally discharged employees whole for their losses through backpay with interest but less any interim earnings..

Unfortunately, practitioners today accept the view that the NLRA itself imposes those limits. They have forgotten – or never knew – that NLRA has only one requirement for remedies – that they be effective. Thus, the limits that frustrate today’s labor law practitioners exist as a matter of custom and acquiescence. As a result, the conundrum as the *Hoffman Plastics* Court saw it, was that (1) ordering the employer to reinstate illegally discharged employees would mean requiring the employer to violate immigration laws forbidding employing these workers; (2) ordering backpay was problematic because it meant rewarding employees who were illegally in the country and thus had no right to work; and (3) there could be no cutoff for the backpay obligation, because the employer could not legally hire these employees, nor could any other employer. Thus, the Court majority concluded, the only legal remedies were the cease and desist order and a brief period of notice posting.

It is not that these two remedies have no value. A cease and desist order provides the basis for contempt remedies if there are further legal violations, and employees should know their rights under the NLRA, even for the brief period of the notice posting. It goes without saying that if employers were required to post notices about NLRA rights, as is required with other state and federal workplace rights, the notice posting remedy would have no value. However, the loss of the other two remedies does nothing to encourage employers not to violate the law in the future. In fact, it may even encourage violations of the NLRA, because the remedies are relatively cheap compared to the benefits of hiring workers who have no protected rights to unionize. The result is certainly not the array of remedies tailored to each situation, as envisioned by Congress.

Foreseeing *Hoffman Plastics*

The incremental process of common law decisionmaking means that our laws can develop in foreseen ways as time changes. It is noteworthy that commentators in the early 1930's foresaw the dynamics on display in *Hoffman Plastics*. For example, the immediate impact of *Fansteel* meant giving employers what Congress had denied them during the pendency of the NLRA. These doctrines had the effects of imposing double punishments on employees; creating a tradition of decision making based on speculation rather than the facts in the record; allowing common law to trump the NLRA, even in cases where Congress explicitly had overruled the common law; an odd inability to handle complex situations appropriately; contempt for the expertise of the NLRB; and a tendency to seek ways to ensure that employers win.

So it was that when employers engaged in the most egregious violations, the courts relieved them of remedial obligations if employees or unions also committed some act the judges saw as violating good order.⁵² In 1939, then Northwestern University School of Law Professor Nathaniel L. Nathanson and Northwestern law student Ellis Lyons summed up the likely impact of *Fansteel* thus:

⁵² Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1304 (1939).

The real danger of the *Fansteel* decision lies in the possibility that some of the lower courts may construe it as authority for preventing effective remedy of employer violations of the statute whenever employees have been guilty of unlawful conduct. Such an attitude would, in turn, have the unfortunate consequences of suggesting to some employers the attractiveness of provoking violence in order to escape their own obligations. The likelihood of such abuses might have been diminished had the Chief Justice been less loathe to indicate the limitations of his doctrine and more willing to balance his condemnation of the strikers with equally trenchant criticism of the employer. If, in ultimate effect, the decision is to advance rather than retard the cause of industrial peace, which the Chief Justice intended to serve, the qualifications implicit, if not explicit, in the holding must be faithfully observed by those who profess to follow it.⁵³

Hart and Prichard urged the courts to take note of the dangers inherent in the 1939 *Fansteel* decision, in particular the problem of inappropriately substituting irrelevant common law issues for issues relevant to a § 10(c) analysis:

Judgment on the one hand may strive to take into account all relevant factors: the gravity of the misconduct, the extent of the provocation, the attitude of the parties when the heat of the strike has subsided, the effect of reinstatement upon the future of collective bargaining in the particular plant, the *in terrorem* value of denial of reinstatement in discouraging future misconduct by these and other employees, the *in terrorem* value of granting reinstatement in discouraging future unfair labor practices by this and other employers. . . . [J]udgment under Section 10(c) must be a disciplined judgment, guided and confined by the necessity of giving a reasoned explanation of the relation between the grounds of judgment and the effectuation of the policies of the Act.⁵⁴

They warned of the dangers that unguided and undisciplined decision making based on speculation as to facts and motives by common law judges. In particular, it was unlikely to lead to reasoned decisions and the enforcement of the law. Their admonitions foreshadow the conduct of the Justices comments during oral argument in *Hoffman Plastics* and the tenor of the majority decision.

The other possible approach to "interpretation" . . . is one which conceives of the problem solely in terms of the employer's "normal rights of redress" – his rights "to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor practices." It is not enough to say in criticism of this approach that it ignores many relevant factors in the problem. It is necessary to say that it escapes meeting the real problem altogether. What the Chief Justice and Mr. Justice

⁵³ Nathaniel L. Nathanson & Ellis Lyons, *Judicial Review of the National Labor Relations Board*, 33 ILL. L. REV. 749, 770 (1939).

⁵⁴ Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1314 (1939). * check jump cites

Stone are doing is to imagine first that there had been no strike [caused by the employer's illegal acts], to imagine next that the employees had done what they did, and then to decide what would have been the employer's rights to discharge his employees in that imaginary situation. Such a technique is explicit in the Chief Justice's opinion.

This reasoning would be satisfying except for the fact that there was a strike, and there were unfair labor practices.⁵⁵

Finally, Hart and Prichard warn that these processes of unreasoned decision create a danger of undermining the NLRB's efforts to enforce the law it is charged with enforcing and making its promise effective. Of these processes, they say:

It 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. . . . It omits from consideration, finally, the importance of discouraging unfair labor practices which is the prime function of the Act. . . . [I]t forecloses consideration of the genuinely difficult question whether the employer has actually "discharged" the employees to redress their wrongs to him or whether he is merely using those wrongs as a pretext to consummate his wrongs to them.⁵⁶

In 1939, Edward Scheunemann, of counsel to the Board, observed:

A reading of the whole act enforces the conclusion that the Board was never intended to have power to punish or to deny protection to employees because of their unlawful conduct [under other laws]. Punishment for that conduct is well taken care of by other legislation, and was not intended to be governed by this act. Yet the effect of the court's decision here is to make the withdrawal of the protection of the Wagner Act another punishment for unlawful conduct of employees and to reverse the Board for its failure to do likewise.⁵⁷

All these faults have continued to and through the Court's *Hoffman Plastics*' decision. The justices are neither uneducated nor lacking in mental acuity. Yet, to read the transcript of the oral argument and the decision in *Hoffman Plastics*, one would think otherwise of these intelligent and educated lawyers. The legal issues are not so complex that they the justices could

⁵⁵ Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1314 (1939). * check jump cites

⁵⁶ Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1314-16 (1939). * check jump cites

⁵⁷ Edward Scheunemann, *The National Labor Relations Act Versus the Courts*, 11 ROCKY MT. L. REV. 135, 145-46 (1939).

not comprehend them. However, they speak as if there were only bilateral options, precisely as did the majority in *Fansteel*:

The Chief Justice's opinion does not explain why a decision upholding the order of reinstatement would have placed a premium on resort to force instead of legal remedies, but makes the statement as if it were self-evident. . . . For clearly the strikers would not have been in a better over-all position as a result of their conduct. They would have suffered the positive discouragement of the state laws, which in this case were enforced (against the recalcitrant strikers) avowedly without leniency by an avowedly hostile court.⁵⁸

In the final instance, the best way to understand the outcome and the majority's inability to see that their reversal of the Board effectively condoned the employer's defiance of the law is to fall back on cynicism. That cynicism is justified by seeing the decision as, first, intended to ensure the employer wins, no matter how tortured the reasoning to get to that point.⁵⁹ The strikers had, after all, already been severely punished. They had been found in contempt of a court order and punished under state law. By concluding that state courts needed assistance in enforcing their own laws, the Supreme Court could do more than just use the state law violations to free the employer from remedying its own violations. By imposing a double punishment on the sitdown strikers who dared to exercise their new rights to join a union and engage in collective bargaining the Court sucked the core elements needed to make those rights meaningful.

Yet to do these acts violates the oaths federal judges swear upon entering their offices. Federal judges must take two oaths. The first, specifically for judges and justices obligates the judge to "administer justice without respect to persons, and do equal right to the poor and to the rich" and to "faithfully and impartially discharge and perform" all duties under the Constitution and laws of the United States.⁶⁰ The second oath is that required of all federal employees to "well and faithfully discharge the duties of the office".⁶¹

Ending the Judicial Amendment Process

If we are to have workplace laws that operate as Congress intended, we must, first, understand the dynamic of the judicial amendment process and, second, create a strategy to hold it in check and even reverse it.

The first step is notice the decisional dynamic in cases from *Fansteel* through *Hoffman*

⁵⁸ Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1318-19 (1939)

⁵⁹ Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1318 n.205 (1939)

⁶⁰ 28 U.S.C. § 453.

⁶¹ 5 U.S.C. § 333.

Plastics and understanding that it is no aberration and is not limited to the NLRA. As discussed earlier, there is no contemporary workplace statute that has not seen its effectiveness eroded by judges who “rewrite” even plain language and the clear intent of a statute. These decisions undermine the statute Congress enacted and, by diminishing the power the constitution gives Congress, undermine the system of checks and balances that preserves our democracy. A 1939 law review article titled “The National Labor Relations Act Versus the Courts” describes this longstanding dynamic.

When the courts begin to substitute their own judgment for that of the Board, or when they reverse the findings of the Board in the absence of a clear abuse of discretion, they are indulging in the kind of judicial intervention which . . . denies to administrative agencies the very effectiveness they were designed to achieve. It would be extremely unfortunate if this result should occur under the Wagner Act, for a flexible administrative procedure – freed as far as possible from the rigid and formal rules of courts of law – is more important today in the field of labor disputes than in any other field. Yet by means of unwarranted judicial intervention in the findings and procedure of the Board the act could be rendered totally ineffective. . . . *It is entirely possible that amendments may from time to time be desirable, but, if so, they should come from the legislature and not from the courts.*⁶²

We know that judges do not at all times and in all cases engage in judicial amendments that undermine the core of a law’s purpose and are contrary to its plain language. Indeed, in the case of the NLRA, there were judicial interpretations that expanded the law in ways that were consistent with Congress’ intent. Those expansions can only fairly be classified as judicial amendments as well, but ones that are benign and more aligned with the role of courts when interpreting statutes. One example is the right of parties under the NLRA to make requests for information necessary to perform their roles in representation, collective bargaining, and grievance handling.⁶³ The NLRA says nothing about information requests and duties to provide information, but this right does promote the practice and procedure of collective bargaining.

Is there anything, then, about this early period that explains the creation of judicial amendments that so fundamentally restructured the law?

~ The Context of the 1930's Judicial Amendments

The process of common law decision making and judicial interpretation is a constant of our system. One area in which those processes have operated is to increase employer power and create greater inequality between employees and employers. As outlined earlier, that dynamic

⁶² Edward Scheunemann, *The National Labor Relations Act Versus the Courts*, 11 ROCKY MT. L. REV. 135, 148 (1939) (emphasis added).

⁶³ * Information requests

was visible during the late nineteenth century through the period when the NLRA was enacted.⁶⁴ During that period there was support in the country and in Congress that the NLRA became law. At the same time, however, there were other powerful and implacable forces that manifested themselves as judicial amendments in cases such as *Fansteel* and *Consolidated Edison*.

The dynamics of that period mirror our own in ways other than just times of serious economic dislocation and that labor law and work are currently major focuses. These include strong opposition from employers to unions and collective bargaining; a rise of economically powerful groups in support of ultra-conservative programs; and a divided union movement.

~ *Opposition to the NLRA*

When one considers the level of power arrayed against the NLRA its survival at any level is remarkable.

The roster of witnesses who opposed the passage of the Act in hearings before the Senate Committee on Education comprises a Who's Who of American industry, including representatives of the United States Chamber of Commerce, American Iron and Steel Institute, American Mining Congress, American Newspaper Publishers Association, Institute of American Packers, Cotton Textile Institute, and Automobile Manufacturers Association, to name but a few.⁶⁵

In 1935, employers' immediate reaction to the new law was massive resistance,⁶⁶ essentially continuing actions begun even before the NLRA was enacted when employers had engaged in wholesale refusals to abide by predecessor labor law.⁶⁷ The National Association of Manufacturers distributed posters to employers and took other actions to promote resistance to the NLRA.⁶⁸ Employer resistance included discriminating against employees for union activity, fostering company-unions, maintaining espionage systems, spreading anti-union propaganda, moving to avoid collective bargaining, employing professional union-wreckers, surveillance of union meetings and activities, fostering anti-union movements, and whispering campaigns,

⁶⁴ cites to discussion of Sherman Act etc above.

⁶⁵ Walter Gelhorn & Seymour L. Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 Colum. L. Rev. 339, 339 (1939). This defiance continued under the NLRA. At the time it was declared constitutional, none of two hundred cease and desist orders issued against employers committing unfair labor practices had been complied with. Note, *Amending the National Labor Relations Act to Benefit Both Employers and Employees*, 24 VA. L. REV. 670, 670 (1937-1938).

⁶⁶ A.H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 38 STAN. L. REV. 945, 947 (1986).

⁶⁷ NATIONAL LABOR RELATIONS BOARD, FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 4 (1936).

⁶⁸ RICHARD C. CORTNER, *THE WAGNER ACT CASES* 96-98 (1964).

among other things.⁶⁹ It was activities such as these that pushed the Fansteel employees to occupy two plants and begin a sitdown strike.

By 1937, at the time “the Wagner Act was declared constitutional, out of 200 ‘cease and desist’ orders which had been issued against employers committing unfair labor practices, none had been complied with.”⁷⁰ Thus, strategies included employer refusals to comply with the law, efforts to gut the new law through amendments,⁷¹ and, in its first two years, the filing of nearly one hundred injunction petitions as part of an anti-NLRB campaign by the American Liberty League.⁷²

The National Labor Relations Act was passed in the teeth of a tenacious belief of employers that employees should not be permitted to bargain collectively through representatives of their own choice. On the very day following the National Labor Relations Board's first session fifty-eight legal luminaries, acting under the aegis of the American Liberty League, declared the Act to be unconstitutional; their pronouncement served as a model brief for the scores of injunction suits which practically brought to a standstill the Board's work during its first two years.⁷³

Though largely forgotten now, members of the American Liberty League included heads of major companies and other American leaders.⁷⁴ The American Liberty League's campaign continued for over a year and quickly moved from exhortations to action by supporting a massive campaign of employer resistance. That resistance included filing ninety-five injunctions against

⁶⁹ Ralph M. Goldstein, *Effectuating the Policies of the National Labor Relations Act*, 20 B.U. L. REV. 74 (1940).

⁷⁰ Note, *Amending the National Labor Relations Act to Benefit Both Employers and Employees*, 24 VA. L. REV. 670, 670 (1937-1938).

⁷¹ See, e.g., Note, *The Proposed Amendments to the Wagner Act*, 52 HARV. L. REV. 970 (1938-1939).

⁷² NATIONAL LABOR RELATIONS BOARD, FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 46-50, 56 (1936); RICHARD C. CORTNER, THE WAGNER ACT CASES 93-96, 98-105 (1964); Seymour S. Mintz, *Editorial Notes: Suits to Enjoin the National Labor Relations Board*, 4 GEO. WASH. L. REV. 391 (1935-1936); Joseph Kuttan, *Note: Conflict of Jurisdiction between Federal District Courts and the National Labor Relations Board*, 23 WASH. U.L.Q. 425 (1937-1938); Harry B. Merican, *Note: The Supreme Court and the National Labor Relations Act*, 26 GEO. L.J. 412 (1938).

⁷³ Walter Gelhorn & Seymour L. Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 Colum. L. Rev. 339-40 (1939).

⁷⁴ For a history of the American Liberty League, see GEORGE WOLFSKILL, THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE, 1934-1940 (1962). Chief financial support for the American Liberty League came from members of the DuPont family, George M. Moffet (president of the Corn Products Refining Co.), J. Howard Pew, President and chairman of General Motors Alfred P. Sloan, National Steel chairman E. T. Weir, General Motors vice president and member of its board of directors John Pratt. Other famous supporters included movie director and producer Hal Roach.

the NLRB to prevent it from operating.⁷⁵

Employer resistance was reinforced by the issuance only a few weeks after the signing of the law of a manifesto by the National Lawyers Committee of the American Liberty League, a stronghold of anti-New Deal sentiment lavishly underwritten by the business community. The league's lawyers pronounced the Wagner Act unconstitutional and strongly implied that the right course for employers was to defy it and count on the courts to uphold their challenge of its validity.⁷⁶

The NLRB's first Annual Report describes the immediate impact of this anti-NLRA campaign.

During its first month, and before the Board had opportunity even to announce its procedure, an incident occurred which was to stimulate injunction suits against the Board, and even to provide a sample brief for those wishing to attack the act. This was the publication by the National Lawyers Committee of the American Liberty League, on September 5, 1935, of a printed assault on the constitutionality of the act. This document, widely publicized and distributed throughout the country immediately upon its issuance, did not present the arguments in an impartial manner for the use of attorneys. It was not a review of the cases which might be urged for and against the statute. It was not a brief in any case in court nor was it an opinion for any client involved in any case pending. Under the circumstances it can be regarded only as a deliberate and concerted effort by a large group of well-known lawyers to undermine public confidence in the statute, to discourage compliance with it, to assist attorneys generally in attacks on the statute, and perhaps to influence the courts.⁷⁷

Opposition of this sort dissipated only when the Supreme Court upheld the constitutionality of the NLRA.⁷⁸

For nearly a year the members of the litigation staff engaged eminent counsel for industry before the Federal district courts of every important industrial center in the country, hoping by the vigor of their counter attacks to discourage still more employers

⁷⁵ Walter Gelhorn & Seymour L. Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 COLUM. L. REV. 339, 339-341 (1939); see also Seymour S. Mintz, *Suits to Enjoin the National Labor Relations Board*, 4 GEO. WASH. L. REV. 391 (1935-1936); Joseph Kuttan, *Conflict Between Federal District Courts and the National Labor Relations Board*, 23 WASH. U. L.Q. 425, 425 (1937-1938).

⁷⁶ A.H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 38 STAN. L. REV. 945, 947 (1986); Joseph Kuttan, *Conflict of Jurisdiction Between Federal District Courts and the National Labor Relations Board*, 23 WASH. U.L.Q. 425, 425 (1937-1938).

⁷⁷ NATIONAL LABOR RELATIONS BOARD, FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 46-47 (1936).

⁷⁸ A.H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 38 STAN. L. REV. 945, 948 (1986)

from bringing on what might very well have been a flood of suits too overpowering for a small staff to meet. Relief from this onerous responsibility came gradually, as it began to appear that the majority of both Federal district courts and circuit courts of appeals would sustain the Board's position that, under the act, the proper remedy for alleged irreparable damage by reason of Board activities does not lie in injunction proceedings but rather through review in an appropriate circuit court of appeals.⁷⁹

The importance of the strong endorsement given the legislation by the court is worth consideration in campaigns to uphold and expand on rights now provided in domestic and international law.⁸⁰

~ *Unions*

Unions played an important role in the enactment of the NLRA. However, that support was not as wholehearted as might have been assumed. As Leon Keyserling, one of the key people behind the enactment of the NLRA recalled:

To be sure, Senator Wagner's efforts to obtain enactment of his bill had powerful allies. The labor organizations brought strong and effective support to bear, considering that their membership was only about 3 million at the time. However, some of the older types of craft unions, fearful of the effect of some of the provisions of the bill upon the structure of their organizations, did not lend it their support and may even have worked against it. At one critical stage in the battle on the House side, Chairman William J. Connery, Jr. of the House Labor Committee came to my office to report that the head of one powerful union had given him the jitters about the bill.⁸¹

The American Liberty League attack might have had less impact had the American union movement come to the support of the new law they lobbied for and the NLRB. Unfortunately, the union movement "split into two warring camps in the fall of 1935 and reduced the support which a unified labor movement would otherwise have supplied it."⁸² Disputes between craft unions – allied formally or informally with the new Congress of Industrial Organizations (CIO) – and industrial unions – allied with the American Federation of Labor (AFL) – as to the appropriate

⁷⁹NATIONAL LABOR RELATIONS BOARD, FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 46 (1936).

⁸⁰ See discussion *infra*.

⁸¹ Leon H. Keyserling, *Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 207 (1960).

⁸²RICHARD C. CORTNER, *THE WAGNER ACT CASES* 90 (1964).

unit for representation broke out immediately,⁸³ and “unit issues led to firestorm of attacks on NLRB by AFL as a kangaroo court with a CIO bias and by CIO for NLRB pro-AFL bias”.⁸⁴ As a result, the AFL and the CIO saw the NLRB as more terrain on which to continue their battle than as a support in the larger goal of increasing union membership.⁸⁵ The NLRB strove to be neutral but was nonetheless seen by the contesting unions as choosing sides.⁸⁶ As one contemporaneous observer put it, “In these disputes the Board is in an unenviable position, for any decision it renders must necessarily aid either of the rival organizations.”⁸⁷

These inter-union battles took two main forms in connection with the NLRA. One was fighting over the unit in which a union election would be held.⁸⁸ The other was fighting for amendments to the NLRA that would put the other organization at a disadvantage.⁸⁹

The ferment within the labor movement as a result of the New Deal influx of new members and the additional opportunities opened up by the Wagner Act had prompted the advocates of industrial unionism – long an impatient minority inside the craft dominated

⁸³ William T. Little, *Labor Law – Appropriate Unit for Collective Bargaining*, 12 WIS. L. REV. 367, 367 (1936-1937).

⁸⁴ Julius Cohen, *The “Appropriate Unit” Under the National Labor Relations Act*, 39 COLUM. L. REV. 1110, 1110 n.3 (1936).

⁸⁵ RICHARD C. CORTNER, *THE WAGNER ACT CASES 90-92* (1964); A.H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 38 STAN. L. REV. 945, 947 (1986); Note, *The Courts and Rights Incident to the NLRA*, 53 HARV. L. REV. 301, 306 (1939-1940).

⁸⁶ Julius Cohen, *Note: The “Appropriate Unit” under the National Labor Relations Act*, 39 COLUM. L. REV. 1110 (1939). For an overview of cases and issues in early cases, see William T. Little, *Labor Law – Appropriate Unit for Collective Bargaining*, 12 WIS. L. REV. 367, 367-69 (1936-1937).

⁸⁷ Note, *Effect of the A. F. of L.-C.I.O. Controversy on the Determination of Appropriate Bargaining Unit Under the National Labor Relations Act*, 47 YALE L. J. 122, 124 (1937).

⁸⁸ Note, *Effect on the A.F. of L.-C.I.O. Controversy of the Determination of Appropriate Bargaining Units under the National Labor Relations Act*, 47 YALE L. J. 122 (1937-1938).

⁸⁹ Note, *The Proposed Amendments to the Wagner Act*, 52 HARV. L. REV. 970, 980-81 (1938-1939). The author referred to this as “a period marked by bitter interunion conflict”. *Id.* at 982. Problems with union support for the NLRA began ever before it had become law. According to Leon Keyserling:

The labor organizations brought strong and effective support to bear, considering that their membership was only about 3 million at the time. However, some of the older types of craft unions, fearful of the effect of some of the provisions of the bill upon the structure of their organizations, did not lend their support and may even have worked against it. At one critical stage in the battle on the House side, Chairman William J. Connery, Jr. of the House Labor Committee came to my office to report that the head of one powerful union had given him the jitters about the bill.

Leon H. Keyserling, *Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 207 (1960); *id.* at 209.

AFL – to establish late in 1935 a Committee for Industrial Organization dedicated to unionizing the mass production industries without dividing the workers along traditional craft lines. The infant CIO, under the chairmanship of John L. Lewis, insisted that it wanted to operate under the banner of the AFL, but the federation condemned the CIO as a dual union and turned much of its wrath on the Labor Board when the Board accepted election petitions from CIO unions on industrial lines, instead of yielding to the AFL view that the demarcation lines of craft unions prevail.⁹⁰

In short, although a team of smart lawyers and economists had been assembled to meet the challenges of creating and preserving the NLRA when attacks on its constitutionality would begin,⁹¹ they were forced, instead, to spend those critical early years fighting powerful assaults by well funded employer groups who were implacably opposed to collective bargaining.

As workers waited for their rights under the new law, a wave of strikes, including sitdown strikes, swept the country.⁹² Fansteel was one of them. Indeed, the Fansteel sitdown strikers “claimed that they had rightfully occupied the factories in self-defense of their right to organize, protected under the recently enacted National Labor Relations Act (NLRA).”⁹³

At the same time, the more powerful forces of judicial amendment were already in operation. The question we face in every generation and with every wrong committed is: How do we preserve the rights Congress has given us? As Osmond Fraenkel observed just a few years after the NLRA was enacted:

Yet it remains inevitable that there should be judges who set themselves up as society's mentors and consider themselves entitled to determine what shall be legal and to pronounce what they believe wise. These men, with the most conscientious motives, destroy statutes either by declaring them unconstitutional as against "natural law," or by emasculating them through interpretation when higher authority has barred the other way.

⁹⁰ A.H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 38 STAN. L. REV. 945, 947 (1986) *see also* Note, *Effect of the A.F. of L.-C.I.O. Controversy of the Determination of Appropriate Bargaining Units Under the National Labor Relations Act*, 47 YALE L.J. 122 (1937-1938) (“In these disputes the Board is in an unenviable position, for any decision it renders must necessarily aid either of the rival organizations in its struggle for superiority.”)

⁹¹ David Ziskind, *The Use of Economic Data in Labor Cases*, 6 U. CHI. L. REV. 607 (1939); *see also* RICHARD C. CORTNER, *THE WAGNER ACT CASES* (1964).

⁹² Warren Woods & Altha Connor Wheatley, *The Wagner Act Decision – A Charter of Liberty for Labor?* 5 GEO. WASH. L. REV. 846, 861 (1936-1937). Quotes from state Fansteel cases.

⁹³ AMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 44-66 (1983); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 519 (2004); Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958*, 24 LAW & HIST. REV. 45, 48 (2006); *see also* *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930 (1938), *rev'd* *Fansteel Metallurgical Corp. v. National Labor Relations Board*, 98 F.2d 375 (7th Cir. 1938), *aff'd* *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *Fansteel Metallurgical Corporation v. Lodge 66 of the Amalgamated Association of Iron, Steel and Tin Workers of North America*, 295 Ill. App. 323 (1938).

Since they exemplify a persistent type of human thinking and feeling, and since judges are seldom chosen for their psychological qualities, it is foolish to hope that we shall ever be without them.

Therefore, the reformer must be prepared to progress slowly. Often, indeed, he will find that judges send him backward half a pace for every step the legislatures send him ahead. Yet, there is forward motion as anyone can testify who was familiar with the state of labor law a brief quarter of a century ago. With persistence and skill we should make even greater strides in this field in the near future. Especially will this be so if the fates give the country judges who are men of good will.⁹⁴

It is often forgotten today that the “number of union members in this country went from three million in 1935 to almost 15 million in 1947.”⁹⁵ A five-fold increase in such a short time is remarkable. And, given the power of the anti-NLRA campaigns, it will come as a surprise that employer resistance declined markedly in the period immediately after the NLRA was held constitutional. Early Court successes led employers to prefer to settle anti-union discrimination cases, even when they involved very large amounts of backpay. The cases involved “amounts ranging from \$10,000 to \$51,000” and were settled “without even going to hearing before the trial examiner. . . . Such settlements totaled \$131,083.85 in 1938 for the Board's Second Region (New York) alone.”⁹⁶ That was, of course, before *Fansteel* and other cases involving judicial amendments were issued. In other words, in that period, the courts sent powerful messages about rights and respect for the rule of law with each case decided.

This turn around by employers is even more dramatic when one considers the aggressive steps taken by the American Liberty League in 1935 and 1936 to destroy the NLRA.

All these complex forces still exist.

What, Then, Are We to Do?

Most people, even lawyers, know that law evolves as judges decide cases. Even when they see cases that radically rewrite law, they are likely to fail to recognize the process as one of judicial lawlessness disguised as statutory interpretation. In recent years, a number of scholars have exposed this dynamic and demonstrated that it is one of longstanding and one that moves in only one direction – to weaken worker protections and rights and to shore up or restore employer

⁹⁴ A.H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 38 STAN. L. REV. 945, 947-48 (1986); Osmond K. Fraenkel, *Judicial Interpretation of Labor Laws*, 6 U. CHI. L. REV. 577, 606 (1939).

⁹⁵ Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1127 n13 (1986).

⁹⁶ Chester C. Ward, “*Discrimination*” Under the National Labor Relations Act, 48 YALE L.J. 1152, 1152 n.6 (1938-1939).

hegemony.⁹⁷ Far better than this cycle of legislation, judicial rewriting of legislation, and potential restoration by re-legislation would be to stop the process of judicial amendments, to prevent new judicial amendments, and to reverse those that now exist.

Even though this is a problem of longstanding, we must not resign ourselves to an eternal and demoralizing round of legislation, judicial amendment, and legislative over-ruling of judicial amendments. This legal treadmill is not the only possibility.

One such strategy is mapped out in *Taking Back the Workers' Law – How to Fight the Assault on Labor Rights*.⁹⁸ That strategy is developed within the context of the NLRA, but the basic principles are relevant to other areas of law. Indeed, it is inspired by that used by the NAACP Legal Defense Fund.⁹⁹ To be successful, a litigation strategy must be a group effort. Change cannot come merely from one person's identifying problems with the way judges decide cases. It requires a group of knowledgeable, thoughtful, and creative people to formulate the outlines of that strategy, to adapt it to meet changed circumstances, and to execute the strategy.

But litigation alone cannot succeed. *Taking Back the Workers Law* advocates the need to for a transformation of our country's values from those of selfish individualism to those of justice and social and industrial democracy, values that are embodied in the NLRA itself.¹⁰⁰ Any campaign to improve the lot of workers must include a values campaign, as well as a litigation strategy. Both international and domestic law, including this country's founding documents, are

⁹⁷ See, e.g., JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); CHARLES O. GREGORY, *LABOR AND THE LAW* (2d rev. ed. 1961); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1977-1978).

⁹⁸ ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW – HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* (2006).

⁹⁹ The National Right to Work Legal Defense Fund describes its founding:

In 1971 in a confidential memorandum, Lewis F. Powell, Jr., who later became a Justice of the U.S. Supreme Court, told the U.S. Chamber of Commerce:

"American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government."

Three years before Justice Powell's warning, we realized how important court action is in our battle to free the working people of America from compulsory unionism and established the National Right to Work Legal Defense Foundation.

Our Foundation's program is modeled after the successful program of the NAACP Legal Defense Fund. In the early 1950's, when the NAACP was stalled in Congress, they filed a series of coordinated legal actions, and by taking those with the best potential to the U.S. Supreme Court, they were able to change the law.

That's exactly what we are doing with Right to Work issues through the Foundation's program.

<http://www.nrtw.org/b/flsap.htm>

¹⁰⁰ Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMPL. & LAB. L. 223 (2005).

important sources for improving worker rights.¹⁰¹ This is the case not only because they are legal documents but also because they speak in the language of values. That is, their power lies not only in their legal legitimacy but, perhaps even more, in the way they resonate with this country's traditional values. Among those that make strong endorsements of the rights of workers is the Clayton Antitrust Act, 1914, which declares: "the labor of a human being is not a commodity or article of commerce" and supports the role of labor organizations in providing mutual help.¹⁰² In 1932, those rights were expanded in the Norris-LaGuardia Act with its strong endorsement of worker solidarity.¹⁰³

It is important not to overlook our founding documents. Not only is the United States Constitution's support for freedom of speech and association mirrored in NLRA policies of promoting rights in the service of equality, freedom of association, freedom of speech, and collective action,¹⁰⁴ its Preamble builds on the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Indeed, the NLRA has a clear point of view, and that point of view is to promote worker collective power and collective bargaining in order to preserve our economy and democracy.

The NLRB is supposed to be impartial, but it is important to remember that the Wagner Act itself was not. The explicit message of the Act was that workers needed protection because, individually, they could not protect themselves. Section one of the Act recognizes that unequal economic power makes it impossible for workers either to get a fair price for their labor or to improve their working conditions.

I mention this point not because it is new, but because it is often overlooked. The Wagner Act tries to make the bargaining process fair, but it does so by favoring labor. When critics accuse the labor laws and the NLRB of being pro-union, as they frequently do, it is a sign that the Act is performing as intended and that the Board is following its mandate. The Act is supposed to be biased; no one feared that in a state of nature John Rockefeller would be overwhelmed by individual workers. When the Board or the courts profess to adopt a more neutral approach to interpreting the Act, one that does not favor either side, they fail to acknowledge the balance struck by the law. The sponsors believed that without some statutory advantage, workers are at a disadvantage. The Wagner Act is

¹⁰¹ The ideas here are discussed at greater length in ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW – HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* 117-27 (2006) and Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 *BERKELEY J. EMPL. & LAB. L.* 223 (2005)

¹⁰² Clayton Antitrust Act, 15 U.S.C. § 17.

¹⁰³ 29 U.S.C. § 102.

¹⁰⁴ Staughton Lynd, *Communal Rights*, 62 *Tex. L. Rev.* 1417, 1430-35 (1984). Lynd also says that 1st Amendment rights are of "the people" and not of the individual. *Id.* at 1432.

not and was never meant to be a disinterested piece of legislation.¹⁰⁵

Many attribute the stagnation that led to a declining percentage of union members beginning a few decades after Taft-Hartley was passed. While Taft-Hartley has long been a target of union anger and blamed for labor's woes,¹⁰⁶ the less visible judicial amendments have been far more important in repealing worker rights. Judge Abner Mikva observed that it is too often forgotten that

Taft-Hartley did not repeal the Wagner Act, it amended it. It did not remove protections given to labor, it simply outlawed unfair tactics by both sides. The basic protections – the rights to organize, to bargain collectively, and to strike – were largely untouched. Taft-Hartley aimed to equalize bargaining power, not to return workers to a primal state of vulnerability.¹⁰⁷

Rather than making the most of what continued to exist and even using law to expand rights, some took the enactment of Taft-Hartley as an insurmountable barrier to union success and thus failed to search for ways to confine any damage. Instead, we must be clear eyed and engage in reasoned analysis to construct a campaign to restore and preserve rights. We must remember the normative quality of law. When law declares public rights and obligations it speaks a powerful moral language that declares action as of concern to all of society and as more than a mere private squabble. The enactment of the Civil Rights Acts created law and legal protections, but of more importance, they declared the values of our society.

When enough people accept the interpretation of a law, it can transform existing norms in line with the law's values. Ultimately, of course, *Fansteel* is a case involving judicial amendments.¹⁰⁸ The Supreme Court decided that, even though the employer had provoked the strike through massive unfair labor practices and even though the sitdown strikers were punished under criminal law for their trespass, the employer need not remedy its violations. Glaringly absent from that decision was any consideration as to how such an outcome promoted the NLRA's policies.

The complexities present in *Fansteel* illustrate the challenges that labor and its allies face and must face up to. The NLRA is a law that has never been in sync with this society's dominant

¹⁰⁵ Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1126-27 (1986).

¹⁰⁶ Boyd Leedom, *Introduction, Symposium on the National Labor Relations Board*, 29 GEO. WASH. L. REV. 191, 197 (1960).

¹⁰⁷ Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1127 (1986); Boyd Leedom, *Introduction, Symposium on the National Labor Relations Board*, 29 GEO. WASH. L. REV. 191, 191-92 (1960).

¹⁰⁸ Edward Scheunemann, *The National Labor Relations Act Versus the Courts*, 11 Rocky Mountain L. Rev. 135, 144-148 (1939); Nathaniel L. Nathanson and Ellis Lyons, *Judicial Review of the National Labor Relations Board*, 33 Ill. L. Rev. 749 (1938-1939).

values. To have been effective, therefore, it needed the wholehearted support of unions and those who support communal values. Even a half century later, it still needs that support if the communal institutions of unions and collective bargaining are to survive and thrive and if the rights and protections Congress has given workers are to be enforced.