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# THE PERSISTENCE OF UNION REPRESSION IN AN ERA OF RECOGNITION

*Anne Marie Lofaso*

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## THE PERSISTENCE OF UNION REPRESSION IN AN ERA OF RECOGNITION

Anne Marie Lofaso \*

### I. INTRODUCTION

Labor rights in countries with predominantly free market economies have generally passed through three stages—repression, tolerance, and recognition.<sup>1</sup> In the United States, nineteenth-century state and federal governments *repressed* labor unions by making conduct, such as workers banding together for higher wages, subject to criminal penalty and civil liability.<sup>2</sup> Courts paved the way for *tolerating* labor unions by overruling repressive precedents.<sup>3</sup> By the early twentieth century, Congress followed suit by legislatively exempting unions from certain legal

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1. See Antoine Jacobs, *Collective Self Regulation, in THE MAKING OF LABOUR LAW IN EUROPE: A COMPARATIVE STUDY OF NINE COUNTRIES UP TO 1945* (Bob Hepple ed. 1986). Notably, the United Kingdom, which has passed through all three stages, seems to oscillate between the tolerance and recognition stages. See Trade Disputes Act, 1906, 6 Edw. 7, c. 47 (Eng.) (ushering in the era of union tolerance); Industrial Relations Act, 1971, 19 & 20 Eliz. 2, c. 72, §§ 27-32, 34-43, 65 (Eng.) (shifting to a recognition model), *repealed by* Trade Union and Labour Relations Act, 1974, 22 & 23 Eliz. 2, c. 52 (Eng.) (returning to a tolerance model); Employment Relations Act, 1999, c. 26, § 23 (shifting back to a recognition model). See generally Nancy Peters, *The United Kingdom Recalibrates the U.S. National Labor Relations Act: Possible Lessons for the United States?*, 25 COMP. LAB. L. & POL'Y J. 227 (2004). British scholars have disagreed as to which stage actually protects workers rights more comprehensively, a debate I touch upon in the conclusion of this Article.

2. For example, state courts often repressed union activity by upholding indictments for criminal conspiracy against workers who banded together for some benefit. See, e.g., *People v. Melvin*, 2 Wheeler Crim. Cas. 262 (N.Y. 1810) (holding that trade unions are criminal conspiracies designed for the illegal purpose of raising the wages of their members). Employers also brought civil actions against unions for damages arising from early union activity. These actions often resulted in injunctive relief. See, e.g., *Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896) (enjoining striking employees from patrolling the sidewalk in front of their employer's business in an effort to deter the hiring of replacement workers).

3. See, e.g., *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (Mass. 1842). Cf. *Commonwealth v. Pullis (The Philadelphia Cordwainers Case)* (Phila. Mayor's Ct. 1806), *reprinted in* A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (John R. Commons et al. eds., 1958) (providing an example of a repressive precedent, namely that membership in a union constituted criminal conspiracy to illegally raise wages). See also Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165 (1931).

liabilities.<sup>4</sup> In 1935, Congress enacted Section 7 of the National Labor Relations Act (NLRA), marking the first formal federal government *recognition of employees' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."*<sup>5</sup> Technically, we are currently in an era of recognition.

After examining the NLRA's seventy-five-year history, however, it is at least debatable whether labor rights in the United States have diverged from the repression-tolerance-recognition pattern. Notwithstanding the fundamentally progressive nature of Section 7, the protective power of the original NLRA, as enacted in 1935 (popularly called "the Wagner Act"), has been eroded by congressional amendments, coupled with successive interpretations of the courts and the National Labor Relations Board (hereinafter "the NLRB" or "the Board")—the very agency tasked by Congress with protecting workers' rights.<sup>6</sup> By weakening the NLRA's protective power, all three branches of the government have legally and economically disempowered unions and thus weakened their capacity to protect the working class.<sup>7</sup>

This Article focuses on several of the sixty-one decisions issued by the NLRB's five-member Board in September 2007 as well as a few of its other more controversial decisions.<sup>8</sup> The labor community has come to regard the Board's September 2007 decisions as the "September Massacre."<sup>9</sup> The term "massacre"

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4. In 1914, Congress enacted the Clayton Act, which exempted organized labor from antitrust laws. 15 U.S.C. § 17 (2006). In 1932, Congress enacted the Norris-LaGuardia Act, which removed federal courts' jurisdiction and authority to grant restraining orders or temporary or permanent injunctions in any "case involving or growing out of a labor dispute," except as otherwise provided by the act. 29 U.S.C. § 101 (2006).

5. 29 U.S.C. § 157 (2006). Indeed, the Supreme Court, in upholding the constitutionality of the NLRA, went so far as to characterize the rights granted under Section 7 as "fundamental." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). The NLRA also marked formal recognition of the right to strike. 29 U.S.C. § 163 (2006).

6. Many scholars have made this observation. *See, e.g.*, ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* (2006); JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 4-5 (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *MINN. L. REV.* 265 (1978).

7. My claim—that weakening labor law's protective power over the working class weakens the union's capacity to protect the working class—does not imply that this is the only avenue that unions have for protecting the working class. Indeed, diluting the NLRA clarifies the need for other paths, such as integrating workplace organizations and community organizations into a "workplace-community." *See* BILL FLETCHER JR. & FERNANDO GAPASIN, *SOLIDARITY DIVIDED: THE CRISIS IN ORGANIZED LABOR AND A NEW PATH TOWARD SOCIAL JUSTICE* 174 (2008). Accordingly, I agree with Fletcher and Gapsin's observation that "if class struggle is not restricted to the workplace, then neither should unions be." *Id.*

8. In September 2007, the Board was comprised of five members: three Republicans (Chairman Robert J. Battista and Members Peter C. Schaumber and Peter N. Kirsanow) and two Democrats (Wilma B. Liebman and Dennis P. Walsh).

9. I first heard the term "September Massacre" applied to the Board's September 2007 decisions at the ABA Labor and Employment Law meeting in Philadelphia on November 8, 2007. During the panel, "A Dialogue with the National Labor Relations Board," former Board member Sarah M. Fox vigorously defended labor's use of that term.

suggests an indiscriminate and instantaneous destruction of a large number of longstanding labor doctrines. But, on closer scrutiny, it becomes clear that many of the September decisions fit into a long history of legislative, administrative, and judicial cutbacks to the original NLRA.

The September Massacre, then, is more accurately viewed as the latest, and perhaps most serious, attack on workers' rights—this time by a Board controlled by appointees of President George W. Bush (hereinafter “the Bush II Board”).<sup>10</sup> The characterization of the September decisions as a “massacre” is arguably accurate for two reasons. First, in many instances, the Bush II Board's September 2007 decisions cumulatively chip away at the NLRA's protections more vigorously than decisions from previous administrations. Second, while historically the courts and Congress have been responsible for much of the NLRA's erosion, the September Massacre was wrought by the very administrative agency charged with protecting Section 7 rights, including the fundamental right of working people to band together collectively for mutual aid and protection.

Section II of this Article discusses the aggregate, weakening effect on the NLRA by the Bush II Board and prior governmental action. This aggregate weakening effect is demonstrated by focusing on four topics: (1) the narrowing statutory definition of employee; (2) the shrinking scope of NLRA Section 7; (3) the dilution of economic weapons; and (4) the rejection of some lawful remedies. Section III of this Article illustrates the damaging role that adjudicative delay has had on the Board's power to administer industrial justice. Section IV of this Article examines one of the most prominent—and perhaps most damaging—of the September 2007 decisions, *Dana Corp.* Section V of this Article concludes with some remarks on what the labor movement can do to regain economic and political power.

## II. THE SEPTEMBER MASSACRE DECISIONS CONSTITUTE PART OF A HALF-CENTURY TREND THAT WEAKENS THE NLRA<sup>11</sup>

### A. Overview

This Section examines how all three branches of government—Congress, the executive branch through the NLRB, and the courts, particularly the Supreme Court—have weakened the NLRA over time. It focuses primarily on those Bush II Board decisions that have chipped away at the fundamental right of working class members to “self-organiz[e],” to “bargain collectively,” and to band together for

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10. In *September Massacre*, see *supra* note \*, I defined the George W. Bush-appointed Board as the Bush Board, but I like much better the nomenclature, Bush II Board, adopted by others. See, e.g., Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2018 n.22 (2009); David L. Gregory, *Unsafe Workplaces, Injured Employees, and the Bizarre Bifurcation of Section 7 of the National Labor Relations Act*, 111 W.VA. L. REV. 395, 407 (2009); William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 308 (2008).

11. See generally Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

“mutual aid or protection.”<sup>12</sup> And it places these cases in the context of larger trends among the other branches that have disempowered workers by narrowing the definition of employee, limiting the scope of Section 7’s protective cover, diluting employees’ economic weapons, and weakening the Board’s remedial framework.

The substantive content of these four areas of labor law are of intense interest to workers for several reasons. As a threshold matter, the question whether any particular worker is an employee under NLRA Section 2(3)<sup>13</sup> is a jurisdictional question; the NLRA simply does not apply to those workers who do not meet the statutory definition of employee.<sup>14</sup> Consequently, as the Board narrows the definition of employee, the NLRA protects fewer members of the working class because the Board will refuse to consider complaints from those workers whom the Board has read out of the statute.<sup>15</sup> I call this phenomenon the vanishing employee.<sup>16</sup>

Even if a particular worker meets the statutory definition of employee, the NLRA’s protection is only as good as the breadth of those activities that are covered. In this Section, I focus on three labor doctrines to show how the Bush II Board has limited the NLRA’s protective cover. First, I show how the Supreme Court’s *Babcock/Lechmere*<sup>17</sup> line of cases coupled with the Bush II Board’s recent assault on paid union organizers curtails employees’ fundamental right to self-organization. Second, I discuss the ramifications of the Bush II Board’s recent attempt in *Register Guard*<sup>18</sup> to further curtail self-organization by cutting off employee access to e-mail as a source of workplace communication. Third, I show how the Bush II Board’s reversal of the court-approved Board precedent extending *Weingarten* rights<sup>19</sup> to nonunion employees is destructive of employees’ right to mutual aid or protection.

Another way to weaken the ability of unions to protect members of the working class is to take away economic weapons available to unions, thereby diluting their economic power. Historically, the eradication of economic weapons was accomplished primarily by congressional amendment to the NLRA. But the Bush II Board has played some role in further chipping away at those economic

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12. 29 U.S.C. § 157 (2006).

13. *Id.* § 152(3) (2006).

14. For example, in *FedEx Home Delivery v. NLRB*, where the Court concluded that the Board incorrectly determined that the FedEx single-route drivers were “employees” within the meaning of NLRA Section 2(3), the Court held that FedEx did not commit an unfair labor practice when it refused to bargain with those employees’ labor representative. 563 F.3d 492, 495, 504 (D.C. Cir. 2009). Had the Court upheld the Board’s conclusion that the drivers were statutory employees, the Court also would have upheld the Board’s conclusion that FedEx, which admittedly refused to bargain with the union, had violated the NLRA. *See, e.g.*, *NLRB v. Igramo Enter., Inc.*, 310 F. App’x 452, 453-54 (2d Cir. 2009) (upholding the Board’s finding that workers were statutory employees and therefore upholding the Board’s finding that a company violated the NLRA when it admittedly threatened those workers for demanding higher wages and for engaging in other protected conduct).

15. *See, e.g.*, *Brown Univ.*, 342 N.L.R.B. 483, 490-93 (2004).

16. *See infra* Part II.B.

17. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

18. 351 N.L.R.B. 1110 (2007), *review granted in pertinent part*, *Guard Publ’g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

19. *See infra* notes 126-29 and accompanying text.

weapons. This Section ends with an examination of the extent to which the Bush II Board has chosen not to exercise its full remedial authority to remedy employer unfair labor practices.

*B. The Vanishing Employee*<sup>20</sup>

*1. The NLRB's Jurisdiction over All Cases Affecting Commerce, All Employers, All Employees, and All Unions Unless Otherwise Exempted from Coverage*

The NLRA grants the Board jurisdiction over all cases “affecting commerce.”<sup>21</sup> In *NLRB v. Jones & Laughlin Steel Corp.*,<sup>22</sup> the main case holding the NLRA constitutional,<sup>23</sup> the Supreme Court declared the Board’s jurisdiction to be coextensive with the power of Congress under the Commerce Clause.<sup>24</sup> The Supreme Court has repeatedly and consistently explained that, “in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause.”<sup>25</sup>

This grant of jurisdiction is limited by three statutory definitions: employer,<sup>26</sup> employee,<sup>27</sup> and labor organization (i.e., unions).<sup>28</sup> With regard to the statutory definition of employer, the Board has imposed discretionary guidelines for

20. I am currently developing an article by this title examining in greater detail the legal phenomenon of the vanishing employee. This section of the Article merely focuses on a few Bush II Board decisions to illustrate the phenomenon.

21. “The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . *affecting commerce*.” 29 U.S.C. § 160(a) (2006) (emphasis added). “Whenever a petition [regarding representation] shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation *affecting commerce* exists shall provide for an appropriate hearing upon due notice.” 29 U.S.C. § 159(c)(1) (2006) (emphasis added). The statute defines “affecting commerce” as “in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.” 29 U.S.C. § 152(7) (2006).

22. 301 U.S. 1.

23. *Id.* at 25-26, 49 (holding the NLRA constitutional as applied to the fourth largest producer of steel in the United States, which was engaged in the manufacture and distribution of iron and steel). *See also* *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 53-54, 57 (1937) (holding the NLRA constitutional as applied to a company engaged in the manufacture, assembly, sale, and distribution of commercial trailers, trailer parts, and accessories in twelve different states); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 72, 75 (1937) (holding the NLRA constitutional as applied to a Virginia corporation “engaged in the purchase of raw materials and the manufacture, sale and distribution of men’s clothing” where 99.57% of the materials involved were purchased outside Virginia and where 82.8% of the garments manufactured were sold to customers outside Virginia).

24. 301 U.S. at 31-32 (explaining that “acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. . . . It is the effect upon commerce, not the source of the injury, which is the criterion.”).

25. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (emphasis in original) (citing *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 3 (1957); *Polish Nat’l Alliance v. NLRB*, 322 U.S. 643, 647 (1944); *NLRB v. Fainblatt*, 306 U.S. 601, 607 (1939)).

26. 29 U.S.C. § 152(2) (2006).

27. *Id.* § 152(3) (2006).

28. *Id.* § 152(5) (2006). The scope of this definition is not discussed in this Article.

asserting jurisdiction that are tantamount to declining to assert jurisdiction over some entities that would otherwise meet the statutory definition of employer; in particular, the Board generally will not assert jurisdiction over retail establishments that gross less than \$500,000 in annual gross volume<sup>29</sup> or over nonretail establishments, such as manufacturers, with less than \$50,000 annual outflow or inflow.<sup>30</sup>

Although the Supreme Court has never reviewed the reasonableness of the Board's policy of declining to assert jurisdiction over a particular statutory employer in these limited circumstances, in *Office Employees International Union, Local No. 11 v. NLRB*,<sup>31</sup> the Court did strike down the Board's policy of declining to assert jurisdiction over an entire subclass of employers, such as a union when "acting as an employer."<sup>32</sup> There, the Court asserted two reasons that the Board's "arbitrary blanket exclusion of union employers as a class [was] beyond the power of the Board."<sup>33</sup> First, the Court observed that the Board's blanket exclusion was contrary to the NLRA's plain language, which defines employer as "any person acting as an agent of an employer, directly or indirectly, but *shall not include . . . any labor organization (other than when acting as an employer)*."<sup>34</sup> The Court then pointed out that, while the Board may "sometimes properly decline[] to (assert jurisdiction) stating that the policies of the Act would not be effectuated by its assertion of jurisdiction *in that case*,"<sup>35</sup> here "the Board renounces jurisdiction over an entire category of employers, *i.e.*, labor unions, a most important segment of American industrial life."<sup>36</sup>

## 2. *The Bush II Board Decisions Read Certain Subclasses of Employees out of the NLRA—Salts, Students, and the Severely Disabled*

At issue here is the statutory definition of employee. NLRA Section 2(3) defines employee as "any employee."<sup>37</sup> The Supreme Court has characterized the statutory definition of "employee" as very "broad,"<sup>38</sup> although the circular nature of the statutory definition leaves some room for interpretation. Under *Chevron*,

29. *Carolina Supplies and Cement Co.*, 122 N.L.R.B. 88, 88-89 (1958) (announcing policy). *See also* *NLRB v. Pizza Pizzaz, Inc.*, 646 F.2d 706, 707 (1st Cir. 1981); *NLRB v. Erlich's 814, Inc.*, 577 F.2d 68, 70 (8th Cir. 1978).

30. *Siemons Mailing Serv.*, 122 N.L.R.B. 81, 85 (1958) (announcing the policy and declaring that the Board "will adhere to its past practice of adding direct and indirect outflow, or direct and indirect inflow," but "will *not* add outflow and inflow"). *See also* *NLRB v. Somerville Constr. Co.*, 206 F.3d 752, 754 & n.3 (7th Cir. 2000); *Blankenship and Assocs. v. NLRB*, 999 F.2d 248, 250 (7th Cir. 1993); *NLRB v. George J. Roberts & Sons, Inc.*, 451 F.2d 941, 944 (2d Cir. 1971).

31. 353 U.S. 313 (1957).

32. 29 U.S.C. § 152(2) (2006).

33. *Office Employees*, 353 U.S. at 318.

34. *Id.* at 314 n.3 (quoting 29 U.S.C. § 152(2) (2006) (emphasis added)).

35. *Id.* at 318 (quoting *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684 (1951) (internal quotation marks omitted)).

36. *Id.*

37. 29 U.S.C. § 152(3) (2006).

38. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91 (1995). *See also* *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 497-98 (1985); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).



*U.S.A., Inc. v. National Resources Defense Council, Inc.*,<sup>39</sup> the Board undoubtedly may interpret “silent or ambiguous” NLRA terms in a reasonable manner.<sup>40</sup> And as a matter of national labor policy, one would think that the Board, which is charged by Congress with eliminating employer and union unfair labor practices,<sup>41</sup> would look to extend the NLRA’s protections to as many members of the working class as would constitute a reasonable interpretation of the statute. But by choosing to decline jurisdiction over certain subcategories of workers, the Bush II Board, in three instances, chose to read certain subclasses of employees out of the NLRA and created a new test for reading out many more workers.

As a threshold matter, the Bush II Board proclaimed that, despite the near-universal breadth of the statutory language, it “ha[d] the discretion to determine whether it would effectuate national labor policy to extend collective-bargaining rights to [a particular] *category* of employees,” and that it was “not compelled to include [that category of employees] in a bargaining unit if the Board determines it would not effectuate the purposes and policies of the Act to do so.”<sup>42</sup> Applying that rationale, the Bush II Board declined to exercise authority over several subclasses of employees, most notably salts,<sup>43</sup> graduate teaching or research assistants,<sup>44</sup> and severely disabled workers.<sup>45</sup>

In the most recent case, *Toering Electric Co.*, the Bush II Board held that salts (i.e., paid union organizers who seek employment with an employer for the purpose of organizing that employer’s workforce)<sup>46</sup> are not statutory employees in circumstances where the salt does not intend to accept a job if offered.<sup>47</sup> The Bush II Board based its decision on several arguments that fly in the face of both Supreme Court precedent and other case precedent. As an initial matter, the Bush II Board, mischaracterizing Supreme Court precedent that discusses the NLRA’s strikingly broad definition of employee,<sup>48</sup> asserted that it need not “extend[] the protections of statutory employees to all other workers who are not specifically excluded”<sup>49</sup> from the statute’s definition. The Bush II Board then cited its own relatively recent cases to justify its argument that such a broad definition of employee would be contrary to precedent, ignoring the fact that more longstanding

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39. 467 U.S. 837 (1984).

40. *Id.* at 843-44.

41. 29 U.S.C. § 158(a) and (b) (2006).

42. *Brown Univ.*, 342 N.L.R.B. at 492 (emphasis added).

43. *Toering Elec. Co.*, 351 N.L.R.B. 225 (2007).

44. *Brown Univ.*, 342 N.L.R.B. at 483.

45. *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 982 (2004).

46. Some believe that the term salt “may be derived from the phrase ‘salting a mine,’ which is the artificial introduction of metal or ore into a mine by subterfuge to create the false impression that the material was naturally occurring.” *Tualatin Elec., Inc. v. NLRB*, 84 F.3d 1202, 1203 n.1 (9th Cir. 1996). See also Victor J. Van Bourg & Ellyn Moscovitz, *Salting the Mines: The Legal and Political Implications of Placing Paid Union Organizers in the Employer’s Workplace*, 16 HOFSTRA LAB. & EMP. L.J. 1, 5 (1998).

47. *Toering Elec. Co.*, 351 N.L.R.B. at 225.

48. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (“The breadth of [Section] 2(3)’s definition is striking: the Act squarely applies to ‘any employee.’”); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91 (1995) (upholding the Board’s “broad, literal interpretation” of Section 2(3) as consistent with the NLRA’s plain language, its statutory purposes, and interpretative case law).

49. *Toering Elec. Co.*, 351 N.L.R.B. at 228.

precedent from previous Boards would dictate a different result.<sup>50</sup>

After narrowly interpreting *Phelps Dodge Corp. v. NLRB*—a Supreme Court case famously (and broadly) holding that job applicants are treated as statutory employees under the Act<sup>51</sup>—the Bush II Board questioned whether “job applicants who lack a genuine interest in seeking an employment relationship are not [statutory] employees.”<sup>52</sup> The Bush II Board held that “an applicant for employment entitled to protection as a Section 2(3) employee is someone genuinely interested in seeking to establish an employment relationship with the employer,” and that “*the General Counsel bears the ultimate burden of proving an individual’s genuine interest in seeking to establish an employment relationship with the employer.*”<sup>53</sup> The Bush II Board thereby circumvented the Supreme Court cases *Phelps Dodge* and *NLRB v. Town & Country Electric, Inc.*,<sup>54</sup> by creating an unpersuasive distinction between job applicants who genuinely seek an employment relationship with an employer and those who do not.

The Bush II Board based its holding on several factors. First, with little discussion of the NLRA’s purposes or its legislative history, it viewed a “relationship between an employer and a putative job applicant who has no genuine interest in working for that employer” as not having “the economic relationship contemplated and protected by the Act.”<sup>55</sup> Ignoring its own question—whether such individuals are statutory employees—the Board then rested its conclusion on its remedial authority, arguing that statutory policies against “windfall and punitive backpay awards” supported its holding.<sup>56</sup> Citing *Jefferson Standard*—a Supreme Court case holding that employees engaged in disloyal product disparagement lose the NLRA’s protection<sup>57</sup>—the Board next suggested that salts, who seek only to provoke unfair labor practices by applying to employers who are hostile to unionization, are disloyal because their “conduct manifests a fundamental conflict of interests *ab initio* between the employer’s interest in doing business and the applicant’s interest in disrupting or eliminating this business.”<sup>58</sup> In the same vein, the Board held that denying the NLRA’s protection to workers involved in these litigation-based salting campaigns is consistent with *Town & Country Electric*, the Supreme Court case that expressly rejected the argument that salts are inherently disloyal.<sup>59</sup> The Court explained:

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50. *Id.* (citing *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982 (2004); *Brown Univ.*, 342 N.L.R.B. at 488). The Bush II Board also cites a Clinton Board decision, *WBAI Pacifica Foundation*, 328 N.L.R.B. 1273, 1274-75 (1999), a case easily distinguishable as involving *unpaid* staff positions.

51. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

52. *Toering Elec. Co.*, 351 N.L.R.B. at 229.

53. *Id.* at 228 (emphasis added).

54. 516 U.S. 85, 92, 96-98 (1995) (unanimously upholding the Board’s interpretation of NLRA Section 2(3) as including paid union organizers).

55. *Toering Electric Co.*, 351 N.L.R.B. at 228.

56. *Id.* at 229.

57. *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 472 (1953).

58. *Toering Elec. Co.*, 351 N.L.R.B. at 231. As Professor Robert Bastress pointed out to me, this quotation speaks volumes about the Bush II Board’s attitude toward unions. No rational union, whose interest is to keep its members in jobs, is out to “eliminat[e] business.”

59. *Town & Country Elec., Inc.*, 516 U.S. at 92-98 (upholding the Board’s interpretation of NLRA Section 2(3) as including paid union organizers).

[The Company] argues that, when the paid union organizer serves the union . . . the organizer is acting adversely to the company. . . . Thus, it concludes, the worker must be the servant (*i.e.*, the “employee”) of the union alone. . . . [That] argument fails . . . because . . . it lacks sufficient support in common law. The Restatement’s hornbook rule (to which the quoted commentary is appended) says that a “person *may* be the servant of two masters . . . *at one time as to one act*, if the service to one does not involve *abandonment* of the service to the other.”<sup>60</sup>

It is noteworthy that the Bush II Board essentially disenfranchised salts in the face of the Supreme Court’s unanimous holding in *Town & Country Electric* and circuit precedent unanimously upholding backpay awards to salts. As the Second Circuit, quoting *Phelps Dodge*, recently pointed out in upholding the Board’s backpay award to a salt:

Discrimination against union labor in the hiring of [workers] is a dam to self organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which . . . is recognized as basic to the attainment of industrial peace.<sup>61</sup>

The Bush II Board’s willingness to read a certain subclass of employees out of the NLRA’s protection is part of its trend toward restricting worker access to the NLRA’s fundamental protections by narrowing the statutory definition of employee. For example, the Bush II Board held that teaching and research assistants at private universities are students and therefore are not statutory employees.<sup>62</sup> The Bush II Board also held that “severely disabled” employees working as janitors are not statutory employees because their employment was primarily rehabilitative rather than economic.<sup>63</sup>

It is also significant that the Bush II Board chose to exclude employees by category rather than on a case-by-case basis.<sup>64</sup> The Bush II Board readily admits that its decision in *Brown University* was based on policy. But rather than identifying even a single labor policy that its decision effectuated, the Board elaborates on a nonlabor policy: “[D]eclining to extend collective-bargaining rights to students who perform services at their educational institutions, that are directly related to their educational program” is based on the “simple and straightforward” distinction between workers who are “primarily . . . students” and those who are “primarily . . . employees.”<sup>65</sup> Based on that distinction, the

60. *Id.* at 93-95 (quoting RESTATEMENT (SECOND) OF AGENCY § 226 (1957) (emphasis added by the Court)).

61. NLRB v. Ferguson Elec. Co., 242 F.3d 426, 436 (2d Cir. 2001) (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185 (1941)). See also Tualatin Elec., Inc. v. NLRB, 253 F.3d 714 (D.C. Cir. 2001) (upholding backpay award to salt); Aneco Inc. v. NLRB, 285 F.3d 326 (4th Cir. 2002) (upholding backpay award to salt but cutting back on the amount of that award).

62. *Brown Univ.*, 342 N.L.R.B. at 483. For a powerful discussion of just how destructive the *Brown* decision is, see Ellen Dannin, *Understanding How Employees’ Rights To Organize Under the National Labor Relations Act Have Been Limited: The Case of Brown University*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY Aug. 2008, available at <http://www.acslaw.org/files/Dannin%20Issue%20Brief.pdf>.

63. Brevard Achievement Ctr., Inc., 342 N.L.R.B. 982, 982 (2004).

64. See Dannin, *supra* note 62 (discussing the lack of authority for this action).

65. *Brown Univ.*, 342 N.L.R.B. at 489 (quoting St. Clare’s Hosp., 229 N.L.R.B. 1000, 1002 (1977)).

Board injected the following test into the statutory definition of employee: whether the relationship between the worker and the employer is “predominantly . . . economic in nature.”<sup>66</sup> This test is applied in each of the three cases of categorical exclusion: (1) graduate teaching assistants are primarily students, not workers in a predominantly economic relationship with an employer; (2) disabled workers are not employees to the extent that they are in a primarily rehabilitative, rather than economic, relationship with their employer; and (3) salts are not statutory employees to the extent that they do not intend to create an economic relationship with their employer. With that test, the Bush II Board categorically excludes these three worker classifications.

The Bush II Board’s construction of the statutory term employee—one that injects as a condition of statutory protection the intent (or capacity) to create a predominantly economic relationship with an employer—is not a reasonable construction of NLRA Section 2(3). To paraphrase the Court in *Office Employees International Union, Local No. 11 v. NLRB*—where it struck down the Board’s categorical exclusion of a subcategory of union employers under NLRA Section 2(2)—such an “arbitrary blanket exclusion of employe[e]s as a class is beyond the power of the Board.”<sup>67</sup> As with the Board’s interpretation of the statutory term employer, not only is the Bush II Board’s construction of the statutory term employee contrary to the broad definition that includes *all* employees except those that are expressly exempted, but that narrow statutory construction also allows the Board to renounce jurisdiction over an entire category of employees, all of whom are important segments of American work life.<sup>68</sup>

Nor are the Bush II Board’s administrative actions consistent with the Board’s longstanding policy of declining jurisdiction over some cases, such as those where gross annual volume is below a certain dollar amount. In those cases, it is reasonable for the Board to avoid litigation over the constitutional limits of its own jurisdiction.<sup>69</sup> By contrast, the Bush II Board’s actions are more analogous to the type of actions the Court struck down in *Office Employees*; in both cases, the Board facially excluded an entire category of people, who otherwise would have come within the Board’s jurisdiction.

But even assuming that the NLRA’s broad statutory protection does not pose a legal obstacle to the Board’s new test, it remains difficult to imagine what labor policy is actually effectuated by that test. Narrowing the definition of employee—by requiring employees to intend only (or at least primarily) to create an economic

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66. *Id.* at 489; *accord Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. at 984.

67. 353 U.S. at 318.

68. *Id.*

69. *Cf.* *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (recognizing, in the NLRA context, the longstanding principle of construing statutes to avoid serious constitutional problems) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); *NLRB v. Catholic Bishop*, 440 U.S. 490, 499-502 (1979); *Am. Comm’n Ass’n v. Douds*, 339 U.S. 382, 407-08 (1950). But while it is true that there remains a constitutional distinction between intrastate and interstate commerce, the Board could probably impose a much lower dollar limit and still avoid a constitutional problem. For further explication of the extent and limits of the Interstate Commerce Clause’s reach, see *United States v. Morrison*, 529 U.S. 598 (2000) (limits); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (extent); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (extent).

relationship with their employers—does not promote collective bargaining between those nonemployee-workers and their employers. Nor does it do anything to equalize bargaining power between those nonemployee-workers and their employers. Nor does the Bush II Board explain why nonemployee-workers, such as students and disabled workers (both of whom are particularly vulnerable and powerless), are less entitled to claim the fundamental rights embodied in Section 7. Nor has the Board explained how narrowing the definition of employee promotes industrial peace.

Rather, the Bush II Board's test examines the question of statutory-employee status from the employer's vantage point: Will the employer economically benefit from this relationship? Ignoring the fact that employers always benefit economically from the labor output of their workers, the Bush II Board proceeds to explain that if the answer to its question is no—either because the worker is *primarily* a student, or a disabled worker whom the employer is helping to rehabilitate, or the worker intends to organize the employer's workplace—then those workers are not employees for purposes of a statute intended to promote the fundamental right of workers to self-organize for the purposes of collective bargaining and mutual aid or protection.

On the flip side, the Bush II Board's analysis discounts the economic value of the relationship to the nonemployee-worker. For example, graduate teaching assistants accept those work assignments not merely because they might learn something from the job but also because they are typically paid for performing those jobs, which are often bundled with tuition waivers or other things of economic value. To say that all graduate teaching or research assistants are therefore disenfranchised from their Section 7 right to band together for mutual aid or protection merely because they are "primarily" students—and therefore have not created a relationship that is primarily economic in nature—hinges the worker's right to organize and band together for mutual aid or protection on the employer's interest. That construction of the NLRA, rather than promoting the values underlining the Act, eviscerates them.

3. *The Bush II Board, with the Help of the Other Branches of Government, Further Narrows the Definition of Employee by Broadening the Statutory Supervisory Exemption*

A slightly different analysis applies to the statutory exemptions from the definition of employee. Consistent with canons of statutory construction, previous Boards have narrowly construed NLRA exemptions. This is particularly apparent when examining the history of the Board's attempt to construe the statutory supervisory exemption in the context of the nursing profession. NLRA Section 2(11) defines supervisor as "any individual having authority, in the interest of the employer, to . . . assign . . . or responsibly to direct [other employees] . . . if in connection with the foregoing the exercise of such authority . . . requires the use of independent judgment."<sup>70</sup> In *Doctors' Hospital of Modesto, Inc.*, a case decided in 1970, the Board determined that a hospital's registered nurses were not supervisors,

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70. 29 U.S.C. § 152(11) (2006).

even though they directed other, less-skilled employees.<sup>71</sup> In the Board's view, the nurses' "daily on-the-job duties and authority in this regard are solely a product of their highly developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their [e]mployer."<sup>72</sup> In 1992, in *Health Care & Retirement Corp. of America (HCR)*, the Board, which was made up of predominantly Republican appointees, had no trouble applying its longstanding precedent to conclude that the nurses in that case were employees, not supervisors.<sup>73</sup> But the Supreme Court, in a 5-4 decision, reversed, finding that the Board's patient-care analysis "created a false dichotomy . . . between acts taken in connection with patient care and acts taken in the interest of the employer."<sup>74</sup>

In *Providence Hospital*, in response to the Supreme Court's decision in *HCR*, the Clinton Board—under the leadership of Chairman William B. Gould IV<sup>75</sup>—defined the term "independent judgment" in a manner that attempted to reconcile NLRA Section 2(11)'s exclusion of supervisors with Section 2(12)'s definition of professional employees.<sup>76</sup> In particular, the Clinton Board explained that independent judgment does not include "ordinary professional or technical judgment in directing less skilled employees to deliver services"<sup>77</sup> In *NLRB v. Kentucky River Community Care, Inc.*, a divided Supreme Court rejected that interpretation.<sup>78</sup>

Any further attempts to narrowly construe the supervisory exemption ended with the Bush II Board. In addition to the decisions handed down in the September Massacre, the Bush II Board—following the Supreme Court's rejection of the Clinton Board's construction of "independent judgment"<sup>79</sup>—has contributed to congressional and judicial deterioration of the NLRA's protective cover by issuing a series of cases, known as the *Oakwood* Trilogy, that further broaden the statutory supervisory exemption in light of the aforementioned Supreme Court rulings.<sup>80</sup> Piggybacking on *Kentucky River*, the Board will now consider the greater skilled workers' professional or technical direction of lesser skilled employees in determining whether the greater skilled worker is a supervisor.<sup>81</sup>

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71. 183 N.L.R.B. 950, 950 (1970), *enforced*, 489 F.2d 772 (9th Cir. 1973).

72. *Id.* at 951.

73. 306 N.L.R.B. 63, 63 n.1 (1992), *enforcement denied*, 987 F.2d 1256 (6th Cir. 1993), *aff'd*, 511 U.S. 571 (1994).

74. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 577 (1994).

75. Chairman Gould is the Charles A. Beardsley Professor of Law, Emeritus, at Stanford Law School.

76. 320 N.L.R.B. 717, 725-30 (1996).

77. *Id.* at 732 ("Charge nurses' daily assignments do not require any independent judgment that goes beyond the professional judgment required of a supervisor.").

78. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713-21 (2001) (5-4 decision).

79. *Id.*

80. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006); *Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006); *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. 727 (2006).

81. The *Oakwood* Trilogy is infamous not only for expanding the definition of the statutory term independent judgment in a manner that tends to swallow professional employees, but also for otherwise expanding the supervisor exemption in a way that punches a gapping hole in the otherwise seemingly broad statutory definition of employee. By coupling broad definitions of "assign" and "responsible direction" with such a broad conception of independent judgment, the Board makes concrete the concerns of *Kentucky River*'s dissent—that most professional employees are no longer covered by the

While these cases are troubling, this trend did not start with the Bush II Board. In fact, the most apparent sources of this trend come from congressional amendments to the NLRA and from the court decisions interpreting those amendments. Most famously, through the 1947 Taft-Hartley amendments to the original NLRA, it was Congress—not the Court and not the Board—that excluded both independent contractors<sup>82</sup> and supervisors<sup>83</sup> from the otherwise strikingly broad definition of the statutory term “employee.”<sup>84</sup> Indeed, Congress created these exemptions—i.e., disenfranchised these workers—in reaction to the Supreme Court’s approval of Board precedent extending the Act’s protections to such employees.<sup>85</sup> As explained above, in the last half-century, the Supreme Court has contributed to this trend and broadened the supervisory exemption by twice rejecting the Board’s interpretation of that statutory term.<sup>86</sup>

These governmental acts—Congress’s enactment of statutory exemptions, the Supreme Court’s refusal to accept narrow interpretations of those statutory exemptions, and the Bush II Board’s broader-than-necessary interpretation of those exemptions—demonstrate the extent to which each branch of government has contributed to narrowing the NLRA’s protective coverage.<sup>87</sup> Once again, this is significant. As observed above, if a worker does not come within the statutory definition of employee, that employee is not protected by the NLRA. Workers who are not protected by the NLRA—or some other labor statute<sup>88</sup>—are generally at-will employees who can be fired for any reason, including the bad reason of coming to the aid of their coworker. For example, an employer remains free to fire a nonstatutory worker who merely asks the boss for a cost-of-living raise on behalf of an entire plant.<sup>89</sup>

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NLRA. The trilogy then goes beyond *Kentucky River* by finding supervisory status among workers who merely exercise supervisory authority on a rotating basis.

82. 29 U.S.C. § 152(3) (2006).

83. *Id.*; *id.* § 152(11).

84. NLRA Section 2(3) defines the term “employee” to include “any employee,” unless expressly excluded by the NLRA. 29 U.S.C. § 152(3). The Supreme Court has repeatedly characterized this statutory definition as “broad.” *See supra* note 48 and accompanying text.

85. Taft-Hartley Act of 1947, 29 U.S.C. §§ 141-97 (2006), *legislatively overruling* Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947) and NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111 (1944).

86. NLRB v. Health Care & Ret. Corp., 511 U.S. 571, 578-80 (1994) (rejecting the Board’s interpretation of “in the interest of the employer” prong of three-prong statutory test for “supervisor” set forth in NLRA); *Ky River Cmty. Care, Inc.*, 532 U.S. at 712-22 (rejecting the Board’s interpretation of “supervisor” in the context of “professional employees,” by rejecting the Board’s interpretation of the ambiguous term “independent judgment”).

87. *See also* NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267, 289 (1974) (upholding the Board’s exclusion of managerial employees from NLRA protection); NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 176-77, 180-85 (1981) (upholding the Board’s “labor nexus” test for excluding from the NLRA confidential employees who “assist and act in a confidential capacity to persons who exercise ‘managerial’ functions in the field of labor relations”).

88. For example, state employees are not covered by the NLRA, *see* 29 U.S.C. § 152(2) (2006), but do tend to be covered under state labor statutes. *See, e.g.*, N.J. STAT. ANN. § 34:13A-3(d) (West 2009) (defining New Jersey public employees as “any employee”). Other employees come under the Railway Labor Act, 45 U.S.C. § 151 (2006).

89. Indeed, the Court’s interference with workers’ right to organize has been so deeply felt by the labor community that it has taken the bold step of filing a complaint with the International Labor Organization. Complaint by the American Federation of Labor and Congress of Industrial

#### 4. *The Bush II Board's Further Assaults on Salts—Rights Without Remedies*

It is perhaps cliché to observe that there is no right without a remedy.<sup>90</sup> Along these lines, the Bush II Board's decision in *Toering Electric* comes on the heels of another Bush II Board decision designed to limit the backpay remedy available to salts. In *Oil Capitol Sheet Metal, Inc.*,<sup>91</sup> the Bush II Board held that it would “no longer apply a presumption of indefinite employment” in the context of an employer's discriminatory discharge of a union salt. This has the effect of attacking the remedy—by sharply restricting backpay—that might attach to a violation of a statutory right, rendering it a right without a remedy.

Coupling *Toering Electric* with *Oil Capitol*, it becomes obvious that the Bush II Board has “cut off the remedy, just in case there [wa]s any right remaining.”<sup>92</sup> As with other cases handed down during the September Massacre, the Bush II Board's willingness to recognize a right without a corresponding remedy is part of a larger trend. In *Sure-Tan, Inc. v. NLRB*, the Supreme Court held that undocumented workers were statutory “employees,” but that it may be inappropriate to award backpay without considering the employees' legal availability for work or actual economic losses.<sup>93</sup> The Supreme Court later used this observation to form the basis of its decision in *Hoffmann Plastic Compounds, Inc. v. NLRB*, where the Court held that congressional policies underlying the federal immigration laws foreclosed the Board from awarding backpay to undocumented aliens who have never been legally authorized to work in the United States, even though those workers are employees under the NLRA.<sup>94</sup> In *Hoffmann*, the Supreme Court rejected the NLRB's argument that the backpay award deters

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Organizations to the ILO Committee on Freedom of Association Against the Government of the United States of America for Violation of Fundamental Rights of Freedom of Association and Protection of the Right To Organize and Bargain Collectively Concerning Employees Classified as “Supervisors” Under the National Labor Relations Act, filed Oct. 23, 2006, [http://www.aflcio.org/joinaunion/voicework/upload/ilo\\_complaint.pdf](http://www.aflcio.org/joinaunion/voicework/upload/ilo_complaint.pdf). The ILO recently ruled in the AFL-CIO's favor. See 349th Report of the Committee on Freedom of Association (March 2008), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_091464.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_091464.pdf).

90. “[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded . . . [I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*23, \*109). I am grateful to Professor Caprice Roberts for discussing this point with me.

In a case of first impression, in the context of reviewing the NLRB's award of backpay to a salt, the Second Circuit recognized the right-without-a-remedy cliché but observed that at least in the labor context a particular person's right may have no remedy: “While black letter law teaches that where there is a right there is a remedy, ‘employee’ status under the [NLRA] does not necessarily mean entitlement to backpay in the face of an unfair labor practice.” *NLRB v. Ferguson Elec. Co., Inc.*, 242 F.3d 426, 430 (2d Cir. 2001) (citing *Sure-Tan, Inc.*, 467 U.S. at 894, 905-06) (holding that undocumented workers were statutory “employees,” but that it was inappropriate to impose even a minimal backpay award without regard to the employees' legal availability for work or actual economic losses).

91. 349 N.L.R.B. No. 118, slip op. 6 (May 31, 2007).

92. Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 61 (2007).

93. 467 U.S. at 894, 899-906.

94. 535 U.S. 137, 145-51 (2002).



employers from violating both labor and immigration laws.<sup>95</sup>

This right-without-a-remedy-phenomenon is part of an even larger trend in labor law: the weakening of remedies in general. I take up that question later in this Article. But first, I would like to examine the types of activities that the NLRA protects under Section 7 and give three examples from the Bush II Board that demonstrate the shrinking contours of Section 7.

### C. *The Shrinking Contours of Section 7*

#### 1. *Workers' Section 7 Rights Necessarily Encompass the Right To Communicate Effectively with One Another Regarding Self-Organization at the Jobsite but Those Rights Differ Depending on Whether the Organizer Is or Is Not a Statutory Employee*

Section 7 is the statutory keystone of the NLRA. It provides, in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities for the purpose of collective bargaining or other mutual aid or protection.<sup>96</sup>

By the NLRA's plain language, Section 7 protects the fundamental right of workers to, among other things, "self-organiz[e]," "bargain collectively," and band together for "mutual aid or protection."<sup>97</sup> Employers plainly violate the rights of workers, and commit unfair labor practices, when they "interfere with, restrain, or coerce employees in the exercise of [these] rights."<sup>98</sup>

The Supreme Court has also repeatedly affirmed the view that "the task of defining the scope of [Section] 7 'is for the Board to perform in the first instance.'"<sup>99</sup> But while it is the Board's primary obligation to protect the integrity of those boundaries, it is ultimately up to the courts to enforce them. Accordingly, the Supreme Court has "long accepted" the Board's view that Section 7 "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite."<sup>100</sup> The Court has also recognized the Board's view that Section 7 "organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."<sup>101</sup>

But the statutory right to receive information at the jobsite has evolved along two lines of cases: *Republic Aviation Corp. v. NLRB*<sup>102</sup> and *Babcock/Lechmere*.

95. *Id.* at 153-57 (Breyer, J., dissenting); Brief for the Respondent at 29-37, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595) (brief available at 2001 WL 1597748, \*29-\*37).

96. 29 U.S.C. § 157 (2006) (emphasis added).

97. *Id.*

98. *Id.* § 158(a)(1) (2006). See also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

99. *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)).

100. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978).

101. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972).

102. 324 U.S. 793.

Interpreting the statutory language of Section 7, the Supreme Court long ago affirmed in *Republic Aviation* that absent special circumstances, employees have a statutory right to engage in organizational activities at the jobsite in nonworking areas during nonworking time.<sup>103</sup> By contrast, in 1956 in *NLRB v. Babcock & Wilcox Co.* and again in 1992 in *Lechmere, Inc. v. NLRB*, the Supreme Court ruled that the NLRA does not grant nonemployee union organizers access to employer-owned property even for the purpose of communicating with employees about the benefits of unionization.<sup>104</sup> The Court held in *Beth Israel Hospital v. NLRB* that Section 7 rights generally yield to employers' property rights, even though Section 7 "necessarily encompasses the right effectively to communicate . . . at the jobsite."<sup>105</sup>

Therefore, the distinction between employee and nonemployee is a significant one under the NLRA not only for determining who is protected by labor law—the statutory employee is protected and the nonemployee is not—but also for determining who gets access to the jobsite for purposes of workplace organizing. Employee-union organizers get statutory access to the jobsite; nonemployee-union organizers generally do not.

2. *The Bush II Board's Decisions and Other Government Decisions Disregard Workers' Section 7 Right To Receive Information About the Benefits of Self-Organization at the Workplace*

a. *The Supreme Court's Babcock/Lechmere Doctrine and the Bush II Board's Treatment of Salts Read Together Repress Workers' Section 7 Right To Self-Organize*

The use of salts is a good example of how unions strategized to legally work around the *Babcock/Lechmere* obstacle to organizing; however, after initial success those efforts were repressed by the Bush II Board.<sup>106</sup> Labor law's treatment of salts illustrates a larger historical trend of repressing workers' fundamental right to organize.

As discussed above, one union response to the *Babcock/Lechmere* line of cases was to use the "inside" employee organizer or salt. Because nonemployee union organizers do not have access to employees at the jobsite, unions have relied on what the management community viewed as a "Trojan Horse" strategy of

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103. *Id.* at 803-04 n.10. For a recent application of this rule, see *Salmon Run Shopping Ctr. LLC v. NLRB*, 534 F.3d 108, 114 (2d Cir. 2008).

104. *Babcock & Wilcox Co.*, 351 U.S. at 113-14; *Lechmere, Inc.*, 502 U.S. at 537, 540-541. The *Babcock/Lechmere* line of cases is subject to two exceptions under which employers' property rights must yield to Section 7 rights. First, employers may not discriminatorily post their property against union solicitation. *Babcock & Wilcox Co.*, 351 U.S. at 112. Second, employers' property rights must yield where there are no alternative means of communication. *Id.*; *Lechmere, Inc.*, 502 U.S. at 537. See also *Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1013-14 (9th Cir. 1999) (holding that union must be granted access to oil-well drilling camp, where employees stay during their two-week work cycle).

105. 437 U.S. at 491.

106. See *supra* note 54 and accompanying text (discussing how the Supreme Court, in *Town & Country Electric*, unanimously held that salts are statutory employees).

infiltrating the enemy from within.<sup>107</sup> Management viewed salts as the foot soldier in that war.<sup>108</sup> The unions' strategy was effective. As explained above, the management community turned to the courts for help but lost in *Town & Country Electric*, where a unanimous Supreme Court upheld the Board's construction of the NLRA as protecting salts.<sup>109</sup> More important than its holding is the reasoning of that decision; the Supreme Court reaffirmed the point of *Phelps Dodge*—that organizing is not disloyal and that the Trojan Horse metaphor is ultimately wrong—emphasizing that there is no inconsistency between being a good employee and engaging in union organizing activity.<sup>110</sup> Since *Town & Country Electric*, the management community has fought back and, with the Bush II Board, found a government entity willing to do its bidding.

*Toering Electric* (where the Board placed on the General Counsel the burden of proving that a salt has a genuine interest in seeking to establish an employment relationship)<sup>111</sup> and *Oil Capitol* (where the Board announced that it would no longer apply a presumption of indefinite employment in the context of an employer's discriminatory discharge of a union salt)<sup>112</sup> make it much harder for unions and the General Counsel to investigate and prove their cases. Moreover, the harder it is to prove a case, the more cases fall by the wayside. Cutting down on reinstatement and backpay also effectively blunts salting. The more reinstatement and backpay remedies are weakened, the less an employer has to fear by treating salts unlawfully.

Simply put, under the *Babcock/Lechmere* line of cases, which generally allows employers to post their property against union organizers, workers are not readily able to receive information from nonemployee-union organizers at the jobsite. Now, under the Bush II Board's line of cases involving salts, workers are much less able to receive information from employee-union organizers at the jobsite. Reading those two lines of cases together, the Board and the courts have effectively limited the Section 7 right of employees to receive information about the benefits of unionization at the jobsite.

Board decisions are reviewed on a case-by-case basis, so courts are likely to miss the larger picture—the systematic undermining of the NLRA's policies. While this picture might be clearer to the Supreme Court, which does routinely entertain policy arguments, the reality is that the Supreme Court has accepted, on average, less than one NLRB case per year in the last decade.<sup>113</sup> This trend has not

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107. See Judd H. Lees, *Hiring the Trojan Horse: The Union Business Agent as a Protected Applicant*, 42 LAB. L.J. 8, 14 (1991); Sunland Constr. Co., 309 N.L.R.B. 1224, 1232 (1992) (Oviatt, concurring) (stating that salts are "reminiscent of the Trojan Horse whose innocuous appearance shields a deadly enemy"); Michael H. Gottesman, *Labor, Employment and Benefit Decisions of the Supreme Court's 1995-96 Term*, 12 LAB. LAW. 325, 331 & n.23 (1997).

108. For additional explanations about what historical events in the development of NLRA case law encouraged the practice of salting, see Van Bourg & Moscovitz, *supra* note 46, at 9-16.

109. *Town & Country Elec.*, 516 U.S. at 92, 96-98.

110. *Id.* at 87-88, 90-98.

111. *Toering Elec. Co.*, 351 N.L.R.B. at 228.

112. *Oil Capitol*, 349 N.L.R.B. at 1353.

113. The Supreme Court has passed on only four NLRB cases (all of which the Board lost) in the past ten years and another nine cases (most of which the Board won) in the previous ten years: *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) (reversing Board); *Hoffman Plastic*, 535 U.S. 137 (reversing

gone unnoticed by academics, who have the luxury of surveying the entire landscape.<sup>114</sup> The *Babcock/Lechmere* doctrine, together with the Bush II Board's view of salting campaigns (as affirmed in *Toering Electric*), contravene the purpose of the NLRA—to “protect[] by law . . . the right of employees to organize and bargain collectively.”<sup>115</sup>

*b. The Bush II Board's Register Guard Decision Further Represses Workers' Section 7 Right To Self-Organize*

The Bush II Board coupled its policy of limiting paid union organizers' access to the workplace with a policy of limiting the reach of *Republic Aviation Corp. v. NLRB*.<sup>116</sup> In *Register Guard*,<sup>117</sup> the Bush II Board held that a company did not commit an unfair labor practice when it, among other things, disciplined an employee for using the company's e-mail system for disseminating union information, even though the company permitted its employees to use its e-mail system for other personal business such as jokes, party invitations, and birth announcements.<sup>118</sup>

Putting aside the employee's use of the company's e-mail system for the moment, such a holding represents a clear departure from the long-settled rules of *Republic Aviation* and its progeny. Under that line of cases, employers may not promulgate overly broad no-solicitation rules;<sup>119</sup> employers may not disparately enforce even facially valid no-solicitation rules;<sup>120</sup> and employers must allow their employees to engage in union solicitation in nonworking areas during nonworking times.<sup>121</sup> And indeed, the Court of Appeals for the D.C. Circuit readily drew the conclusion that such company conduct is unlawful.<sup>122</sup>

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Board); *Ky. River Cmty. Care*, 532 U.S. 706 (2001) (reversing Board); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998) (reversing Board on substantial evidence grounds); *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996) (upholding Board); *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996) (upholding Board); *Town & Country Elec.*, 516 U.S. 85 (upholding Board); *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994) (reversing Board); *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317 (1994) (upholding Board); *Lechmere, Inc.*, 502 U.S. 527 (reversing Board); *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190 (1991) (reversing Board in part); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (upholding Board); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) (upholding Board). The Supreme Court also recently granted certiorari in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 77 U.S.L.W. 3670, 78 U.S.L.W. 3012, 78 U.S.L.W. 3245, 78 U.S.L.W. 3251 (U.S. Nov. 2, 2009) (No. 08-1457). Oral argument is scheduled for March 23, 2010. *See also infra* n.189 and accompanying text.

114. *See, e.g.*, James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. LAW & POL'Y J. 221 (2005).

115. 29 U.S.C. § 151 (2006).

116. 324 U.S. 793 (1945).

117. *Guard Publ'g Co. (Register Guard)*, 351 N.L.R.B. 1110 (2007), *review granted in pertinent part*, 571 F.3d 53 (D.C. Cir. 2009).

118. *Guard Publ'g Co.*, 351 N.L.R.B. at 1117.

119. *See, e.g.*, *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 482 (5th Cir. 2001).

120. *See, e.g.*, *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1006 (D.C. Cir. 2001); *Rest. Corp. of Am. v. NLRB*, 827 F.2d 799, 804-05 (D.C. Cir. 1987); *Waste Mgmt.*, 329 N.L.R.B. 198, 199-200 (1999).

121. *See Republic Aviation Corp.*, 324 U.S. at 796-99.

122. *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 58-62 (D.C. Cir. 2009). The court did not reach the question whether the company's particular rule was invalid because the question was not raised. *Id.* at

But *Register Guard* remains noteworthy for what it says about the Bush II Board's inclination to repress union organizing. In an attempt to circumvent longstanding Supreme Court, appellate court, and Board precedent, the Bush II Board held that those cases did not apply because although statutory employees have an NLRA right to solicit at the jobsite, they do not have a right to use the company's equipment.<sup>123</sup> The Bush II Board equated e-mail access to other forms of media, such as bulletin boards and televisions, rather than examining whether employers might be justified on managerial grounds to limit access to some equipment but not to other; it thereby created a blanket rule denying access. The Bush II Board further concluded that there was no unlawful discrimination because the employee's union communications were of a sufficiently different nature from jokes and birth announcements that the company was warranted in treating the two situations differently.<sup>124</sup> In so holding, the Bush II Board expressly stated that it was modifying its own precedent.<sup>125</sup> Once again it modified its precedent in a manner that was less protective of employees' organizational rights.

*c. The Bush II Board's Refusal To Extend Weingarten to Nonunion Employees  
Represses Workers' Section 7 Right To Band Together for Mutual Aid or  
Protection*

Almost a half-century ago, the Supreme Court recognized that Section 7's broad protection applied to nonunionized employees who must "speak for themselves as best they could" because they have no bargaining representative.<sup>126</sup> Thirteen years later, in *NLRB v. J. Weingarten, Inc.*, the Supreme Court upheld the Board's interpretation of Section 7 as creating an employee right to refuse to submit, without union representation, to an investigatory interview that the employee "reasonably believes . . . will result in disciplinary action."<sup>127</sup> The Court held that the statutory right to union representation in this context "inheres in [Section] 7's guarantee of the right of employees to act in concert for mutual aid and protection."<sup>128</sup> The Court further explained that the "action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of [Section 7's mutual aid or protection clause]."<sup>129</sup>

When first presented with the question whether to apply *Weingarten* to nonunion employees in the unorganized workplace, the Board held that the *Weingarten* rule should apply in this context.<sup>130</sup> Over the next several years, the Board oscillated between two policies—one that extended the *Weingarten* right of

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58. The court instead held that the company discriminatorily enforced its rule to discourage union activity in violation of NLRA Section 8(a)(1). *Id.* at 58-61.

123. *Guard Publ'g Co. (Register Guard)*, 351 N.L.R.B. 1110, 1114-17 (2007).

124. *Id.* at 1116-20.

125. *Id.* at 1117.

126. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

127. 420 U.S. 251, 257 (1975).

128. *Id.* at 256.

129. *Id.* at 260.

130. *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982).

representation to the nonunion workplace and one that did not.<sup>131</sup> Given the politicized nature of this labor law issue, the Bush II Board not surprisingly took the position in *IBM Corp.* that the *Weingarten* rule should not apply to employees in the nonunion workplace.<sup>132</sup>

The significant point here is that the Bush II Board, along with the Reagan Board but unlike the Clinton and Carter Boards, decided to shrink the contours of Section 7's protective reach by shrinking the otherwise long arm of the mutual aid or protection clause. This is so, notwithstanding the Supreme Court's observation that the right to representation during an investigatory/disciplinary meeting is "clearly" within the literal meaning of Section 7's mutual aid or protection clause.<sup>133</sup> And this is so, notwithstanding the D.C. Circuit's recent holding that the Clinton Board's policy extending such *Weingarten* rights to the nonunion setting is a permissible construction of the NLRA.<sup>134</sup>

But even more significantly, the Bush II Board chose to shrink Section 7's broad protective cover in a way that flies in the face of the NLRA's historical import. In the era of union repression, not many years before, Congress enacted the NLRA, workers who banded together for mutual aid faced criminal conspiracy charges. And although the subsequent, brief period of tolerance helped to immunize unions and employees from such charges, the early twentieth century witnessed oscillation between tolerance and repression until passage of the Wagner Act in 1935. One of the main purposes of the NLRA—then and now—is to establish the balance of power between workers and employers<sup>135</sup> by protecting workers who engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection"<sup>136</sup> from employer interference,<sup>137</sup> regardless of whether those workers have a designated bargaining representative.<sup>138</sup> Simply put, these cases represent repressed concerted activity of the most vulnerable workers—unrepresented workers on the verge of discipline. And while employees are no longer criminally prosecuted for bringing their co-workers in with them to act as a witness to a disciplinary meeting, they are subject to dismissal for such conduct.

#### *D. The Bush II Board's Swipe at the Right to Strike Fits into the Larger Trend*

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131. See *IBM Corp.*, 341 N.L.R.B. 1288 (2004) *overruling* *Epilepsy Found.*, 331 N.L.R.B. 676 (2000); *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 232 (1985) *overruling* *Materials Research Corp.*, 262 N.L.R.B. 1010 (holding that the NLRA compels the conclusion that nonunion employees have no *Weingarten* rights); *E. I. DuPont de Nemours*, 289 N.L.R.B. 627, 630-31 (1988) (disavowing its reasoning in *Sears*—that the NLRA compels that conclusion—and finding that limiting *Weingarten* rights to union employees "best effectuate[s] the purposes of the [NLRA]"), *enforced in* 876 F.2d 11 (3d Cir. 1989).

132. *IBM Corp.*, 341 N.L.R.B. at 1288 *overruling* *Epilepsy Found.*, 331 N.L.R.B. 676 (2000). See also Catherine Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2025 & nn.55-58 (2009).

133. *Weingarten*, 420 U.S. at 260.

134. *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1100 (D.C. Cir. 2001).

135. 29 U.S.C. § 151 (2006).

136. *Id.* § 157.

137. *Id.* § 158(a)(1).

138. See *Wash. Aluminum Co.*, 370 U.S. at 14.

*That Has Weakened or Removed Available Economic Weapons*

The right to strike is protected by NLRA Section 7, which protects employees' right to band together for mutual aid or protection,<sup>139</sup> and Section 13, which prohibits the Board or reviewing courts from "constru[ing the NLRA] so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."<sup>140</sup> Statutory language notwithstanding, the Bush II Board made subtle changes in its precedent that diminished the right to strike.

In *Jones Plastic & Engineering Co.*, the Bush II Board chipped away at the economic power behind the employees' statutory right to strike, holding that employers may treat striker replacement workers as permanent even when hired "at-will."<sup>141</sup> Until recently, the employer bore the burden of proving the permanent status of the replacements by "showing that there was a mutual understanding between the [employer] and the replacements that the nature of their employment was permanent."<sup>142</sup> In particular, the employer was required to establish "that the replacements were hired in a manner that would 'show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis.'"<sup>143</sup>

Unless *Jones Plastic* is interpreted to mean that an employer always satisfies its burden of showing a mutual understanding merely by showing that it hired replacement workers at-will, then *Jones Plastics* is a relatively minor change in the law. Seen differently, however, there is a larger historical trend at play, in which unions' economic weapons have been blunted almost beyond recognition. Nothing in the plain text of the NLRA supports the right of employers to combat a strike by hiring replacement workers—an employer tactic that undoubtedly weakens the economic impact of a strike, thereby "diminish[ing]" the right to strike.<sup>144</sup> Yet in its brief to the Supreme Court in *NLRB v. MacKay Radio & Telegraph Co.*, the Board informed the Supreme Court that employers have this right, notwithstanding the effect that this nonstatutory right has on the employees' statutory right to strike:

The Board has never contended, in this case or any other, that an employer who has neither caused nor prolonged a strike through unfair labor practices, cannot take full advantage of economic forces working for his victory in a labor dispute. The Act clearly does not forbid him, in the absence of such unfair labor practices, to replace the striking employees with new employees or authorize an order directing that all the strikers be reinstated and the new employees discharged. Admittedly the strikers are not "guaranteed" reinstatement by the Act. . . . Admittedly an employer is fully within his rights under the statute in refusing to reinstate striking employees when he has legally filled their positions . . . . The

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139. See, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967).

140. 29 U.S.C. § 163 (2006).

141. 351 N.L.R.B. 61, 67 (2007).

142. *Target Rock Corp.*, 324 N.L.R.B. 373, 373 (1997), *enforced*, 172 F.3d 921 (D.C. Cir. 1998).

143. *Id.* (quoting *Ga. Highway Express*, 165 N.L.R.B. 514, 516 (1967) *aff'd sub nom.* *Truck Drivers & Helpers Local No. 728 v. NLRB*, 403 F.2d 921 (D.C. Cir. 1968)).

144. 29 U.S.C. § 163 (2006).

Board did not question that right in this case.<sup>145</sup>

Thus, blunting economic weapons had an early start. As the quote above shows, in 1938, one year after the Supreme Court declared the Wagner Act constitutional, the NLRB—the administrative agency charged by Congress with administering that Act—paved the way for the Supreme Court to dilute labor’s most powerful economic weapon. It comes as little surprise, then, that the Supreme Court subsequently observed that an employer may maintain operations during an economic strike by employing permanent replacement workers: “The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.”<sup>146</sup>

But the damage did not stop with replacement workers. The following year, the Supreme Court removed the sit-down strike from labor’s arsenal of economic weapons.<sup>147</sup> Congress also raided labor’s economic arsenal. Most significantly, subsequent amendments to the NLRA took away labor’s right to engage in secondary boycotts (e.g., the union’s legal right to picket any employer with which the union does not have a primary labor dispute), and, in most cases, to enter into hot cargo agreements (e.g., a contractual provision permitting employees to refrain from handling products from struck or non-union firms).<sup>148</sup> Couple those amendments with the various ways in which the Supreme Court has blunted workers’ labor-picketing rights,<sup>149</sup> and we witness the depletion of labor’s economic power within a generation. It is no wonder that many labor advocates recommend keeping disputes away from the Board and out of the courts.

*E. The Bush II Board’s Refusal To Use the Full Extent of Its Remedial Authority*

NLRA Section 10(c) authorizes the Board “to select and fashion” remedial

145. Reply Brief for the Petitioner at 15-18, *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938) (No. 706), 1939 WL 48681. Professor Samuel Estreicher argues that this interpretation of the NLRA is supported by the Act’s legislative history. Samuel Estreicher, *Collective Bargaining or “Collective Begging”?: Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577, 584 (1994).

146. *MacKay Radio & Tel. Co.*, 304 U.S. at 346.

147. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). See generally James Gray Pope, *How American Workers Lost the Right To Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

148. 29 U.S.C. §§ 158(b)(4), 158(e) (2006). However, the right to enter into hot cargo agreements is still permitted in the construction and garment industries. See *id.* § 158(e).

149. See, e.g., *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 618-19 (1980) (Stevens, J., concurring) (explaining why labor picketing is not entitled to full free speech protection); *Int’l Bhd. of Teamsters, Local 695 v. Vogt*, 354 U.S. 284, 289 (1957) (recognizing that the “broad pronouncements . . . of Thornhill had to yield ‘to the impact of facts unforeseen,’ or at least not sufficiently appreciated”). See generally James Gray Pope, *The Thirteenth Amendment Versus The Commerce Clause: Labor and the Shaping of American Constitutional Law*, 102 COLUM. L. REV. 1 (2002). Cf. *Thornhill v. Alabama*, 310 U.S. 88, 99 (1940) (holding unconstitutional a statute that had been applied to ban all picketing without regard to the number of picketers, the peaceful character of the picketers, the nature of their dispute with the employer, or the character and the accurateness of the message used in notifying the public of the facts of the dispute).



orders to prevent and remedy the effects of unfair labor practices.<sup>150</sup> Section 10(c) provides that, on finding that an employer—or union—has committed an unfair labor practice, the Board may direct the violator “to take such affirmative action . . . as will effectuate the policies of [the Act].”<sup>151</sup> Notwithstanding the “broad” remedial language of the NLRA,<sup>152</sup> the Supreme Court early on concluded that the Board’s remedial authority “does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.”<sup>153</sup>

The NLRA’s weakened remedial scheme through judicial amendment has been well documented by Professor Ellen Dannin.<sup>154</sup> But the courts still characterize that authority as “broad” and typically defer to the Board unless it finds that the Board has acted in a punitive manner. Accordingly, one would think that the Board would use all of its broad, albeit limited, remedial authority to deter wrongdoers—employers and unions who engage in unfair labor practices.<sup>155</sup> To the contrary, the Bush II Board has sought to diminish the already insufficient remedial powers afforded by the Act as interpreted.

For example, the Board has refused to issue a *Gissel*<sup>156</sup> bargaining order—a bargaining order issued in cases where an employer engages in pervasive misconduct that tends to undermine the union’s majority support, thereby making a free and fair election or rerun election unlikely—in cases where employer misconduct has been particularly egregious. In *Intermet Stevensville*, despite noting most of the employer’s numerous unfair labor practices committed during and after the election campaign—including removing its bulletin board to prevent union use; confiscating union property; interrogating prounion employees; restricting timing and movement of prounion workers at the jobsite; unlawfully disciplining prounion employees; and unlawfully changing prounion employees work schedule—the Board nevertheless reversed the judge’s recommended *Gissel* bargaining order.<sup>157</sup> Perhaps from the disenfranchised employees’ point of view, the refusal to issue *Gissel* bargaining orders is nothing new, as the Board has

150. *Hoffman Plastics*, 535 U.S. at 142-43. See also *Sure-Tan*, 467 U.S. at 898-99.

151. 29 U.S.C. § 160(c) (2006).

152. See, e.g., *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) (characterizing the Board’s remedial power as “broad” and “discretionary”).

153. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938). See also *Phelps Dodge*, 313 U.S. at 208-09 (1941) (Stone, J., dissenting in part).

154. For an excellent discussion of how the courts have judicially amended the NLRA to dilute the Board’s remedial powers and for some ideas of how to strengthen the Board’s remedial powers without amending the NLRA, see DANNIN, *supra* note 6, at 52-55.

155. Indeed, NLRB General Counsel Ron Meisburg has expressed his willingness to seek tougher remedies, at least in first contract cases when unions are at their most vulnerable. See Memorandum from Ronald Meisburg, Gen. Counsel to Reg’l Dirs. (May 29, 2007).

156. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

157. *Cast-Matic Co. (Intermet I)*, 350 N.L.R.B. 1349, 1359 (2007). See also *id.* at 1364-65 (Walsh, dissenting). See also *Cast-Matic Co. (Intermet II)*, 350 N.L.R.B. 1270 (2007) (reversing judge’s Section 8(a)(5) findings based on the *Gissel* bargaining order that the Board reversed in *Intermet I* and reversing most of the judge’s additional Section 8(a)(3) findings). Board Member Walsh also dissented in *Intermet II*. See *id.* at 1270 n.4.

sometimes had trouble enforcing these bargaining orders in court.<sup>158</sup> But the sting here is that the agency charged with protecting workers' rights is not even trying to issue these orders.

The Bush II Board also refused to issue a special remedy in a case involving a recidivist employer. In *Albertson's, Inc.*, the Bush II Board upheld most of the judge's findings that the employer violated the NLRA by refusing to furnish information to the employees' bargaining representatives, but did not agree with the judge's characterization of those violations as "egregious or widespread misconduct" sufficient "to demonstrate a general disregard for the employees' fundamental statutory rights," which would have merited special remedies.<sup>159</sup> Rather, the Board found that the employer's "failure to respond to the Unions' information requests that were routinely generated in the course of investigating and pursuing grievances" were "unlawful and a persistent problem," but did not rise to the level of "egregious or widespread misconduct."<sup>160</sup> The Bush II Board further found that the employer's "information request violations were not so numerous, pervasive, and outrageous that special or extraordinary remedies [were] needed to dissipate fully the coercive effects of these violations."<sup>161</sup> Accordingly, the Bush II Board issued a narrow cease and desist order and a notice posting.

The Bush II Board also has used procedure to prevent substantive employee gains. In *St. George Warehouse*, the Bush II Board held that the unlawfully discharged employee and the General Counsel, on his or her behalf, now bear the burden of coming forward with evidence that the employees took reasonable steps to search for work after being fired.<sup>162</sup> And in *Domsey Trading Corp.*, the Bush II Board reduced the backpay award of workers unlawfully discharged for striking, based primarily on the statements or omissions from unsworn compliance forms that the 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.<sup>163</sup> The Board found that these internal records automatically override sworn and credited testimony by the discriminatee.<sup>164</sup>

Perhaps the most interesting instance where the Bush II Board weakened

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158. *Compare* Douglas Foods Corp. v. NLRB, 251 F.3d 1056, 1062, 1065-67 (D.C. Cir. 2001) (refusing to enforce *Gissel* bargaining order despite upholding the "bulk" of the Board's unfair labor practice findings) with *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 826-29 (D.C. Cir. 2001) (upholding Board's issuance of *Gissel* bargaining order).

159. 351 N.L.R.B. 254, 260 (2007) (quoting *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357, 1357 (1979).

160. *Id.*

161. *Id.*

162. 351 N.L.R.B. 961, 961 (2007). Placing such a burden on the discriminatee not only is contrary to longstanding Board precedent, *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1317-21 (D. C. Cir. 1972), but is also contrary to the common law and holdings under various federal employment statutes. *See, e.g.*, *Grace v. City of Detroit*, 216 F. App'x 485, 492 (6th Cir. 2007) (providing that a Title VII defendant bears the burden of establishing plaintiff's failure to mitigate damages); *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1995); *Robinson v. Transp. Authority*, 982 F.2d 892, 898 (3d Cir. 1993); *Edwards v. Sch. Bd.*, 658 F.2d 951, 956 (4th Cir. 1981); *DiSalvo v. Chamber of Commerce*, 568 F.2d 593, 598 (8th Cir. 1978); *Sporgis v. United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975).

163. 351 N.L.R.B. 824, 844-45 (2007).

164. *Id.* at 844.

administrative remedies is provided by *Grosvenor Orlando Associates, Ltd.*<sup>165</sup> There, the Bush II Board—in the context of evaluating a backpay award to striking employees who were lawfully picketing to protest their own unlawful discharge for participating in a protected strike—held that those employees were required to begin searching for alternative employment within two weeks of their unlawful discharge.<sup>166</sup> The Board established this requirement even though the employment search would require the employees to abandon the very protected activity for which they were fired (i.e., participating in the picket line) and an activity which the judge determined “constituted a mass application for work.”<sup>167</sup> Ostensibly applying long-settled principles governing the sufficiency of unlawfully discharged employees’ efforts for obtaining interim earnings—which include evaluating the backpay period as a whole rather than mechanically dissecting isolated portions of that period—the Board concluded that any other result would reward “idleness.”<sup>168</sup> In so concluding, the Board effectively declared “idle” those engaged in the fundamental right to strike.

The significance of this declaration—equating Section 7 activity with idleness—is difficult to overstate. Historically, the idle scrounger is the image used by policymakers to withhold benefits from those perceived by some as undeserving of our charity. By equating strikers with the idle, the Board has dealt a fundamental blow to the right to strike despite the Act’s plain-language protection of that right from “interfere[nce] . . . imped[iment] or diminish[ment] in any way.”<sup>169</sup> Utilizing the idle scrounger metaphor, the Board in this case conflates the strikers’ efforts to secure their old jobs with the inaction of those who refuse to work because they are lazy. This conflation depicts the strikers as unworthy of our charity, rather than protecting them from “interfere[nce] . . . imped[iment] or diminish[ment]” of their fundamental right to strike.<sup>170</sup> More significantly, the Board is importing a dubious metaphor into its analysis—one that has its genesis in Elizabethan poor laws and that has infiltrated twentieth-century American social security laws, including unemployment benefits.<sup>171</sup>

Diminishing the remedy also weakens the right to strike by making it a less effective weapon in the workers’ arsenal. Striking employees who have been discharged for utilizing a lawful economic weapon must now choose between continuing to fight the employer’s unlawful conduct and surrendering to search for work. Surrendering to search for work allows the worker to earn interim earnings and reduce the employer’s backpay liability. The Board, in one fell swoop, has effectively mandated that strikers finance the employer’s unlawful activity, a burden the Board has refused to place upon employers, and reduced the ability of

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165. 350 N.L.R.B. 1197 (2007).

166. *Id.* at 1199.

167. *Id.* at 1206 (Walsh, dissenting in part).

168. *Id.* at 1199 (majority opinion).

169. 29 U.S.C. § 163 (2006).

170. *Id.*

171. For a more thorough discussion of this metaphor, see Anne Marie Lofaso, *British and American Legal Responses to the Problem of Collective Redundancies* (July, 1996) (unpublished D.Phil. dissertation, University of Oxford) (on file with author). See also Lofaso, *supra* note 92, at 12-13.

strikers to communicate their grievance to the general public.<sup>172</sup>

The extent of the Board's willingness to require employees to finance the employer's unlawful conduct is extreme. In addition to requiring employees to attempt to secure interim earnings immediately, the Board further requires those employees who find interim employment to seek "'interim interim' work while waiting for their new jobs to start."<sup>173</sup>

Moreover, considering employment law's emphasis on worker loyalty, this outcome is rather ironic. After all, it is the strikers who are loyal to the company; they choose to air their grievances and seek to change undesirable aspects of their organization rather than quit. Those disloyal to the company are more likely to employ an "exit" strategy by seeking alternative employment rather than strike.<sup>174</sup> The Board's policy of repressing union communication to the consumer promotes the flow of labor from one organization to another (i.e., exit) rather than promoting change from within (i.e., voice), thereby alienating those loyal employees who advocate change.<sup>175</sup>

### III. THE EFFECTS OF ADJUDICATIVE DELAY ON INDUSTRIAL JUSTICE<sup>176</sup>

The Bush II Board has also been criticized for long delays in issuing orders—a criticism that the statistics support. Of the sixty-one decisions issued in September 2007, more than half of the cases were pending before the Board for more than four years, twenty-one of which had been pending before the Board for more than five years.<sup>177</sup> But condemning the Board for its administrative sluggishness is hardly new. In the ten years between 1997 and 2007 that I worked for the Board, I cannot recall a single year in which it was not publicly disparaged for delay in case-processing.

The recurring problem of delay cannot be placed squarely on the Bush II Board, but is, once again, systemic and probably relates to several factors, only some of which are endemic to the Board itself. First, there are typically many months, sometimes years, in which the Board is not working at full capacity. For example, since late December 2007, the Board has been functioning with only two

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172. See *E.L. Wiegand Div. v. NLRB*, 650 F.2d 463, 468 (3d Cir. 1981) (providing that employers need not pay striking employees during strike because such activity effectively compels the employer to finance the employees' strike against itself).

173. *Grosvenor Orlando Assocs., Ltd.*, 350 N.L.R.B. at 1209 (Walsh, dissenting).

174. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970); RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984).

175. Anne Marie Lofaso, *Workplace Dissent, Democracy, and Justice* (unpublished manuscript, on file with author).

176. Sarah Fox first gave me the idea of discussing the problem of delay, which she addressed in her presentation to the labor and employment bar at the ABA meeting. See *supra* note 9.

177. Thirty-three cases were pending before the Board for more than four years. See, e.g., *Domsey Trading Corp.*, 351 N.L.R.B. 824 (2007) (involving 202 workers unlawfully discharged during a 1989-90 organizing campaign at a used clothing facility in Brooklyn, New York; the employer's anti-union campaign involved reprehensible acts of abuse such as physical assault and racial and sexual abuse; the back pay award has yet to be issued); *D. L. Baker, Inc.*, 351 N.L.R.B. 515 (2007); *The Earthgrains Co.*, 351 N.L.R.B. 733 (2007); *Ryder Mem'l Hosp.*, 351 N.L.R.B. 214 (2007); *BP Amoco Chem.-Chocolate Bayou*, 351 N.L.R.B. 614 (2007); *Berthold Nursing Care Ctr.*, 351 N.L.R.B. 27 (2007).

Board members—Member Liebman, a pro-union-leaning Democrat and Member Schaumber, a pro-business-leaning Republican.<sup>178</sup> Although President Obama has nominated three new Board members, Congress has yet to act on those nominees.<sup>179</sup> Assuming a two-member Board even has authority to issue decisions,<sup>180</sup> the current Board can only issue decisions if those two members agree—an unlikely event in any but the most noncontroversial cases. In January 2008—its first full month as a two-member Board—it issued only four noncontroversial decisions<sup>181</sup> and only three decisions on the merits.<sup>182</sup> The

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178. Chairman Battista's term expired on December 16, 2007; the recess appointments of Members Walsh and Kirsanow expired at the *sine die* adjournment of Congress in January. Press Release, N.L.R.B., Labor Board Temporarily Delegates Litigation Authority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart (Dec. 28, 2007), available at [http://www.nlr.gov/about\\_us/news\\_room/template\\_html.aspx?file=http://www.nlr.gov/shared\\_files/Press%20Releases/2007/R-2653.htm](http://www.nlr.gov/about_us/news_room/template_html.aspx?file=http://www.nlr.gov/shared_files/Press%20Releases/2007/R-2653.htm).

179. The two Democratic nominees are Craig Becker and Mark Gaston Pearce; the Republican nominee is Brian Hayes. Press Release, N.L.R.B., White House Announces Three NLRB Nominations, July 10, 2009, available at [http://www.nlr.gov/shared\\_files/Press%20Releases/2009/B071009.pdf](http://www.nlr.gov/shared_files/Press%20Releases/2009/B071009.pdf). At the time this Article went to press, Senator John McCain had delayed confirmation of the three-person package based on opposition to Craig Becker's nomination. See Steve Greenhouse, Labor Panel Is Stalled by Dispute on Nominee, N.Y. TIMES, Jan. 15, 2010 at A1b, available at <http://www.nytimes.com/2010/01/15/us/politics/15nlrb.html>.

180. The Board claims that it has authority to delegate authority to a two-member Board under Section 3(b) of the National Labor Relations Act, codified at 29 U.S.C. § 153(b) (2006). See, e.g., Aluminum Casting & Eng'g Co., 352 N.L.R.B. 1, n.7 (2008) (explaining that the two-member Board that decided that decision properly constituted a quorum under Section 3(b)). But the Board's reading of Section 3(b) is not without controversy. See Laurel Baye Healthcare, Inc. v. NLRB, 564 F.3d 469, 472-76 (D.C. Cir. 2009), petition for cert. filed, 186 L.R.R.M. (BNA) 2417 (U.S. Sept. 29, 2009) (No. 09-377) (rejecting the Board's interpretation of Section 3(b)'s quorum requirements and concluding that the Board is without such authority). Section 3(b) states that "two members shall constitute a quorum of any group designated pursuant to the first sentence," which "authorize[s] the Board] to delegate to any group of three or more members any or all of the powers which it may itself exercise." 29 U.S.C. § 153(b) (2006). The Board's decision to delegate its authority to the remaining two members presents a strained reading of Section 3(b), but at least some reviewing courts have accepted the Board's interpretation as reasonable. See Snell Island SNF LLC v. NLRB, 568 F.3d 410, 414-24 (2d Cir. 2009); New Process Steel, L.P. v. NLRB, 564 F.3d 840, 845-48 (7th Cir. 2009), cert. granted, 77 U.S.L.W. 3670, 78 U.S.L.W. 3012, 78 U.S.L.W. 3245, 78 U.S.L.W. 3251 (U.S. Nov. 2, 2009) (No. 08-1457); Northeastern Land Services, Ltd. v. NLRB, 560 F.3d 36, 40-42 (1st Cir. 2009).

181. See Aluminum Casting, 352 N.L.R.B. at 1 (granting General Counsel's motion for summary judgment awarding back pay in amount stipulated by the parties); Mason Tenders Local #388, 352 N.L.R.B. No. 2, No. 5-CB-10112 (NLRB Jan. 23, 2008) (granting General Counsel's motion for summary judgment ordering employer to comply with an informal Board settlement agreement); Countrywide Landfill, 352 N.L.R.B. No. 3, No. 7-CA-49546 (NLRB Jan. 24, 2008) (granting General Counsel's motion for default judgment where employer withdrew answer); HWH Trading Corp., 352 N.L.R.B. No. 4, No. 29-CA-28419 (NLRB Jan. 25, 2008) (granting General Counsel's motion for default judgment where employer failed to file an answer).

182. See Kingsbridge Heights Rehab. Care Ctr., 352 N.L.R.B. 6 (2008) (adopting without discussion judge's conclusion that employer violated the Act by surveilling employees' union activities and threatening to delay reinstatement of employees upon unconditional surrender to return to work); Int'l Alliance of Theatrical Stage Employees & Moving Picture Operators, Local 720, 352 N.L.R.B. 29 (2008) (second supplemental decision and order) (amending remedy issued in supplemental decision and order issued in 2004); Biosource Landscaping Servs., LLC, 352 N.L.R.B. No. 20 (2008) (adopting without discussion judge's conclusion that employer violated Section 8(a)(1) by threatening employees with plant closure if they voted for a union and informing employees that it would be futile for

following month, the Board issued an additional nineteen decisions—in two of which the Board granted motions for default judgment,<sup>183</sup> in another two of which the Board made decisions regarding jurisdictional disputes,<sup>184</sup> in eight of which the Board adopted the judge’s decision with little or no discussion,<sup>185</sup> and in only seven of which the Board discussed the merits.<sup>186</sup>

Along these lines, to the extent that the two Board members have been able to agree and issue decisions, the fact that the United States Court of Appeals for the D.C. Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB* has concluded that the Board is without authority to issue those decisions is significant.<sup>187</sup> The NLRA permits “[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought [to] obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia.”<sup>188</sup> Accordingly, the losing parties in final decisions issued between December 2007 and the time that the full Board is appointed are within their right to petition for review in the D.C. Circuit, which has thus far refused to enforce the Board’s “invalid” order.<sup>189</sup> If the Board ultimately loses this issue in the Supreme Court—then most of the two-member Board’s work of the last two years will be lost.

Second, the procedural requirements of cases under the Board’s jurisdiction, like those of most cases under the exclusive jurisdiction of an administrative

employees to choose a union because it would not permit a union; and issuing cease-and-desist order and notice posting).

183. See *Proper Steel Erectors, Inc.*, 352 N.L.R.B. 74 (2008) (failure to file answer to amended compliance specification); *Publ’n Printing Co.*, 352 N.L.R.B. No. 12, No. 14-CA-29046 (NLRB February 11, 2008) (failure to file answer).

184. See *Int’l Longshore & Warehouse Union, Local 10*, 352 N.L.R.B. 162 (2008); *Bldg., Concrete, Excavating & Common Laborers Union, Local 731*, 352 N.L.R.B. 107 (2008).

185. See *North Am. Linen, LLC*, 352 N.L.R.B. 167 (2008); *Clarke Mfg., Inc.*, 352 N.L.R.B. 141 (2008); *Found. Coal W., Inc.*, 352 N.L.R.B. 147 (2008); *Valley Health Sys., LLC*, 352 N.L.R.B. 112 (2008); *Nat’l Broad. Co.*, 352 N.L.R.B. 90 (2008); *Stepan Co.*, 352 N.L.R.B. 79 (2008); *Windstream Corp.*, 352 N.L.R.B. 44 (2008); *Laborer’s Int’l Union, Local Union No. 169*, 352 N.L.R.B. 33 (2008).

186. See *Leiferman Enters, LLC*, 352 N.L.R.B. 152 (2008); *Aircraft Servs. Int’l, Inc.*, 352 N.L.R.B. 137 (2008); *Cardinal Health Care, Inc.*, 352 N.L.R.B. 104 (2008); *Ralphs Grocery Co.*, 352 N.L.R.B. 128 (2008); *Lorge Sch.*, 352 N.L.R.B. 119 (2008); *Smith Indus. Maint. Corp.*, 352 N.L.R.B. No. 13 (February 14, 2008); *Hercules Drawn Steel Corp.*, 352 N.L.R.B. 53 (2008).

187. See *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-76 (D.C. Cir. 2009), *petition for cert. filed*, 186 L.R.R.M. (BNA) 2417 (U.S. Sept. 29, 2009) (No. 09-377) (rejecting the Board’s interpretation of Section 3(b)’s quorum requirements and concluding that the Board is without such authority).

188. 29 U.S.C. § 160(f) (2006).

189. The current Board has continued to issue decisions, notwithstanding the D.C. Circuit’s decision in *Laurel Baye*. In protest of that decision, the Board filed a petition for rehearing en banc in that case. See *Petition for Rehearing, Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), Nos. 08-1162 & 08-1214 (D.C. Cir. May 27, 2009), available at <http://lawprofessors.typepad.com/files/nlr-petition.pdf>. The Court has denied that petition. See *Laurel Baye*, 564 F.3d at 469. The Board has recently filed a petition for a writ of certiorari in the United States Supreme Court. See *Brief of NLRB, NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc.*, Docket No. 09-377, available at <http://www.usdoj.gov/osg/briefs/2009/2pet/7pet/2009-0377.pet.aa.html>. The Supreme Court will consider this issue. See *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 77 U.S.L.W. 3670, 78 U.S.L.W. 3012, 78 U.S.L.W. 3245, 78 U.S.L.W. 3251 (U.S. Nov. 2, 2009) (No. 08-1457).

agency, facilitate delay through the administrative review procedure. Although cases might theoretically move through the Board quickly—from charge, to complaint, to hearing, to administrative law judge’s recommended decision, to Board decision and final order—cases potentially slow down at the court review stage. At this stage, cases are often remanded to provide additional Board findings of fact or better explanations for the Board’s legal conclusion.

Third, the Board is supposed to make policy through adjudication.<sup>190</sup> Coupling this congressional charge with the political composition of the Board has created a recipe for juridical disaster. Board members often come to the NLRB with specific political agendas. In controversial areas, such as the question whether nonunion employees may request a witness during a disciplinary interview, the Board has flipped its policy several times.<sup>191</sup> This flipping is known as “oscillation.” The policy of oscillation, which is a perfectly legal course for an administrative agency to follow, has several negative consequences for those affected by the NLRA.<sup>192</sup> Most obviously, the policy of oscillation destabilizes the law. This is a particularly bad consequence for those employers, employees, and unions under the jurisdiction of the NLRA, which Congress enacted to stabilize industrial relations.

Some scholars have argued that one way around this problem is for the Board to embrace rulemaking.<sup>193</sup> While I am sympathetic to this course of action, at least two scholars have argued that the Board is without authority to engage in substantive rulemaking.<sup>194</sup>

Fourth, because one Board may not be able to issue a case before a new Board comes in, cases are often left in limbo as the composition of the Board changes. More precisely, as administrations change, new Board members come to the Board, often with new policy agendas. Every change in administration renews the opportunity for oscillation. While there may be some good reasons to support a policy of oscillation (e.g., that oscillation shows responsiveness to the majority

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190. Many scholars have argued that courts also make policy. This may be true, but not to the extent of an administrative agency that is charged with making national policy on specific subject matter. As the Supreme Court has repeatedly explained: “Because it is to the Board that Congress entrusted the task of ‘applying the [NLRA]’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,’ that body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.” *Beth Israel Hosp.*, 437 U.S. at 500-01 (citation omitted) (quoting *Republic Aviation*, 324 U.S. at 798); accord *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

191. In *IBM Corp.*, 341 N.L.R.B. 1288 (2004), the Bush II Board reversed *Epilepsy Foundation*, 331 N.L.R.B. at 676, a case where the Board applied the principles of *J. Weingarten*, 420 U.S. 251, to a “nonunionized [setting] . . . permitting an employee] the right to have a coworker present at an investigatory interview which the employee reasonably believed might result in disciplinary action.”

192. For an excellent critique of the Board’s policy of oscillation, see Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

193. See Fisk & Malamud, *supra* note 132, at 2016 n.12.

194. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 510-11 (2002). See also *id.* at 565-70 (arguing that, contrary to the views of Judge Friendly and other scholars, subsequent amendments to the NLRA did not alter the original limitation on the scope of the Board’s rulemaking authority). This issue was not raised in *Am. Hosp. Ass’n*, 499 U.S. 606. See Merrill & Watts, *supra* note 194, at 56 (“The Association did not raise the more fundamental question whether the NLRB possessed legislative rulemaking authority in the first place. Rather, the parties, the Seventh Circuit, and the Supreme Court all assumed that Congress had given the NLRB the power to promulgate legislative rules.”).

will) the consequence for the particular parties to a dispute is uncertainty. The burden of delay is rarely spread evenly over all parties under the NLRA's jurisdiction (i.e., employers, employees, and unions). Rather, employees and unions working on behalf of employee rights bear the greater burden of delay because it is their rights that are being delayed. To be sure, employers will complain that delay affects them as well. But while an employer can protect itself against backpay remedies by putting aside damage awards lest the Board finds that the employer engaged in unlawful conduct, it is often difficult to remedy employee rights that are not immediately remedied, such as the denial of employment through unjust termination or the denial of representation through employer unfair labor practices that interfere with free and fair elections or the denial of a first contract because of an employer's unlawful refusal to bargain. And although there are means for expedited review, federal courts contribute to this problem to the extent that court review of final Board decisions typically takes more than a year.

#### IV. *DANA CORPORATION*: THE "MASSACRE" IN THE SEPTEMBER MASSACRE?

Several of the Bush II Board's recent decisions show its predilection not only for making unionization more difficult but also for making decertification easier. This hard-in/easy-out approach further frustrates the NLRA's main policy of promoting industrial peace and stability through the process of collective bargaining.<sup>195</sup>

##### A. *The Bush II Board's Decision To Undermine Voluntary Recognition*

In keeping with a hard-in theme, the Bush II Board changed its rules governing voluntary recognition. Until recently, a union receiving voluntary recognition from an employer enjoyed an irrebuttable presumption of majority status for a reasonable period of time to enable the parties to reach agreement on a first contract.<sup>196</sup> That changed in *Dana Corp.*, where the Board removed this "voluntary recognition bar [to decertification]" for the first forty-five days following employer recognition.<sup>197</sup> The Board's new rule also requires employers and unions to notify employees of their newly minted right to file a decertification petition or election petition within forty-five days of receiving notice that their employer has recognized the union under a neutrality or card-check agreement.<sup>198</sup> Under the new

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195. The NLRA's policy of industrial peace and stability cannot be overstated. During the 1960s, the Supreme Court felt so strongly about this underlying policy that it was willing to waive a union's statutorily protected right to strike in cases where the union had agreed to a grievance-arbitration proceeding. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

196. *Keller Plastics E., Inc.*, 157 N.L.R.B. 583, 587 (1966).

197. 351 N.L.R.B. at 434.

198. During the 2007 ABA Labor and Employment Law meeting, former Board Member Sarah M. Fox pointed out that this is the first time in the Board's history that the Board has required employers who have not violated the law to post an official government notice in the workplace advising employees of their rights under the Act. She noted that the only right mentioned in those notices is the right of those who wish to decertify—not the right of the majority that wants the union to represent its interests for purposes of collective bargaining. See *supra* note 9. The only Board notice to come close to such a requirement is the Board's *Notice of Election*, which requires employers to notify workers of balloting details through a notice posting three days before a Board-conducted election. See *Notice of*



rules, a recognition bar is erected only if “45 days pass from the date of notice without the filing of a valid petition.”<sup>199</sup>

In recent years, voluntary recognition has served as an alternative for unions frustrated with the Board’s election rules, which have given employers advantages such as captive-audience speeches. The Board’s modified approach diminishes the value of that alternative and assaults the principle of majority rule: a decertification petition supported by thirty percent of the employees trumps a card-check agreement supported by seventy percent of the employees, thereby forcing an election.

### B. *The Significance of Dana Corporation*

Until *Dana Corp.*, there was very little erosion of the Board’s longstanding approach to voluntary recognition. *Dana Corp.* stands as perhaps the most revolutionary decision of the September Massacre for two reasons. First, *Dana Corp.*’s new voluntary recognition rules are themselves revolutionary. As former NLRB Board Member Sarah Fox recently pointed out, the rules mark the first time the Board requires a nonremedial posting.<sup>200</sup> Second, and more significantly, *Dana Corp.* highlights the cumulative effect of the Bush II Board’s hostility to unions. The *Dana Corp.* rules, combined with the *Babcock/Lechmere* doctrine excluding non-employees from organizing on employers’ private property and the Bush II Board’s new approach to salts, undoubtedly make it significantly harder to organize the workplace. In that sense, *Dana Corp.* symbolizes the Bush II Board’s vigorous resistance to union organization and signals a new era of government repression of unionization.<sup>201</sup>

## V. CONCLUSION: ADVICE FOR THE PRESIDENT AND CONGRESS

This Article provides an initial review of some of the Bush II Board’s decisions, with special focus on its September 2007 decisions, and their place in labor history. Much more analysis must be done to determine the actual deleterious effects of the Bush II Board’s actions on the rights of the working class. Perhaps a little more time—and court review—is needed to determine whether the Bush II Board’s most recent assault on those rights is a massacre, part of a slow erosion of those rights by all branches of government, or both.<sup>202</sup>

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*Election*, CASEHANDLING MANUAL § 11314, available at <http://www.nlr.gov/nlr/legal/manuals/CHMII/Sections11300-11350.pdf>. Notably, the Beck notice instituted by President Bush through an Executive Order was not a Board-required notice. See Exec. Order No. 13201, 66 Fed. Reg. 11,221 (Feb. 17, 2001), *revoked by* Exec. Order No. 13496, 74 Fed. Reg. 6,107 (Jan. 30, 2009).

199. See *Dana Corp.*, 351 N.L.R.B. at 434.

200. See *supra* note 9.

201. The early Bush II Board laid the foundation for cutting back on representational rights by making it difficult for unions to retain representation in the successorship context when it reversed precedent providing for a successor bar: “[T]he preclusion of petitions challenging the union’s majority status for a reasonable period after a successor employer’s obligation to recognize an incumbent union is triggered.” *St. Elizabeth Manor, Inc.*, 329 N.L.R.B. 341, 344 (1999), *overruled by* *MV Transp.*, 337 N.L.R.B. 770, 770 (2002).

202. *But see Guard Publ’g*, 591 F.3d 53, (denying enforcement to one of the Bush II Board’s most controversial decisions, *Republican Guard*, 351 N.L.R.B. 1110).

Whatever the complete analysis shows, it surely will show this: The September Massacre reveals a Board willing to erode the protections provided for workers using the very law that was intended to safeguard those protections. In the wake of *Lechmere*, salts became an effective organizing tool for unions. When the Supreme Court affirmed that union tactic, the Bush II Board stepped in to weaken it. Voluntary recognition is claimed by unions to be an effective organizing tool—a way that unions could avoid repressive employer tactics, such as captive audience speeches and administrative delay. So, the Bush II Board stepped in and repressed that union tactic as well.

One obvious cure for the damage wrought by the September Massacre is, of course, a new presidential administration. Oscillation of NLRA policies is a part of our national labor policy.<sup>203</sup> An Obama Board with a pro-law-enforcement majority is likely to reverse much of this precedent. But there are many problems with the Board's penchant for oscillation. Even if oscillation does reflect the majority will, oscillation takes time and creates unpredictability in the law. In any event, if the September Massacre is, to a large extent, part of a greater trend toward chipping away at the Board's unique protections for workers, a change in administration may not be enough. Instead, fundamental reform that also provides certainty in the law is needed.

*First*, the members of the Obama Board must be willing to enforce the NLRA and promote the policies underlying the Act, policies which include “encouraging the practice and procedure of collective bargaining.”<sup>204</sup> But, as explained immediately above, that strategy is helpful only if the President appoints a pro-law-enforcement Board. And given the political nature of labor law and the Board's penchant for oscillation, these results are likely to be short-lived. Accordingly, at least with regard to some of the more political issues that have dominated the Board's adjudicatory process in the past thirty years, the Obama Board should reverse the Bush II Board's most egregious precedents both by adjudication and then by rulemaking.<sup>205</sup>

The Obama Board should overturn the economic test for employee status—whether the relationship between the worker and the employer is “predominantly . . . economic in nature”<sup>206</sup>—and return to a case-by-case evaluation. In such evaluations, the Board would presume employee status based on record evidence of employment; the party asserting nonemployee status could rebut that presumption by producing evidence and persuading the Board that the worker meets the definition of one of the enumerated exemptions, such as supervisor.<sup>207</sup> When overruling this test, the Board should also expressly overrule *Toering Electric*,

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203. Estreicher, *supra* note 192, at 175-77 (advocating the use of rulemaking to overturn prior precedent to make oscillation more difficult).

204. 29 U.S.C. § 151 (2006).

205. *But see* Merrill & Watts, *supra* note 194, at 510-11 (discussing the potential obstacles to NLRB rulemaking).

206. *Brown Univ.*, 342 N.L.R.B. 483 (quoting *St. Clare's Hosp.*, 229 N.L.R.B. 1000, 1002 (1977)); *accord* *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 982 (2004).

207. *See* *Ky. River Cmty. Care*, 532 U.S. at 710-11 (holding that it is a reasonable construction of the NLRA to place the burden of proving supervisory status on the party claiming that the worker is a supervisor).

*Brown University, Brevard Achievement Center, and St. Clare's Hospital.*

Moreover, case-by-case adjudication of employee status is likely to conserve administrative resources because only those cases where there is a genuine dispute in status are likely to be litigated. In so doing, the Board can avoid the unintended consequences of broad rulemaking, which often results in adjudicatory backtracking and messy case law that is difficult to enforce in the courts of appeals.

The Obama Board should also expressly overrule several other cases discussed in this Article. For example, the Board should expressly overrule *Oil Capitol*<sup>208</sup> and return to the remedial structure for salts that the courts of appeals had accepted.<sup>209</sup> The Obama Board should also review its equipment-and-bulletin-board line of cases in the context of union solicitation and make reasoned judgments about whether use of a particular piece of equipment really implicates the employer's property or managerial interests.<sup>210</sup>

The Obama Board should also extend *Weingarten* rights to nonunion employees in the organized workplace. The right to representation, especially during an investigatory meeting that is reasonably likely to result in discipline, is a core Section 7 right under the mutual aid or protection clause that all statutory employees hold, regardless of whether those employees are actually represented by a union. In extending these rights to nonunion employees, the Board must expressly overrule *IBM Corp.*<sup>211</sup>

In response to the unpredictability that results from oscillation, the Obama Board should consider making these changes more permanent by engaging in rulemaking. To get around the problem raised by Professor Merrill,<sup>212</sup> Congress should amend the NLRA to expressly authorize the Board to engage in substantive rulemaking and to make court challenges to rules directly appealable to the courts of appeals.<sup>213</sup>

*Second*, Congress must be willing to enact legislative changes, both substantive and procedural, to the NLRA. Unfortunately, as this Article shows, congressional change has been predominantly harmful to unions. Any proposed amendment—even a pro-worker amendment—presents the risk that the legislation will include anti-worker provisions.<sup>214</sup> Notwithstanding this risk, labor currently backs several legislative amendments to the NLRA. The most likely candidates at this point are an act entitled the Re-Empowerment of Skilled and Professional

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208. 349 N.L.R.B. 118.

209. See, e.g., *Ferguson Elec.*, 242 F.3d at 436.

210. In examining these issues, the Obama Board could start with Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262 (2008). The Board should also examine *Intel Corp. v. Hamidi*, 30 Cal.4th 1342, 1353 (2003) (examining the marginal cost of transmitting e-mail messages).

211. See *IBM Corp.*, 341 N.L.R.B. 1288.

212. See Merrill & Watts, *supra* note 194, at 569 (raising the question of whether the NLRB possesses legislative rulemaking authority).

213. See, e.g., *Am. Hosp. Ass'n*, 499 U.S. at 608-09 (challenge to rule went first to the district court and then to the court of appeals).

214. For that and other reasons, I support eliminating the supervisory exemption altogether. But that discussion is beyond the scope of this Article.

Employees and Construction Tradeworkers (RESPECT)<sup>215</sup> and the Employee Free Choice Act (EFCA).<sup>216</sup>

RESPECT would have the immediate effect of overruling the Board's recent *Oakwood* Trilogy by narrowing the definition of supervisor in two ways. First, the Act would remove the authority to assign and to responsibly direct other employees as conditions for finding supervisory status. Second, the Act would require workers to possess supervisory authority over employees for a majority of that worker's work time, thereby reversing the Board's policy of finding supervisory status and exempting those workers from the NLRA's protection, in cases where employees exercise one of the twelve enumerated powers in as little as 10 percent of their work time.

The question whether RESPECT is likely to empower workers depends in part on the type of litigation that could arise from its enactment. RESPECT would obviously spark litigation over the extent to which a worker's time is spent discharging supervisory powers. What is less obvious is that RESPECT is also likely to spark litigation over the putative supervisor's other powers, especially disciplinary power and the power to "effectively to recommend such action." By eliminating the powers to assign and responsibly to direct from the twelve enumerated powers, and by retaining the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, . . . reward, . . . discipline . . . or to adjust [employee] grievances,"<sup>217</sup> RESPECT essentially limits the supervisory exemption to those employees who have authority over other employees where authority entails one person's actual power over another person. While, from the employee's perspective, this seems like the right move, such legislation may very well backfire if courts misunderstand the significance of the amendment and begin to find that workers hold the power to discipline in cases where there is very little authority, such as in cases where workers are merely reporting work transgressions to true supervisors and managers.<sup>218</sup>

EFCA, as it is popularly known, is currently the more controversial of the two legislative bills. EFCA currently has three main mandates.<sup>219</sup> First, it requires the Board to investigate, and if appropriate, certify unions when a majority of employees have signed authorization cards.<sup>220</sup> Second, it guarantees a contract for

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215. H.R. 1644, 110th Cong. (2007), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-1644>.

216. H.R. 1409, 111th Cong. (2009), (reintroduced March 10, 2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1409>.

217. 29 U.S.C. § 152(11) (2006).

218. *Compare* Hosp. Gen. Menonita v. NLRB, 393 F.3d 263, 267-68 (1st Cir. 2004) (holding that evidence is insufficient to demonstrate supervisory status "where an employee's involvement in the evaluation process is merely reportorial in nature") with *NLRB v. Quinnipiac Coll.*, 256 F.3d 68, 76-77 (2d Cir. 2001) (overturning Board finding and holding that evidence is sufficient to demonstrate supervisory status where employees "have the discretion whether to report an individual for disciplinary infractions").

219. See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1409> (reintroduced March 10, 2009). See generally AFL-CIO, SUMMARY OF EMPLOYEE FREE CHOICE ACT (2009), at [http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/EFCA\\_Summary.pdf](http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/EFCA_Summary.pdf).

220. See Employee Free Choice Act of 2009, *supra* note 219, § 2.

workers represented by a newly certified union by mandating binding arbitration after ninety days of bargaining in first contract situations.<sup>221</sup> Third, it strengthens remedies by authorizing the Board to order civil penalties against employers who willfully or repeatedly violate the Act; requiring employers to pay treble backpay damages to remedy unlawful discharges; and mandating injunctive relief in cases of discharge, significant interference with employee rights during elections, and first contract bargaining.<sup>222</sup>

Although many news agencies are reporting the demise of EFCA's card check requirements,<sup>223</sup> it remains worthwhile to analyze this most controversial aspect of EFCA for two reasons. First, the card check represents the business community's most disingenuous attack on employee self-organization. Second, news agencies have been reporting the death of card check for many years but it apparently continues to resurrect itself. As with RESPECT, the question whether EFCA is likely to empower workers depends on how EFCA is interpreted by the Board and reviewing courts. Notwithstanding employer protestations that EFCA would make it significantly easier for unions to organize employees and is therefore counterproductive in today's economic recession, EFCA leaves much room for Board interpretation, which means that there is plenty of room for the Board to circumscribe what appears to be a pro-union bill.

In particular, EFCA requires the Board to "develop guidelines and procedures for the designation by employees of a bargaining representative" in "find[ing] that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating [their representative]."<sup>224</sup> For example, in the election context, where the Board is asked to determine whether a particular union ever enjoyed a card majority for purposes of determining whether to issue a *Gissel* bargaining order, the Board has well-developed, court-approved, case law for authenticating authorization cards. Under these rules, the Board applies the *Cumberland Shoe* doctrine:

[I]f the card itself is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election.<sup>225</sup>

The Board also requires authentication of signatures, often by comparing signatures to payroll records.

When confronted with a union that demands Board certification upon a showing of a majority of authorization cards, the Board, at the very least, is likely to borrow from this case law. But it is also likely that such case law would merely signal a starting point. The Board, especially some future pro-business Board, could certainly develop rules that would create additional obstacles before

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221. *See id.* § 3.

222. *See id.* § 4.

223. *See The New Old 'Card Check,'* WALL ST. J., July 21, 2009, at A11, available at <http://online.wsj.com/article/SB124804413309863431.html>.

224. *See* Employee Free Choice Act of 2009, *supra* note 219, § 7.

225. *Gissel Packing*, 395 U.S. at 584 (internal citations omitted) (citing *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963)); and *Levi Strauss & Co.*, 172 N.L.R.B. No. 57 (1968)).

authenticating cards in the name of protecting the integrity of the Board's processes.

If labor loses EFCA's card check provision, it will need to put something in its place that promotes self-organization. As many scholars have pointed out, unions often support voluntary recognition because employers have figured out that if they give five captive audience speeches<sup>226</sup> over approximately five weeks, the employer can chip away at the union's majority to such an extent that it will lose the election.<sup>227</sup> To fix this problem, Congress could require the Board to hold secret-ballot elections within two weeks of filing a petition for election.<sup>228</sup> This permits the employer to give its side of the story without allowing so much time to run that employers can scare employees, who really want a union, out of voting for the union.

*Third*, courts must be willing both to defer to Board decisions in the appropriate circumstances and to reverse the Board when it acts to repress union organizing and collective bargaining in contravention of the NLRA's express protections. This point is complex. As a threshold matter, if a Board hostile to workers' Section 7 rights is clever, it can escape judicial review by chipping away at those rights through adjudication and then using its own precedent to further erode those rights guaranteed by the NLRA. Federal courts decide individual cases and controversies; courts reviewing the adjudicated decisions of administrative agencies have a much smaller policymaking role than courts reviewing cases involving other federal questions. Given judicial deference to administrative decisions in the form of *Chevron* and *Universal Camera* deference, reviewing courts may feel hamstrung to do much about such decisions.

Reviewing courts must also restrain themselves from taking out their frustration with the Board's administrative delay on discriminatees and other victims of unfair labor practices by refusing to enforce Board orders issued on stale

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226. Under the Board's current policy, employers may hold meetings during paid work hours to inform employees of the disadvantages of union membership and to encourage them to vote against the union in the upcoming election so long as speeches are noncoercive. Nor must employers give unions access to their premises to give pro-union election speeches. See *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406-07 (1953). There are two main limitations on employers' privilege to speak to their employees. First, those speeches cannot be coercive. See 29 U.S.C. § 158(c) (2006). Second, employers may not give captive audiences speeches within twenty-four hours of an election. *Peerless Plywood*, 107 N.L.R.B. 427, 429 (1953) (prohibiting employers and unions "from making elections speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election").

227. See, e.g., DONALD P. WILSON, *TOTAL VICTORY! THE COMPLETE MANAGEMENT GUIDE TO A SUCCESSFUL NLRB REPRESENTATION ELECTION CAMPAIGN* 164 (1994). Wilson presents data that management has a 92.7% chance of defeating the union in the representation election if it requires its employees to attend five or more captive audience speeches. *Id.*

228. See, e.g., William B. Gould, *What Would Employee Free Choice Mean in the Workplace*, 58th Annual Conference of Labor Relations Agencies: Labor Management Relations and the Global Economic Crisis (July 20, 2009), available at [http://www.law.stanford.edu/display/images/dynamic/publications\\_pdf/Gould%20July%2020%20Speech%20to%20ALRA1.pdf](http://www.law.stanford.edu/display/images/dynamic/publications_pdf/Gould%20July%2020%20Speech%20to%20ALRA1.pdf) (advocating, among other things, expedited elections). Although some may suggest that Gould's cure (i.e., expedited elections) is worse than the disease (i.e., broken elections), I disagree. To be sure, employers will retain the right to challenge elections, which means that some elections will be overturned on the back-end of an expedited election process. But many other elections will not be overturned.

cases. Courts could instead hold the Board accountable by compelling it to issue decisions in cases where charging parties bring the Board's delay to the courts' attention by petitioning the court for a writ of mandamus.<sup>229</sup>

*Fourth*, labor advocates must be willing to use what is left of the NLRA to push forward a pro-union agenda.<sup>230</sup> But labor advocates are wary of such an approach. If anything, labor advocates are often persuaded by the arguments of the legal abstentionists<sup>231</sup> and have nearly abandoned the NLRA. That would be an effective strategy if the NLRA did not have primary and often exclusive jurisdiction over labor-management disputes.<sup>232</sup> But because the Board may regulate labor-management relations, and often may preempt others from regulating those relationships, an anti-union Board can create rules that force the parties to use its processes and then stack those rules in favor of de-collectivization. Such is the legacy of *Dana Corp.*

*Fifth*, labor must understand that it is losing the media war. Images of "big labor" and labor bosses—often combined with derogatory images of Italian-Americans to evoke Mafia-controlled, corrupt workplaces—dominate the mass media.<sup>233</sup> And notwithstanding the fact that unions today are entitled to voluntary recognition without a Board-conducted secret-ballot election, the main thrust of the anti-EFCA campaign concerns the "loss" of a fundamental right to an election. Labor must be willing to reinvent itself by sending the message that unions have essentially created the floor of rights upon which Americans work—a message that would find a more receptive audience if students were required to study labor history in public school.<sup>234</sup> Some groups are already starting to educate the public,

229. See 28 U.S.C. § 1651 (2006) (authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). See, e.g., *NLRB v. Long Island Coll. Hosp.*, 20 F.3d 76, 80 (2d Cir. 1994) (noting the denial of mandamus notwithstanding years of delay prior to the Board's issuance of a final agency decision).

230. For a discussion of how this might be done, see DANNIN, *supra* note 6.

231. "Collective laissez-faire" or legal abstentionism is the theory that employees' rights are best protected by respecting freedom of contract with as little state support or legal intervention as possible. Adherents of that theory believed that government regulation of labor relations—even policies of recognition—could hurt labor in the long run by re-subjecting unions to judicial repression of legally gained rights. Under that view, subjecting unions to legal regulation made it possible for judges, who come predominantly from the property owning and capitalist class, to cut back on rights gained through the legal process. It was thought that cut backs were less likely to occur where unions were given regulatory immunity—permitted to wield their economic power without being subject to legal regulation. Sir Otto Kahn-Freund, the Austrian-born professor of comparative law at Oxford, is usually credited with developing the theory of collective laissez-faire and applying that theory to British labor relations. See O. Kahn-Freund, *Legal Framework*, in *THE SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN* (Allan Flanders & H.A. Clegg, eds.). For an excellent discussion of legal abstentionism, see Sandra Fredman, *The New Rights: Labour Law and Ideology in the Thatcher Years*, 12 OXFORD J. LEGAL STUD. 24, 39-42 (1992).

232. For a discussion of three examples where this has been effective, see Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375 (2007).

233. See, e.g., *Union Violence Meets the Sopranos*, <http://www.youtube.com/watch?v=APzu9zX4mBA> (last visited Oct. 2, 2009).

234. California Education Code § 51009. See Wisconsin Senate Bill 135/Assembly Bill 172, available at [http://nxt.legis.state.wi.us/nxt/gateway.dll/Session%20Related/bills09/12125/12126?f=templates\\$fn=document-frameset.htm\\$g=\[field folio-destination-name:'sb135'\]\\$x=Advanced#0-0-0-269521](http://nxt.legis.state.wi.us/nxt/gateway.dll/Session%20Related/bills09/12125/12126?f=templates$fn=document-frameset.htm$g=[field folio-destination-name:'sb135']$x=Advanced#0-0-0-269521).

but greater effort is needed.<sup>235</sup>

Accordingly, labor must recognize that it needs to utilize a Sun Tzu strategy.<sup>236</sup> Much can be said on this strategy but let me at least begin the conversation. Labor first needs to understand that business interests have the upper hand. Labor must take evasive action and not hit big business head-on.<sup>237</sup> Along these lines, labor needs to get a message across to consumers that it is not interested in destroying corporate America but in making it better by improving the lives of workers.<sup>238</sup> For example, labor should promote universal health care as both a civil rights message—all workers are entitled to healthcare—and as an economic message—American companies can compete more effectively on the global market if the financial burden of healthcare was not placed on them.

Conversely, labor needs to counterattack big business's current Sun Tzu strategy of deception.<sup>239</sup> For example, very few Americans understand that EFCA does not take away workers' right to an election. Rather, it takes away the employer's right to insist on an election, notwithstanding a union's showing of majority support in the form of card check,<sup>240</sup> yet business has been very effective in bringing that fallacious message across, so much so that many feel that the card check is now a lost battle.<sup>241</sup> Labor can counter this message in part by educating consumers about the role that business plays in repressing workers rights at the workplace.

Another very effective, time-tested method of winning this war is through what labor does best—grassroots organizing. Labor has already begun doing this through Working America.<sup>242</sup> Once again, this is a Sun Tzu strategy because it employs a strategy of winning over consumers and producers without fighting. But to be effective, labor must integrate with other grassroots communities into a workplace-community.<sup>243</sup> For example, labor should integrate with environmental groups to push for blue-green jobs.<sup>244</sup> Labor should also integrate with civil rights groups to push for social reforms that would help the working classes, whose

235. See, e.g., What Have the Unions Ever Done for Us?, [http://www.youtube.com/watch?v=184NTV2CE\\_c](http://www.youtube.com/watch?v=184NTV2CE_c) (last visited Oct. 2, 2009).

236. See generally SUN TZU, THE ART OF WAR (Lionel Giles trans., 1910).

237. "If he is in superior strength, evade him." *Id.* § 1, ¶ 21.

238. *Id.* § 3, ¶ 1 (arguing in favor of taking "the enemy's country whole and intact" rather than "to shatter and destroy it").

239. "All warfare is based on deception." *Id.* § 1, ¶ 18.

240. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 302, 306-10 (1974) (reversing the NLRB's decision and holding that an employer does not violate Section 8(a)(5) of the NLRA by refusing to recognize a union supported by a majority of valid authority cards and further holding that in such cases the union has the burden of filing the election petition).

241. "When you engage in actual fighting, if victory is long in coming, then men's weapons will grow dull and their ardor will be damped. If you lay siege to a town, you will exhaust your strength." SUN TZU *supra* note 236, § 2, ¶ 2. *Id.* at § 2, ¶ 2. By currently winning this media war, business has made labor fight a battle they had already lost.

242. See Working America, <http://www.workingamerica.org> (last visited Oct. 22, 2009).

243. See FLETCHER & GAPASIN, *supra* note 7, at 174.

244. The BlueGreen Alliance, a national partnership between unions and environmental organizations, is an example of such a community that is "dedicated to expanding the number and quality of jobs in the green economy." BlueGreen Alliance, <http://www.bluegreenalliance.org> (last visited Oct. 8, 2009).



members include a disproportionate percentage of minorities.<sup>245</sup> This means that labor should also act on the understanding that unions must not restrict themselves to the workplace because class struggle is not restricted to the workplace.<sup>246</sup> And labor unions should embrace globalization by taking advantage of cross-border opportunities to organize.<sup>247</sup> Some, like the United Steelworkers and the UK's largest union, Unite, have already begun this process.<sup>248</sup>

*Sixth*, academics must be willing to teach and write about labor law so that when these branches of government and private advocates are ready and willing to effect change they can draw upon a coherent, well-developed set of ideas.<sup>249</sup> Unfortunately, labor programs in law schools are dwindling. Many law schools no longer teach labor law as a separate course, if at all. And the less labor law is taught, the less likely law professors will write in the area. Labor law professors must convince their deans—and the law school's constituents—that teaching labor law is important. And if they are already teaching labor law, professors must convince their students of the importance of labor law so that they will take the course and be able to recognize labor law issues as they arise in practice. Through labor law, students can learn administrative law. Moreover, labor law is vital to understanding how to deal with many workplaces, especially the public sector where unions represent a larger percentage of workers.<sup>250</sup> Indeed, the NLRA protects all employees—union and nonunion—who are engaged in mutual aid or protection.

A quick glance at recent federal labor case law and the September 2007 NLRB decisions might suggest that legal abstentionists have a point—at least to the extent that legal processes appear to have diluted, perhaps even repressed, Section 7 rights. Unions, through their lobbying efforts in the political sphere, are responsible for most legislation that constitutes the floor of rights upon which our working class walks. That includes health and safety regulations, minimum wage and

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245. The facts under the case *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), provide insight into this approach. In that case, the company, which had a history of racial segregation and open discrimination, began to require either a high school diploma or passage on two general intelligence tests as job prerequisites. *Id.* at 427-28. The test requirements had the effect of eliminating a significant percentage of African-American job applications from job positions. *See id.* at 430. The Supreme Court held that if such tests disparately impact a minority group, the company violates Title VII unless it can demonstrate that the tests were reasonably related to the job. *Id.* at 431. This type of class action is a form of labor activism. *See generally* ROBERT SAMUEL SMITH, *RACE, LABOR & CIVIL RIGHTS* (2008).

246. *See* FLETCHER & GAPASIN, *supra* note 7, at 174 (“[I]f class struggle is not restricted to the workplace, then neither should unions be.”).

247. *See* Jeffrey M. Hirsch, *Making Globalization Work for Employees* (July 22, 2009) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1437720](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437720)).

248. *See North American Steelworkers, UK's Unite Forge Trans-Atlantic Union Alliance*, ICEM IN BRIEF (Int'l Fed'n of Chem., Energy, Mine, and Gen. Workers' Union, Geneva, Switz.), July 14, 2008, available at <http://www.icem.org/en/3-Energy-Oil-and-Gas/2724-North-American-Steelworkers-UK%E2%80%99s-Unite-Forge-Trans-Atlantic-Union-Alliance>.

249. For some discussion of this issue, see Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL'Y. J. 789 (2002).

250. *See* BUREAU OF LABOR STATISTICS, CPS NO. 42, UNION AFFILIATION OF EMPLOYED WAGE AND SALARY WORKERS BY OCCUPATION AND INDUSTRY (2008), available at <http://www.bls.gov/cps/cpsaat42.pdf>. (comparing 2008 private sector union density rate of 7.6 percent with public sector union density rate of 36.8 percent). According to this table, in 2008, 40.7 percent of the public sector was represented by unions. *Id.*

maximum hour laws, child safety laws, and hundreds of other government acts that prevent the exploitation of workers upon whose sweat—and sometimes blood—our society relies to enjoy a high standard of living.<sup>251</sup> However, labor advocates must not surrender by entirely abandoning the courts and the NLRB. While true liberation of workers might largely come through economic and political channels, labor advocates ignore the courts and administrative agencies at the peril of our workers and a more progressive social agenda.

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251. For a discussion of this in the coal mine safety context, see Anne Marie Lofaso, *Approaching Coal Mine Safety from a Comparative Law and Interdisciplinary Perspective*, 111 W.VA. L. REV. 1, 3, 7 (2008).