

***Hoffman Plastics* as Labor Law— Equality at Last for Immigrant Workers?**

By ELLEN DANNIN*

Introduction

*H*OFFMAN PLASTICS,¹ THE POSTER CHILD of immigration cases—and law—gone wrong,² is popularly viewed as a case that imposed penalties unique to immigrant workers. For example, one author says of *Hoffman Plastics*:

[A]fter *Hoffman*, employers are now *de jure* exempt from ordinary labor liability in many circumstances (previously, employers were at best *de facto* exempt, in light of the reluctance of some undocumented workers to file labor complaints).³

It is true that the Supreme Court decision in *Hoffman Plastics* can relieve an employer who illegally fires an undocumented worker from owing a back pay remedy under the National Labor Relations Act

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1. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). The facts, analysis, and remedies are set out in greater detail in the NLRB's decision. *See Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683 (1994).

2. *See, e.g.*, Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2005); Marianne Staniunas, *Comment: All Employees Are Equal, but Some Employees Are More Equal Than Others*, 6 U. PA. J. LAB. & EMP. L. 393 (2004); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004).

3. Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 216 (2007); *see also* Catherine Fisk & Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 399 (Laura J. Cooper & Catherine Fisk eds. Foundation Press 2005).

(“NLRA”).⁴ However, the sad truth is, rather than creating an injury unique to immigrants, *Hoffman Plastics* is better seen as part of the long American tradition of judicial hostility toward unions and labor law. Thus, as discussed in more detail in this Article, the Supreme Court held that, although Hoffman Plastics violated the NLRA by firing Jose Castro in retaliation for his union activities, Hoffman Plastics owed no back pay because Castro had violated immigration laws. In 1939 and 1942, the Supreme Court held that Fansteel Metallurgical and Southern Steamship had violated the NLRA for illegally firing workers for their union activities, but owed these workers no back pay because they had violated various laws by staging sit-down strikes. In other words, the judicial tradition of refusing to enforce the rights Congress created under the NLRA applies equally to immigrant and native workers. This does not mean that immigration status, law, and policy played no role in *Hoffman Plastics*’ outcome. Rather, we cannot fully understand *Hoffman Plastics*—and, thus, how to redress the situation—unless we understand how the courts have historically treated all workers, both immigrant and native, in the United States.

Furthermore, the NLRA cannot be fully understood outside its historical context. Professors James Atleson and Karl Klare have shown that the disconnect between the clear language in the law passed by Congress, and the law as it is applied today, is the result of decades of “judicial amendments” that weakened or eliminated worker rights and protections created by Congress.⁵ *Hoffman Plastics* cannot be fully understood without seeing it as a recent link in this judicial legacy that preceded the enactment of the NLRA.

The long legacy of judicial amendments is accompanied by the legacy of scholars who criticized these judicial actions. For example, in 1935, as Congress debated the enactment of the NLRA, the Senate advocated its enactment and decried court decisions that had “intensified” the relative weakness of the wage earner under earlier laws.⁶ Attorney Osmond K. Fraenkel observed that judges had “amended”

4. 29 U.S.C. § 151 (2006).

5. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); CHARLES O. GREGORY, LABOR AND THE LAW 239 (2d ed. 1958); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978); see also Frank W. Munger, *Social Citizen as “Guest Worker”: A Comment on Identities of Immigrants and the Working Poor*, 49 N.Y.L. SCH. L. REV. 665 (2004) (arguing that declining conditions of low-wage labor actually predated immigration and has long been supported by changes in domestic social policies).

6. S. REP. NO. 573, at 3 (1935), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2300, 2302 (1949).

earlier labor laws by declaring that a statute merely embodied the common law; that the legislature had no authority to take away powers inherent in judges; and that any other interpretations would be unconstitutional.⁷

It would, no doubt, be cold comfort to employees whose rights today are limited by decades of NLRA judicial amendments to hear that, by 1935, the process of judicial amendments had a long pedigree.⁸ It would, no doubt, be dispiriting to know that when Congress drafted the NLRA, it was still smarting from the experience of passing predecessor laws that were all judicially amended. These antecedents of the NLRA included the Clayton Act,⁹ passed in 1914 to reverse judicial amendments of the Sherman Act¹⁰ that destroyed worker rights to organize by giving federal courts the power to issue sweeping injunctions in labor disputes.¹¹ That hope proved hollow, for in 1932, Congress tried to overturn judicial amendments of the Clayton Act that had given courts new power to thwart the act of worker organizing by passing the Norris-LaGuardia Act.¹² Understanding the NLRA requires seeing it both as part of this statutory lineage and as affected by the same forces.

It would also, no doubt, be bitter to the drafters of the NLRA to know that not only has their struggle to enact a law that truly promoted labor rights failed, but also that workplace laws continue to be subject to the process of judicial amendments and congressional repeals today. For example, Congress amended Title VII¹³ in 1978,¹⁴

7. Osmond K. Fraenkel, *Judicial Interpretation of Labor Laws*, 6 U. CHI. L. REV. 577, 592 (1939) (discussing history of judicial amendments of progressive labor laws); see also Judge Stephen Adler, *Further Reasons for the NLRB's Inability to Guarantee American Workers the Freedom to Organize and Bargain Collectively: Comment on Autonomous and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 261 (2005). A study of judicial decision making found that "conservative members of the Rehnquist Court are using the canons in such contested cases to ignore—and thereby undermine—the demonstrable legislative preferences of Congress." James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005); see also James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999).

8. Fraenkel, *supra* note 7; J. Louis Warm, *A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation*, 23 MINN. L. REV. 255, 354–56 (1939) (describing judicial amendments of the Sherman, Clayton, Norris-LaGuardia, and National Labor Relations Acts).

9. 15 U.S.C. §§ 15, 17, 26 (2006); 29 U.S.C. § 52 (2006).

10. 15 U.S.C. §§ 1–7 (2006).

11. Lewis H. Van Dusen, *The Progress of Labor Law*, 14 TEMP. U. L. Q. 1, 13 (1939).

12. 29 U.S.C. §§ 101–115 (2006).

13. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006).

1991,¹⁵ and 2009,¹⁶ and the Americans with Disabilities Act (“ADA”)¹⁷ in 2008,¹⁸ in order to overturn judicial amendments and reinstate the laws Congress originally wrote.

Most laws, however, are not amended because the cost of restoring them to their original purpose is too great. Instead, most of these laws linger on, hobbled, ineffective, and despised. For example, the ADA was successfully amended in 2008 only because of the personal stake and strong support of Wisconsin Representative F. James Sensenbrenner, one of the ADA’s original authors. Even with the support of this powerful man, it took over a year to secure the passage of a Congressional amendment to overturn the judicial amendments.¹⁹ In 2007, at a press conference in support of restoring the ADA, Representative Sensenbrenner said:

The Supreme Court has slowly chipped away at the protections of the ADA, leaving millions of citizens vulnerable to discriminatory treatment. The court’s interpretation created a vicious circle for Americans with disabilities. It created a broad range of people who benefit from “mitigating measures,” such as improvements in medicine, who still experience discrimination from employers, yet have been labeled “not disabled enough,” to gain the protections of the ADA. This is unacceptable.

Today, we want to place the ADA rightfully back among our Nation’s great civil rights laws.²⁰

Unions have spent years lobbying for the enactment of the Employee Free Choice Act (“EFCA”), legislation that is a response to judicial amendments and intended to make union organizing easier.²¹ The EFCA and ADA amendment campaigns have required costly lobbying and powerful supporters. Most judicially amended laws, how-

14. See Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006) (enacted to overrule *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) and *Geduldig v. Aiello*, 417 U.S. 484 (1974)).

15. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (as codified and amended in 42 U.S.C. 1981 (1994)).

16. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

17. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006).

18. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

19. 154 CONG. REC. H8290, 1129–30 (daily ed. Sept. 17, 2008) (statement of Rep. Sensenbrenner).

20. Congressman Jim Sensenbrenner, Statement at ADA Restoration Act Press Conference (July 26, 2007), <http://sensenbrenner.house.gov/News/DocumentSingle.aspx?DocumentID=70169>.

21. Recently, the legislation has been unsuccessfully introduced a number of times. See, e.g., Employee Free Choice Act of 2009, H.R. 1409, 111th Cong.; Employee Free Choice Act, H.R. 800, 110th Cong. (2007); Employee Free Choice Act, H.R. 1696, 109th Cong. (2005).

ever, lack sufficiently powerful partisans and thus linger in their weakened state. The enervated Family and Medical Leave Act (“FMLA”), legislation to protect the right of employees to return to their jobs after taking unpaid leave to care for family members or for their own illness, and the Occupational Safety and Health Act (“OSHA”), legislation to promote safe workplaces, have long failed to achieve their purposes because no partisan with sufficient power and commitment to restore them to their original purposes has come forward.²²

The National Labor Relations Act, legislation created to promote equality of bargaining power between employers and employees, suffered judicial amendments almost immediately. It was these events, in the NLRA’s early days, that laid the legal foundation for the outcome in *Hoffman Plastics*. Indeed, the *Hoffman Plastics* majority opinion makes the connection explicit. Only by recovering that history can one understand this longstanding—and continuing—judicial dynamic and develop strategies to restore and protect worker rights. This Article recounts this history of the NLRA, the events leading up to *Hoffman Plastics*, and the impact that history and case law have had on worker rights as an essential foundation for constructing a strategy to reverse and end this pernicious longstanding dynamic.

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

Unions have been essential in ensuring that workers have the power to demand fair treatment and a fair share in the wealth of this nation.²³ Thus, the promise of jobs draws migrants to the United States in search of a better material and civic life, and unions and union membership have helped make jobs good jobs. Ironically, both immigrants and unions are often accused of being un-American and of undermining the economic welfare of the United States.²⁴ For example, the recent discussion around bailouts for American automo-

22. There is, of course, often debate as to Congress’s intent and whether that intent included giving courts the power to make policy decisions. See GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003).

23. See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984).

24. Prime proponents of anti-union positions are the National Right to Work Legal Defense Foundation and the National Right to Work Committee. According to the National Right to Work Legal Defense Foundation’s website, “No force is inflicting more damage on our economy, citizenry, and cherished democracy than the union bosses.” National Right to Work Legal Defense Foundation, How Can I Help?, <http://www.nrtw.org/hcih/> (last visited Oct. 31, 2009).

bile companies included attacks on the wages and benefits of unionized workers as forces responsible for the automobile industry's woes.²⁵ High percentages of immigrants to the United States support unions and unionization.²⁶ These immigrants are even willing to risk the jobs they came for and deportation. In *Hoffman Plastics*, immigrant workers took that risk and lost when they were fired for organizing a union, a penalty that all American workers face for organizing. The immigrant workers in *Hoffman Plastics* who lacked the legal right to work in the United States also, of course, faced penalties under immigration laws, including deportation. The Supreme Court majority in *Hoffman Plastics* effectively increased the penalty under immigration laws by using violation of those laws as grounds for also denying the right to a remedy under the NLRA.

Thus, citizenship status mattered in *Hoffman Plastics* only in the details of the excuse the Court would use to deny an NLRA remedy to an employee whose rights had been violated. The intellectual groundwork for that deprivation was created in cases that had, decades before, created a doctrine that even trivial employee wrongdoing relieved the employer of its NLRA obligations. That doctrine undermined the effectiveness of the NLRA and ignored NLRA language that required that remedies promote the Act's policies,²⁷ including promoting employee freedom of association, equality of bargaining power, and mutual aid or support; protecting forming and joining unions and employees' right to strike; and encouraging collective bargaining.²⁸ These NLRA policies and rights, and their enforcement by providing effective remedies, were intended to overturn decades of court decisions that had strengthened employer and corporate power.²⁹

Thus, the decisions that led to *Hoffman Plastics* destroyed employee freedom of association, equality of bargaining power, mutual aid or support, forming and joining unions, and promoting collective bargaining, thus violating the express command of section 10(c) of

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

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

27. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (2006) [hereinafter NLRA].

28. 29 U.S.C. §§ 151, 157, 163 (2006).

29. See Warren Woods & Altha Connor Wheatley, *The Wagner Act Decisions—A Charter of Liberty for Labor?*, 5 GEO. WASH. L. REV. 846, 854–57 (1937).

the NLRA.³⁰ Furthermore, relieving employers of their obligation to provide back pay or, indeed, any remedy to illegally fired workers makes it triply attractive to hire workers suspected of not being in this country legally. First, workers' fear of sanctions for violating immigration laws may make them timid about organizing. Second, if they dare organize, firing them defeats unionization. Third, *Hoffman Plastics* frees the employer from the customary remedy of back pay.³¹

The *Hoffman Plastics* majority was not unaware of these consequences. Rather, it dismissed the concerns of the National Labor Relations Board ("NLRB") and the Immigration and Naturalization Service ("INS")—the two expert federal agencies most affected by the outcome of the case—that denying a monetary remedy would actually undermine the enforcement of both immigration and labor laws.³² The Court also ignored the court of appeals majority decision that, under the law at the time, the discharged employee, Castro, had actually violated no law by working in the United States.³³

The *Hoffman Plastics* Court's decision to relieve a law violator of its obligations under the law on the premise of supporting the enforcement of another law only makes sense when placed within the NLRA's historical context, in which judges created barriers to remedies.³⁴ For example, courts have inappropriately imported into the NLRA's remedial scheme a contract doctrine that requires fired workers to engage in a job search to "mitigate" damages, even though the

30. NLRA § 10(c), 29 U.S.C. § 160(c) (2006).

31. Wishnie, *supra* note 3, at 216–17.

32. Brief for the National Labor Relations Board at 15, 32, *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595), 2001 WL 1597748. The court of appeals majority decision made similar points in support of its findings and also found that, under the law at the time, the discharged employee, Castro, violated no law by working in the United States. *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229, 240–43 (D.C. Cir. 2000).

33. *Hoffman Plastics*, 208 F.3d at 240–43.

34. See, e.g., Anne Marie Lofaso, Workplace Dissent, Democracy, and Justice (unpublished paper, on file with author). Lofaso discusses how employee rights to express their views about workplace conditions have been eroded through judicial amendments. In *NLRB v. Local U. No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464 (1953), more commonly known as "*Jefferson Standard*," the Supreme Court held that employee activity legal under the NLRA lost its legal protection when the courts saw the conduct as disloyal to the workers' employer. *Id.* at 477–78. This trend has continued in more recent cases. In each of these cases, the employer has taken adverse employment actions against employees for using speech to communicate an ongoing dispute with their employer and for criticizing that employer's behavior in that dispute. For a discussion of other recent cases, see Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act*, ISSUE BRIEF (Am. Const. Soc'y, Wash., D.C.) May 13, 2008, at 11–12, available at <http://www.acslaw.org/node/6664>.

NLRA contains no such requirements. Completely missing from the Court's menu of remedies is redress for the victims of the violator's actions and an analysis that is faithful to Congress' command that NLRA remedies promote the Act's policies.³⁵ The Court seems to have forgotten its oft-quoted observation that the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."³⁶

In *Hoffman Plastics*, the Court's dismissal of the unanimous positions of the two expert agencies—the NLRA and the INS—by substituting its own judgment was something the Supreme Court itself had forbidden as long ago as 1941:

A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. . . . But, in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. *The exercise of the process was committed to the Board, subject to limited judicial review.*³⁷

Sixty years ago, the Supreme Court endorsed court deference to the NLRB's expertise; yet, the *Hoffman Plastics* decision and oral argument have only contemptuous skepticism for the proposition that these two expert agencies could understand the impact that eliminating remedies would have on enforcing the law.

II. Oral Argument in *Hoffman Plastics*: Shifting Blame to the Victim

At oral argument in *Hoffman Plastics*, Chief Justice Rehnquist expressed concern—and even zeal—for ensuring that wrongdoers not be rewarded.³⁸ However, the violator of the NLRA, the respondent employer, was not the wrongdoer that concerned him. Rather, he and other justices saw the employer as the victim and strove to shift blame to the discriminatee in order to free the employer from its remedial obligations. Chief Justice Rehnquist stated:

35. NLRA § 10(c), 29 U.S.C. § 160(c) (2006).

36. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

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

38. Transcript of Oral Argument, *Hoffman Plastics*, 535 U.S. 137 (2002) (No. 00-1595), 2002 WL 77224.

Our decision in *Sure-Tan* followed this line of cases and set aside an award closely analogous to the award challenged here. There we confronted for the first time a potential conflict between the NLRA and federal immigration policy, as then expressed in the Immigration and Nationality Act (INA)

. . . .
For example, the Board was prohibited from effectively rewarding a violation of the immigration laws by reinstating workers not authorized to reenter the United States.³⁹

Justice Scalia contended that the discriminatee's inability to mitigate damages by securing legal employment in the United States and thus decrease the amount of back pay owed him by the employer was essentially equivalent to or greater than the employer's original violation.⁴⁰ Indeed, Justice Scalia saw the impossibility of mitigation of damages as an argument to prevent a wily discriminatee from taking advantage of a hapless employer. Otherwise, he argued: "If [the discriminatee is] smart he'd say, how can I mitigate, it's unlawful for me to get another job. . . . I can just sit home and eat chocolates and get my back pay."⁴¹

Under the NLRA, only the discriminator's intent matters. But the analysis advocated by justices who joined the *Hoffman Plastics*' majority "rewrote" the NLRA to shift that inquiry to reverse the roles of victim and victimizer. As Justice Scalia put it:

In most back pay situations where the employer has committed an unfair labor practice and dismisses an employee improperly, the *amount he's going to be stuck with for back pay* is limited by the fact that the person unlawfully fired has to mitigate. He has to find another job. If he could have gotten another job easily and doesn't do so, the employer doesn't have to pay. *Now, how is this unlawful alien supposed to mitigate?* . . . Mitigation is quite impossible, isn't it?

. . . .
I mean, but what you're saying is when both the employer and the employee are violating the law, we're going to—you're asking the courts to give their benediction to this stark violation of United States law by awarding money that hasn't even been worked for. I—it's just something courts don't do.⁴²

Given that back pay—and front pay—are standard remedies that involve payment of money that is not worked for and are remedies found under a wide range of state and federal labor, employment, and tort laws, it seems unlikely that a jurist of Justice Scalia's experi-

39. *Hoffman Plastics*, 535 U.S. at 144–45.

40. See Transcript of Oral Argument, *Hoffman Plastics*, 535 U.S. 137 (No. 00-1595), 2002 WL 77224.

41. *Id.* at 32–33.

42. *Id.* at 31, 32, 38 (emphasis added).

ence could be genuinely shocked—nor actually believe—that back pay is a flawed remedy because the money was not worked for. Furthermore, that position only returns the analysis to the reason the back pay remedy is owed at all: the employer’s violation caused the unemployment. In addition, Justice Scalia’s math is faulty. In a typical case, the employer has broken two laws in hiring and then firing the worker and should be responsible for remedying both violations. Under Justice Scalia’s view, the worker, who has only violated one law—entering the country illegally—should be punished for breaking that law and, in addition, be deprived of a remedy for not continuing to work in the United States.

Throughout the oral argument, all parties treated the obligation to mitigate damages and the limited palette of remedies under consideration as unalterable parts of the NLRA. In fact, section 10(c)’s language is more of a floor than a ceiling, requiring only that remedies promote the NLRA’s policies. Rather than considering how to obey Congress’ command under section 10(c), the justices focused only on ways to weaken NLRA rights and remedies.

Justice Kennedy’s contribution to the oral argument was to construct an entrapment defense that suggested that blame should be shifted from the employer to the union. He did this by speculating that the union had allowed undocumented workers to participate in the union organization campaign, thus inducing the employer to fire the employee-organizer. He also suggested that if the union allowed undocumented workers to participate in organizing, this conduct must have violated some law:

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

....

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

....

Here, *what you’re saying is that a union can, I suppose even knowingly, use illegal aliens on the workforce to organize the employer, knowing that by doing that the alien will still be entitled to back pay.* That seems to me completely missing from any calculus, from any equitable calculus in your brief. I just—and since it’s a more direct link, I’m quite puzzled by it.⁴³

43. *Id.* at 34–35 (emphasis added).

As explored in the next section, this discussion and the decision that flowed from it are the direct descendants of a judicial amendment that created the doctrine that two wrongs means that the NLRA wrongdoing employer has no obligation to remedy its violation, while the wronged employee has no remedy.

A. The Supreme Court Treated Jose Castro as Any Employee, No Better and No Worse

Chief Justice Rehnquist's majority opinion has a more serious tone than his statements at oral argument but, nonetheless, makes clear that the case's focus is on the worker's conduct, rather than the employer who has violated the NLRA. This is the case, even if legal sanctions specific to the employee's violation have been imposed. Immediately after Chief Justice Rehnquist recited the facts and procedural history of the case, he said:

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

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

Though we found that the employer [*Fansteel*] had committed serious violations of the NLRA, the Board had no discretion to remedy those violations by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts. Two years later, in *Southern S.S. Co.*, . . . the Board awarded reinstatement with backpay to five employees whose strike on shipboard had amounted to a mutiny in violation of federal law. We set aside the award, saying:

"It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important [c]ongressional objectives."

. . . Since *Southern S.S. Co.*, we have accordingly never deferred to the Board's remedial preferences where such preferences poten-

tially trench upon federal statutes and policies unrelated to the NLRA.⁴⁴

Of course, given that the NLRB is required to enforce only one law, it is not surprising it would be “singled-minded” in its zeal for enforcing the NLRA, though not to the extent suggested by Justice Rehnquist. Justice Rehnquist was certainly correct in his observation that the courts have refused to defer to Board remedies.⁴⁵ He was, however, wrong that the Board’s remedies were mere preferences and wrong about which body was enforcing Congress’ intent.

Indeed, in drafting the NLRA, Congress anticipated views such as those of Justice Rehnquist and cautioned against making the NLRA into a general remedy for all ills related to the workplace when cases involved violations of law and civil order in addition to violations of the NLRA.⁴⁶ The two cases Justice Rehnquist relied on in *Hoffman Plastics—NLRB v. Fansteel Metallurgical Corp.* (“*Fansteel*”)⁴⁷ and *Southern S.S. Co. v. NLRB* (“*Southern Steamship*”)⁴⁸—were decided by the Supreme Court in 1939 and 1942. In *Fansteel* and *Southern Steamship*, employees struck in response to serious employer mistreatment and legal violations, including refusal to recognize and bargain with the employees’ union representative,⁴⁹ and were later charged with trespass, mutiny, and other violations as part of the acts of striking. Of strikes, the NLRA says: “Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”⁵⁰ The outcome of these two cases limited both NLRA remedies and the right to strike.

44. *Hoffman Plastics*, 535 U.S. at 142–44 (quoting *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1939); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

45. See ELLEN DANNIN, *TAKING BACK THE WORKERS’ LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* 99–116 (2006).

46. See S. REP. NO. 573, at 17 (1935), *reprinted in* 2 *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935*, at 2316–17 (1949); see generally Note, 48 *HARV. L. REV.* 630, 653–54 (1935) (reviewing discussions related to these issues shortly before the Wagner Act was introduced into Congress).

47. 306 U.S. 240 (1939).

48. 316 U.S. 31 (1942).

49. In connection with the pendency of the NLRA, the Senate noted that 50,242,000 working days were lost every twelve months to labor disputes and that “at least 25 percent of all strikes have sprung from failure to recognize and utilize the theory and practices of collective bargaining.” S. REP. NO. 573, at 1–2 (1935), *reprinted in* 2 *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935*, at 2301 (1949).

50. NLRA § 13, 29 U.S.C. § 163 (2006).

In *Fansteel*, company employees organized a union shortly after the NLRA was enacted and requested that their employer bargain.⁵¹ Rather than obey the law, the employer refused to recognize and bargain with the union and, instead, engaged the aid of an anti-union employer group to create a company union and hired an industrial spy and provocateur. After weeks of employer refusals to bargain, the workers struck by occupying two buildings. Employer efforts to dislodge them included the use of force and violence and a state court injunction. The strikers finally left after emetic gas was used, and some were found guilty of contempt, trespass, and related acts under state law. Several served jail sentences and were fined.

Meanwhile, the employer continued its refusal to obey the NLRA, including, among other things, installing a company union (an act that violated section 8(a)(2)) and offering reinstatement to any striker who was willing to abandon their rights under the NLRA (acts that violate section 8(a)(3)). This should have been an easy case with regard to the remedy. Employees who violated trespass and other laws and who had been found in contempt of the injunction were not refused reinstatement, as long as they renounced their NLRA rights.

The *Fansteel* majority, however, had difficulty limiting an employer's right to choose whom to hire or refuse to hire, even when those acts violated the NLRA:

We find it unnecessary to consider in detail the respective contentions as to respondent's offer of reemployment, for we think that its action did not alter the unlawful character of the strike or respondent's rights in that aspect. The important point is that respondent stood absolved by the conduct of those engaged in the 'sit-down' from any duty to reemploy them, but respondent was nevertheless free to consider the exigencies of its business and to offer reemployment if it chose. In so doing it was simply exercising its normal right to select its employees.⁵²

The dissent by Justices Reed and Black explained why allowing the employer's traditional rights of hire to trump the NLRA and clear congressional intent was not appropriate:

51. These facts are taken from the decisions in *Fansteel Metallurgical Corp. v. Lodge 66 of the Amalgamated Ass'n of Iron, Steel and Tin Workers of N. Am.*, 14 N.E.2d 991 (Ill. App. Ct. 1938), and *In re Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930 (1938), as well as Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275 (1939). See also Nathaniel L. Nathanson & Ellis Lyons, *Judicial Review of the National Labor Relations Board*, 33 ILL. L. REV. 749 (1939) (Fansteel's anti-union behavior was not unique in this period).

52. *Fansteel Metallurgical Corp.*, 306 U.S. at 259.

None on either side of the disputed issue need be suspected of ‘countenancing law-lessness,’ or of encouraging employees to resort to ‘violence in defiance of the law of the land.’ Disapproval of a sit-down does not logically compel the acceptance of the theory that an employer has the power to bar his striking employee from the protection of the Labor Act.

The Labor Act was enacted in an effort to protect interstate commerce from the interruptions of labor disputes. This object was sought through prohibition of certain practices deemed unfair to labor, and the sanctions adopted to enforce the prohibitions included reinstatement of employees. To assure that the status of strikers was not changed from employees to individuals beyond the protection of the act, the term employee was defined to include ‘any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . .’ s. 2(3), Act of July 5, 1935. Without this assurance of the continued protection of the act, the striking employee would be quickly put beyond the pale of its protection by discharge.⁵³

In other words, after the enactment of the NLRA, employers retained the right to hire or fire whomever they wished, for any reason they wished, as long as that reason was not itself a violation of the NLRA. Given that the employer’s only ground for denying reinstatement was support for the employees’ support for their freely chosen union, and that the employer reinstated even workers who had violated laws and been found in contempt of court—as long as they forsook their union, the remedy in *Fansteel* should have been uncontroversial. Indeed, such a distinction itself was evidence of illegal discrimination.⁵⁴ However, even though the employer was unconcerned about re-employing employees who had violated the court order and state law, the Supreme Court majority was zealous about supporting the employer’s right not to offer reinstatement to the strikers who refused to forsake their NLRA rights.

The second case the *Hoffman Plastics*’ majority pointed to, *Southern Steamship*, also involved workers who struck in reaction to their employer’s labor law violations. As in *Fansteel*, serious employer violations of labor law, including refusal to recognize and bargain with their union, led to a one-day peaceful sit-in strike aboard the steamship. When the ship reached its destination, the employer fired the five crew members who had been most active in the strike. Professor Ah-

53. *Id.* at 266.

54. One way of viewing the employer’s offer of reinstatement to lawbreakers who were willing to abandon their union is as impeaching its later defense against hiring pro-union employees—that it did not want to employ lawbreakers.

med White's account of these events included parallels with *Fansteel* in the Court's interpretation of NLRA rights.

This, it seemed at the time, constituted another violation of the Wagner Act and in the view of the union, the Board, and the Third Circuit Court of Appeals, clearly warranted the standard remedies of reinstating the fired strikers and awarding them back pay. But when the matter was finally decided by the Supreme Court, the Court found against the Board and the seamen. It held that a shipboard strike constituted an act of mutiny, a felony under federal law, that the strike aboard the *City of Fort Worth* was illegal and unprotected, and that the Board therefore could not remedy the discharges by ordering that the seamen be reinstated and provided back pay.⁵⁵

Other similarities to *Fansteel* included the Supreme Court's treatment of the employer labor law violator and the employees.

Southern Steamship held that the mere unlawfulness of a strike limited the Board's remedial powers and with this the right to strike. The Court justified this rule by speculating widely as to the inherent risks of mutiny. In so doing it established this kind of speculation as a legitimate mode of analysis for courts to engage in to test the limits of the Board's remedial powers and the reach of the Act's protections. In fact, *Southern Steamship* established a clear rule to the effect that the Board's remedial powers and the Act's protections should yield *wherever* they came into conflict with other federal statutes or policies.⁵⁶

Thus, in these cases the Court laid the foundation for *Hoffman Plastics*. In all three cases, the Court ignored the employer's legal violations, the workers' motives⁵⁷ to assert their legal rights and resist their employer's lawless behavior, and the section 10(c) requirement that NLRA remedies promote its policies. Furthermore, in each case, the Court "amended" the law to include provisions Congress had rejected when it drafted the law.⁵⁸ In its place, the Court created a quasi-equitable doctrine that denied remedies to employees the Court saw as having unclean hands. Accompanying that innovation was a haphazard decision-making process based more in speculation than in a careful application of law to facts.

A contemporaneous analyst of *Fansteel* observed:

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

56. *Id.* at 280–81 (emphasis in the original).

57. See Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW & HIST. REV. 45, 48 (2006) (arguing that the sitdowners were motivated to engage in legal practice, including enforcing the NLRA and the U.S. Constitution).

58. See *infra* Part II.B.1–4.

No single decision ever shapes inflexibly the judicial approach to a complex and genuinely troublesome problem. The emotion-ridden issues of employee misconduct, packed as they are with implications for so many of the basic conflicts of society, are least of all susceptible to solution at one stroke. If the analysis here made is accepted, it is unfortunate that the Court—confronted with those issues—appeared to treat the mere fact of violation of state law as so nearly conclusive a touchstone of judgment.⁵⁹

However, there was not just one case, even at that time. The *Fansteel* majority built on *Consolidated Edison Co. v. NLRB* (“*Consolidated Edison*”),⁶⁰ a 1938 case in which the employer had also illegally refused to recognize its employees’ choice of representative. Today, *Consolidated Edison* is known, not for the violation, but for dictum that judicially amended and limited section 10(c). The *Consolidated Edison* majority observed that, in giving the NLRB the power to require affirmative action, Congress had, “of course,” excluded remedies that were punitive.⁶¹ In fact, Chief Justice Rehnquist relied on *Consolidated Edison* in a footnote where he considered whether it provided other grounds to free the law-breaking employer of any obligation to remedy its violations:

Because the [NLRB] is precluded from imposing punitive remedies . . . it is an open question whether awarding backpay to undocumented aliens, who have no entitlement to work in the United States at all, might constitute a prohibited punitive remedy against an employer. . . . Because we find the remedy foreclosed on other grounds, we do not address whether the award at issue here is “‘punitive’ and hence beyond the authority of the Board.”⁶²

B. The Judicial Amendments On Which *Hoffman Plastics* Is Built

The judicial amendments relied on by the *Hoffman Plastics* majority differ from precedent and doctrine—although they have now become precedents and doctrine—by the processes through which they arose and the arc of their development. Their dynamics, which will be discussed in this section, include: (1) providing by judicial decision

59. Hart & Prichard, *supra* note 51, at 1327.

60. *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938).

61. *Id.* at 235–36; *see also* *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). Justice McReynolds and other justices who dissented from the decision upholding the constitutionality of the NLRA in *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1936), joined the majority in decisions that made the NLRA less effective, including *Consolidated Edison* and *Fansteel*. *See also* ATLESON, *supra* note 5 (Professor Atleson observes that attention must be paid to courts’ use of the words “of course,” and that those words signal areas where the courts override the NLRA’s language and congressional intent.).

62. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 n.6 (2002) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 905 n.14 (1984)).

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making what Congress had refused; (2) making the NLRA a general law to right all wrongs; (3) using eligibility for remedies to displace legal rights; and (4) recasting NLRA rights and purposes as individual rather than communal rights.

Not only were these elements of judicial amendments discussed by early twentieth century legal scholars, the term “judicial amendment” was also in use then. Many scholars in that era described and decried the judicial amendments of their day as lawless decision making but were unsuccessful in ending them. In fact, even judicial amendments that directly contradict the NLRA’s language are now treated, not just as black letter law, but as if they are the law Congress enacted.

It has long been forgotten by most of us that these concerns and insights of scholars in the early twentieth century even existed. However, their language and analysis are so incisive and relevant to labor law today that paraphrasing rather than letting them speak to their progeny, would not be as clear as their own words.

1. Providing by Judicial Decision That Which Congress Rejected

The *Fansteel* majority established as law provisions that Congress had rejected when it enacted the NLRA and earlier legislation. For example, in its May 1, 1935 report,⁶³ the Senate reviewed, and Congress rejected, a number of proposals that would later become “law” through the process of judicial amendment. The report concluded: “Proposals such as these under discussion are not new. They were suggested when section 7(a) of the National Industrial Recovery Act was up for discussion, and when the 1934 amendments to the Railway Labor Act were before Congress. In neither instance did they command the support of Congress.”⁶⁴

Immediately after the NLRA became law, commentators decried what they called “judicial amendments” and the tendency of judges to reinsert common law concepts into laws that had been expressly enacted to displace those very concepts.⁶⁵ Restrictions rejected by Con-

63. S. REP. NO. 573, at 17 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2316–17 (1949).

64. *Id.*

65. See, e.g., Note, 52 HARV. L. REV. 970, 973 n.28 (1939); Edward Scheunemann, *The National Labor Relations Act Versus the Courts*, 11 ROCKY MTN. L. REV. 135, 145 (1939); Warm, *supra* note 8. For an extended history of the process of judicial amendments, see GREGORY, *supra* note 5; ATLESON, *supra* note 5; and Klare, *supra* note 5.

gress but which, nonetheless, became part of the law through *Fansteel's* judicial amendments to the NLRA included:

Prohibiting, *e.g.*, sitdown strikes . . . strikes accompanied by systematic violence and intimidation, strikes for a closed shop . . . strikes for the checkoff, strikes to prevent the use of materials, equipment or services . . . strikes to cause the commission of an illegal act or the omission of a legal duty, violation of local civil or criminal laws during the course of a labor dispute, and interference with the omnibus rights of any person enjoyed by him under the Constitution or laws of the United States.⁶⁶

Thus, *Fansteel* achieved what lobbying during and after the pendency of the NLRA had not, and it laid the groundwork for *Hoffman Plastics*.

2. Making the NLRA a Law to Right All Wrongs

The *Fansteel* and *Hoffman Plastics* majorities justified denying remedies and protections to workers injured by employers who engaged in a long course of lawlessness on the grounds that the judges were simply enforcing the law. In *Fansteel*, workers who had struck in response to employer lawlessness had no remedy for employer violence and intimidation during the sit-down strike because, rather than focus on NLRA rights and remedies, the Court was bent on enforcing state civil and criminal laws. Doing so overwrote the NLRA with irrelevant common law doctrines. As a result, the Court denied NLRA remedies to employees on the ground that they had violated state civil or criminal laws during the strike, and did so even though the employer was willing to reinstate other employees who had committed similar acts, as long as the employees gave up their rights under the NLRA. The *Hoffman Plastics* majority also expressed concern about rewarding employees and workers who had violated other laws, even though this was a concern their employer did not share. In both *Fansteel* and *Hoffman Plastics*, the employees had already suffered sanctions in the proper tribunals for violating the laws that so concerned the Court.

In 1935, Congress stated:

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

66. Note, *supra* note 65, at 971 n.9.

. . . .

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

The only results of introducing proposals of this sort into the bill, in the opinion of the committee, would be to overwhelm the Board in every case with countercharges and recriminations that would prevent it from doing the task that needs to be done. There is hardly a labor controversy in which during the heat of excitement statements are not made on both sides which, in the hands of hostile or unsympathetic courts, might be construed to come under the common-law definition of fraud, which in some States extends even to misstatements innocently made, but without reasonable investigation. And if the Board should decide to dismiss such charges, its order of dismissal would be subject to review in the Federal courts.⁶⁷

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

As soon as the strike took place the company announced that the striking employe[e]s were fired, and therefore contended before the Board and the courts that they were no longer employe[e]s, could obtain no benefit from the Wagner Act, and therefore could not be reinstated. The act provides “the term ‘employe[e]’ shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice.” To the casual observer and to the Board that seems to dispose of the contention of the company, for there was no question but that the strike here was in consequence of a series of unfair labor practices on the part of the employer. Nevertheless, the Court reversed the ruling of the Board and sustained the contention of the company on the grounds that Congress had not intended to include within the definition of employe[e], anyone who engaged in unlawful conduct, even though his conduct was engendered by unfair labor practices of an employer in the first place. It is submitted that the decision reads a restriction into the act which was not placed there by Congress. In that sense the decision represents on this point a “judicial amendment.”⁶⁸

67. S. REP. NO. 573, at 16–17 (1935), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2316–17 (1949) (citations omitted) (emphasis added); *see also* Scheunemann, *supra* note 65, 145–46; Note, *supra* note 65, 974–76 (referring to *Fansteel* and *NLRB v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir. 1938)); Woods & Wheatley, *supra* note 29, at 859–61. For an example of discussions related to these issues shortly before the Wagner Act was introduced into Congress, *see* Note, *supra* note 46, at 653–54.

68. Scheunemann, *supra* note 65, at 145. In 1939, Professor Chester C. Ward observed:

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Cases from *Fansteel* through *Hoffman Plastics*—and continuing today—have created a type of reverse preemption of the NLRA. In effect, although the Constitution says federal laws shall be the supreme law of the land,⁶⁹ the Court appears to have judicially amended the Constitution to add “except for the NLRA.” Thus, rather than having federal law preempt conflicting state law, the Court has created a special doctrine allowing this nation’s most basic labor law to be preempted by other laws—state or federal—when those other laws are the source for legal misdeeds by employees. The result of doing so is to free a lawbreaker from remedying its unfair labor practices.

3. Using Eligibility for Remedies to Displace Legal Rights

The Court’s decision in *Hoffman Plastics* follows a tradition of ignoring and misreading NLRA policies and text. In *Fansteel*, the Court displaced what should have been a focus on the appropriate remedy for the discharged workers with the inappropriate focus on whether the strikers retained their status as employees. The NLRA’s broad definition of employee shows why such an inquiry is inappropriate: employee “shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice”⁷⁰

While engaging in that irrelevant inquiry, the Court ignored the NLRA’s provision on remedies: section 10(c). As enacted by Congress, judgment as to the remedy to be ordered “under Section 10(c) must be a disciplined judgment, guided and confined by the necessity of giving a reasoned explanation of the relation between the grounds of judgment and the effectuation of the policies of the Act.”⁷¹ Just as the *Fansteel* majority ignored the command of section 10(c), so too did the

Bizarre interpretations of the Act indicate that the courts sometimes read generally rather than specifically. [In one case, among other examples,] the court amazingly misconstrued the Board’s jurisdiction to depend upon the existence of a “labor dispute” as defined in § 2(9), and then, more amazingly, misconstrued that definition to require a proximate relation of employer-employee, after quoting the words of the statute, which are exactly the reverse.

Chester C. Ward, “Discrimination” Under the National Labor Relations Act, 48 YALE L.J. 1152, 1154–55 n.21 (1939).

69. U.S. CONST. art. VI, cl. 2.

70. 29 U.S.C. § 152(3) (2006). Labor dispute is defined in 29 U.S.C. § 152(9) (2006).

71. Hart & Prichard, *supra* note 51, at 1315. The Supreme Court in *Fansteel* not only judicially amended the NLRA to release employers from remedies when employees had engaged in misconduct, it also attempted to amend the definition of employee by finding that once the sit-down strikers were discharged, they were no longer employees and thus were not entitled to a remedy. *Id.* at 1309–17. It did so even though the Senate Report on the NLRA clearly took the contrary position. *Id.* at 1311.

Hoffman Plastics majority. While those issues might have had some relevance to the decision, they should not have been allowed to displace the one provision that spoke to the issue of remedy.⁷²

As an early commentator of the courts' treatment of the NLRA observed of the Supreme Court's *Fansteel* decision:

It converts the actual problem of the effect of misconduct as a qualification upon the Board's remedial power to correct actual wrongs by employers into a hypothetical problem of the employer's punitive power to obtain redress for hypothetical wrongs by employees. The Court's approach omits from consideration the provocation to the employees. It omits from consideration the effect of reinstatement upon the future of collective bargaining in the plant. It omits from consideration, finally, the importance of discouraging unfair labor practices which is the prime function of the Act. By imagining that there has been no strike it forecloses consideration of the genuinely difficult question whether the employer has actually "discharged" the employees to redress their wrongs to him or whether he is merely using those wrongs as a pretext to consummate his wrongs to them.⁷³

4. Recasting NLRA Rights and Purposes as Individual Rather than Communal Rights

Of the NLRA, Justice Thurgood Marshall observed: "These are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" ⁷⁴ Courts, however, have recast NLRA rights as individual rights, a change that fundamentally affects the NLRA's purposes and policies.⁷⁵ Congress intended NLRA rights to be collective rights as a means of promoting the well-being of society as a whole.⁷⁶ Around the

72. *Hoffman Plastics* is not an aberration. The courts have limited NLRA rights in cases involving strikes and refusals to acquiesce to employer bargaining demands. Ellen Dannin, *From Dictator Game to Ultimatum Game . . . and Back Again: The Judicial Impasse Amendments*, 6 U. PA. J. LAB. & EMP. L. 241 (2004). The courts have also limited NLRA rights in cases involving complaints about working conditions or employer actions. See Matthew W. Finkin, *Disloyalty! Does Jefferson Standard Stalk Still?*, 28 BERKELEY J. EMP. & LAB. L. 541 (2007); see also Anne Marie Lofaso, Address at the Working Class Studies Association Conference (June 6, 2009). In each situation, the court labeled actions that were specifically protected in the NLRA as disloyal and unprotected.

73. Hart & Prichard, *supra* note 51, at 1316.

74. *Emporium Capwell Co. v. W. Addition Comm. Org.*, 420 U.S. 50, 62 (1975) (referring to NLRA § 7 rights of self-determination).

75. Scheunemann, *supra* note 65, at 145.

76. Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 230 (2005).

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time of the NLRA's enactment, proposals were made that would have meant NLRA rights were individual rights. One contemporary observed:

Proceeding on the analogy between Board proceedings and a private employee-employer suit, this proposal ignores the fact that the Board is a public body representing the interest of the public in preventing employer practices which tend to promote industrial strife. . . . Where industrial strife is most bitter, and both sides are likely to be provoked into overstepping the bounds, these proposals withdraw the Act and throw the situation back to the anarchy of the pre-Wagner Act period.⁷⁷

C. Limiting and Limited Remedies

The extent to which *Consolidated Edison's* dictum limiting remedies would hobble the NLRA was apparent immediately after that case issued⁷⁸ and made even clearer in *Fansteel*.⁷⁹ Those early cases progressively transformed the NLRA into a law limited to specific weak remedies despite leaving unchanged the broad command that remedies must effectuate the NLRA's policies. Because *Hoffman Plastics* involved discrimination against workers for their union activities, it was assumed that the only available remedies were (1) issuing a cease and desist order that the employer not violate the NLRA in the future; (2) ordering the employer to post a notice telling employees about their NLRA rights for sixty days; (3) ordering reinstatement of illegally discharged employees; and (4) making illegally discharged employees whole for their losses through back pay with interest but less any interim earnings.

Seeing NLRA remedies as limited in this way created a conundrum for the *Hoffman Plastics* majority. The employer would violate immigration laws if it reinstated an illegally discharged employee, and this option had been expressly eliminated by *Sure-Tan, Inc. v. NLRB*.⁸⁰ Even sixty days of back pay would reward an employee who was illegally in the country and thus had no right to work. The *Hoffman Plastics* majority created a new remedial barrier. It treated as an employer right and an employee obligation that the employee must work in order to decrease the employer's back pay. Jose Castro could not legally work in the United States. The Court majority saw his inability to work

77. Note, *supra* note 65, at 975.

78. Ralph M. Goldstein, *Effectuating the Policies of the National Labor Relations Act*, 20 B.U. L. REV. 74, 76-77 (1940).

79. See *supra* note 61 and accompanying text (discussing *Consolidated Edison's* role in the *Fansteel* decision).

80. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984).

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as precluding any back pay remedy. Thus, the only remedies available were the cease and desist order and a brief period of notice posting.

It is not that these two remedies have no value. A cease and desist order provides the basis for contempt remedies if there are further legal violations, and employees should know their rights under the NLRA, even for the brief period of the notice posting. Employers are not required to post notices about NLRA rights except as part of a remedy for violations. As a result, this remedy is the only opportunity for workers to read these rights at their workplace, as is required for other state and federal workplace rights. The loss of the other two remedies, however, removes incentives for a law-breaking employer to comply with the law in the future. More important, this result falls far short of the role Congress meant remedies to play in promoting NLRA policies.

The discussion so far has examined longstanding problems in judicial decision making that have allowed judges to effectively rewrite the NLRA. Merely identifying the problem, however, does nothing to remedy it. In order to find an effective remedy, one must understand why this decisional dynamic exists. In fact, as discussed in the next Part, events around *Fansteel* provide us with evidence that mere identification of problems is not sufficient to change the dynamic. Contemporaneous commentators have carefully analyzed *Fansteel* and clearly explained the problems created by the majority decision, including predicting the outcome seen in *Hoffman Plastics*.

III. *Hoffman Plastics* Was Predicted and Predictable

As already discussed, the effects of *Fansteel* have been to give employers rights that Congress denied them in enacting the NLRA to impose double punishment on injured employees, while relieving wrongdoing employers of remedial obligations, and to weaken incentives to comply with the law. Furthermore, it has endorsed decision making based on speculation rather than the facts in the record; it has allowed common law to trump the NLRA, even in cases where Congress had overruled the common law; it has demonstrated contempt for the NLRB as an expert agency; and, finally, it has demonstrated a predisposition to ensuring that employer rights trumped employee rights under the NLRA. These effects were already apparent when *Fansteel* was decided, and, yet, that knowledge was insufficient to stem the practices that would lead to outcomes such as that in *Hoffman Plastics*.

For example, in 1939, Henry L. Hart, Jr. and Edward F. Pritchard, Jr.—both major figures in law and politics at this time—observed that even when employers engaged in egregious violations, the courts relieved them of remedial obligations if employees or unions had committed some act the judges saw as violating “good order.”⁸¹ Also in 1939, then Northwestern University School of Law Professor Nathaniel L. Nathanson and Northwestern law student Ellis Lyons warned of *Fansteel’s* likely effects, including promoting the very practices the NLRA was enacted to end:

The real danger of the *Fansteel* decision lies in the possibility that some of the lower federal courts may construe it as authority for preventing effective remedy of employer violations of the statute whenever employees have been guilty of unlawful conduct. Such an attitude would, in turn, have the unfortunate consequences of suggesting to some employers the attractiveness of provoking violence in order to escape their own obligations. The likelihood of such abuses might have been diminished had the Chief Justice been less loathe to indicate the limitations of his doctrine and more willing to balance his condemnation of the strikers with equally trenchant criticism of the employer. If, in ultimate effect, the decision is to advance rather than retard the cause of industrial peace, which the Chief Justice intended to serve, the qualifications implicit, if not explicit, in the holding must be faithfully observed by those who profess to follow it.⁸²

Hart and Prichard urged the courts to be aware of the danger that the 1939 *Fansteel* decision would cause judges to use irrelevant common law analysis in place of a section 10(c) analysis:

Judgment on the one hand may strive to take into account all relevant factors: the gravity of the misconduct, the extent of the provocation, the attitude of the parties when the heat of the strike has subsided, the effect of reinstatement upon the future of collective bargaining in the particular plant, the *in terrorem* value of denial of reinstatement in discouraging future misconduct by these and other employees, the *in terrorem* value of granting reinstatement in discouraging future unfair labor practices by this and other employers. . . . [J]udgment under Section 10(c) must be a disciplined judgment, guided and confined by the necessity of giving a reasoned explanation of the relation between the grounds of judgment and the effectuation of the policies of the Act.⁸³

Their warnings of the danger of unguided and undisciplined decision making based on speculation as to facts and motives foreshadowed the oral argument and majority decision in *Hoffman Plastics*.

81. Hart & Prichard, *supra* note 51, at 1304.

82. Nathanson & Lyons, *supra* note 51, at 770.

83. Hart & Prichard, *supra* note 51, at 1314–15 (emphasis added).

Both erased the fact that the case was about the employer's violating the law by firing a worker for his union activities. On that point, Hart and Prichard warned:

The other possible approach to "interpretation" . . . is one which conceives of the problem solely in terms of the employer's "normal rights of redress"—his rights "to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor practices." It is not enough to say in criticism of this approach that it ignores many relevant factors in the problem. It is necessary to say that it escapes meeting the real problem altogether. What the Chief Justice and Mr. Justice Stone are doing is to imagine first that there had been no strike [caused by the employer's illegal acts], to imagine next that the employees had done what they did, and then to decide what would have been the employer's rights to discharge his employees in that imaginary situation. . . . This reasoning would be satisfying except for the fact that there was a strike, and there were unfair labor practices.⁸⁴

Hart and Prichard observed that such a process "converts the actual problem of the effect of misconduct as a qualification upon the Board's remedial power to correct actual wrongs by employers into a hypothetical problem of the employer's punitive power to obtain redress for hypothetical wrongs by employees."⁸⁵ By losing focus on the importance of the NLRA's "prime function"—discouraging unfair labor practices—it foreclosed consideration of the genuinely difficult question of whether the employer had actually "discharged" the employees to redress their wrongs to him or whether he merely used those wrongs as a pretext to consummate his wrongs to them.⁸⁶

Also in 1939, Edward Scheunemann, of counsel to the NLRB, cautioned that the NLRA did not include power either to punish employees or to deny them its protections because they had committed conduct that was unlawful under other laws.

Punishment for that conduct is well taken care of by other legislation, and was not intended to be governed by this act. The court itself has recognized that fact in other decisions. Yet the effect of the court's decision here is to make the withdrawal of the protection of the Wagner Act another punishment for unlawful conduct of employe[e]s and to reverse the Board for its failure to do likewise.⁸⁷

84. *Id.* at 1315.

85. *Id.* at 1314–16.

86. *Id.* at 1316.

87. Scheunemann, *supra* note 65, at 146 (internal footnote omitted).

All these faults have continued to and through *Hoffman Plastics*. The opinions speak of legal issues as if there were only bilateral options, as did the majority in *Fansteel*:

The Chief Justice's opinion does not explain why a decision upholding the order of reinstatement would have placed a premium on resort to force instead of legal remedies, but makes the statement as if it were self-evident. . . . For clearly the strikers would not have been in a better over-all position as a result of their conduct. They would have suffered the positive discouragement of the state laws, which in this case were enforced (against the recalcitrant strikers) avowedly without leniency by an avowedly hostile court.⁸⁸

Judicial decision making of this sort violates the oaths federal judges swear upon when entering their offices. Federal judges swear, first, to "administer justice without respect to persons, and do equal right to the poor and to the rich" and to "faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States."⁸⁹ The second oath is one required of all federal employees to "well and faithfully discharge the duties of the office."⁹⁰

In both *Fansteel* and *Hoffman Plastics* it is difficult to understand the majority's apparent inability to engage in the basic process of adjudication. Both majority opinions fail to take into account that their reversal of the NLRB effectively condoned the employer's defiance of the law. Their apparent inability to consider that the *Fansteel* strikers and Jose Castro in *Hoffman Plastics* had already been punished, including time in jail for some of the strikers and heavy fines for contempt of court when they refused to end their strike, imposes a double punishment on workers who dared to exercise their rights to join a union. These outcomes, along with others already discussed, make it difficult not to be cynical about the judges' actions and not to see the decisions as intended to ensure the employer wins, no matter how tortured the reasoning to get to that point⁹¹—actions that violate the oaths federal judges swear.

Why, then, if the deficiencies of the analysis used in *Fansteel* were so obvious, did we see them used seventy years later in *Hoffman Plastics* and in many cases between and since? That these defective processes were understood and publicly discussed in the 1930s tells us more is

88. Hart & Prichard, *supra* note 51, at 1319.

89. 28 U.S.C. § 453 (2000).

90. 5 U.S.C. § 3331 (2006).

91. For a discussion of the Justices' motives in *Fansteel*, see Hart & Prichard, *supra* note 51, at 1318–23.

needed to promote enforcement of the NLRA than seeing and condemning these processes. The next part of this discussion examines evidence of the larger social dynamics that have promoted the sort of decision-making processes in *Fansteel*, *Southern Steamship*, *Consolidated Edison*, *Hoffman Plastics*, and many other cases not discussed in this Article.⁹²

IV. Confronting the Judicial Amendment Process

For workplace laws to operate as Congress intended, there must be, first, an understanding of the judicial amendment process, and second, the creation of strategies to check and even reverse it. Understanding requires noticing the decisional dynamic present in individual cases. Concern about the judicial amendment process and effects on law were part of Congress' deliberations as to the NLRA. Within four years of the NLRA's enactment, similar analyses and concerns were expressed.

When the courts begin to substitute their own judgment for that of the Board, or when they reverse the findings of the Board in the absence of a clear abuse of discretion, they are indulging in the kind of judicial intervention which . . . denies to administrative agencies the very effectiveness they were designed to achieve. It would be extremely unfortunate if this result should occur under the Wagner Act, for a flexible administrative procedure—freed as far as possible from the rigid and formal rules of courts of law—is more important today in the field of labor disputes than in any other field. Yet by means of unwarranted judicial intervention in the findings and procedure of the Board the act could be rendered totally ineffective.

. . . *It is entirely possible that amendments may from time to time be desirable, but, if so, they should come from the legislature and not from the courts.*⁹³

The process of common law decision making and judicial interpretation is a constant of our system, and the dynamic of judicial amendments of labor statutes existed during the late nineteenth century and through and past the NLRA's enactment.⁹⁴ What is difficult to understand is why there was sufficient support to enact a series of pro-labor laws, including the NLRA, yet, at the same time, a judiciary that felt free to impose its own views on the law. The next sections

92. Other key cases involving judicial amendments are discussed in ATLESON, *supra* note 5; DANNIN, *supra* note 45; GREGORY, *supra* note 5; Klare, *supra* note 5; James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004). R

93. Scheunemann, *supra* note 65, at 148 (emphasis added). R

94. *See supra* text accompanying notes 9–13. R

discuss forces that existed despite a general legal and social climate that made labor law and work issues more salient. Countervailing forces that weakened the NLRA and NLRB included opposition to unions and collective bargaining encouraged by economically powerful groups in support of ultra-conservative programs and a divided union movement. It is worth noting that, in some cases, similar forces and climates exist today.

A. Opposition to the NLRA

The formidable power arrayed against the NLRA when it was introduced into Congress makes its survival, at any level, remarkable. For example:

The roster of witnesses who opposed the passage of the Act in hearings before the Senate Committee on Education comprises a Who's Who of American industry, including representatives of the United States Chamber of Commerce, American Iron and Steel Institute, American Mining Congress, American Newspaper Publishers Association, Institute of American Packers, Cotton Textile Institute, and Automobile Manufacturers Association, to name but a few.⁹⁵

That opposition did not end with the NLRA's enactment. Employers that had engaged in wholesale refusals to abide by the labor law that preceded the NLRA⁹⁶ continued to engage in massive resistance to the new law.⁹⁷ Employer resistance included discriminating against employees for union activity, fostering company-unions, maintaining espionage systems, spreading anti-union propaganda, moving their location to avoid collective bargaining, employing professional union-wreckers, surveilling union meetings and activities, fostering anti-union movements,⁹⁸ and distributing posters to employers promoting resistance to the NLRA.⁹⁹ Activities such as these eventually impelled the Fansteel employees' sit-down strike.

Strategic employer resistance included passive and active refusals to comply with the law and efforts to gut the new law through amendments.¹⁰⁰ By 1937, when "the Wagner Act was declared constitutional, out of 200 'cease and desist' orders which had been issued against

95. Walter Gellhorn & Seymour L. Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 COLUM. L. REV. 339, 339 n.2 (1939).

96. 1 NLRB ANN. REP. 4 (1936).

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

98. Goldstein, *supra* note 78, at 75.

99. RICHARD C. CORTNER, *THE WAGNER ACT CASES* 96 (1964).

100. *See, e.g.*, Note, *supra* note 65; *see also* JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* VOLUME I

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employers committing unfair labor practices, none had been complied with,"¹⁰¹ and, in its first two years, the American Liberty League filed roughly one hundred injunction petitions as part of its anti-NLRB campaign.¹⁰² Contemporary commentators noted:

The National Labor Relations Act was passed in the teeth of a tenacious belief of employers that employees should not be permitted to bargain collectively through representatives of their own choice. On the very day following the National Labor Relations Board's first session fifty-eight legal luminaries, acting under the aegis of the American Liberty League, declared the Act to be unconstitutional; their pronouncement served as a model brief for the scores of injunction suits which practically brought to a standstill the Board's work during its first two years.¹⁰³

Members of the American Liberty League included heads of major companies and other American leaders.¹⁰⁴ Chief financial support for the American Liberty League came from J. Howard Pew; members of the DuPont family; George M. Moffett, president of the Corn Products Refining Co.; Alfred P. Sloan, president and chairman of General Motors; E. T. Weir, National Steel chairman; John Pratt, General Motors vice president and member of the General Motors board of directors; and famous supporters, such as Hal Roach, movie director and producer.¹⁰⁵

Employer resistance was reinforced by the issuance only a few weeks after the signing of the law of a manifesto by the National Lawyers Committee of the American Liberty League, a stronghold of anti-New Deal sentiment lavishly underwritten by the business

(1933–1937) 204–11 (1974) (internal footnote omitted) (recounting federal court injunctions halting NLRB proceedings).

101. F.L. Watson, Jr., Note, *Amending the National Labor Relations Act to Benefit Both Employers and Employees*, 24 VA. L. REV. 670, 670 (1938).

102. See generally CORTNER, *supra* note 99, at 93–96, 98–105 (explaining the obstacles that the NLRB faced in litigation). James Gross puts the total injunctions at 103. GROSS, *supra* note 100, at 206; 1 NLRB ANN. REP., *supra* note 96, at 46–50, 56; Joseph Kutten, Note, *Conflict of Jurisdiction Between Federal District Courts and the National Labor Relations Board*, 23 WASH. U. L.Q. 425 (1938) (examining problems attendant to the proliferation of suits enjoining NLRB hearings); Harry B. Merican, Note, *The Supreme Court and the National Labor Relations Act*, 26 GEO. L.J. 412 (1938) (discussing early Supreme Court treatment of the NLRA); Seymour S. Mintz, Editorial Notes, *Suits to Enjoin the National Labor Relations Board*, 4 GEO. WASH. L. REV. 391 (1936).

103. Gellhorn & Linfield, *supra* note 95, at 339–40; *Brief of the NLR Act*, 3 U.S.L.W. 1, 8 (1935) (summary of American Liberty League brief).

104. For a history of the American Liberty League, see GEORGE WOLFSKILL, *THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE, 1934–1940* (1962).

105. KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* 3–34 (2009); see also PETER H. IRONS, *THE NEW DEAL LAWYERS* 80–82, 98 (1982).

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community. The league's lawyers pronounced the Wagner Act unconstitutional and strongly implied that the right course for employers was to defy it and count on the courts to uphold their challenge of its validity.¹⁰⁶

The NLRB's first annual report published in 1936 described the immediate impact of this anti-NLRA campaign.

During its first month, and before the Board had opportunity even to announce its procedure, an incident occurred which was to stimulate injunction suits against the Board, and even to provide a sample brief for those wishing to attack the act. This was the publication by the National Lawyers Committee of the American Liberty League, on September 5, 1935, of a printed assault on the constitutionality of the act. This document, widely publicized and distributed throughout the country immediately upon its issuance, did not present the arguments in an impartial manner for the use of attorneys. It was not a review of the cases which might be urged for and against the statute. It was not a brief in any case in court nor was it an opinion for any client involved in any case pending. Under the circumstances it can be regarded only as a deliberate and concerted effort by a large group of well-known lawyers to undermine public confidence in the statute, to discourage compliance with it, to assist attorneys generally in attacks on the statute, and perhaps to influence the courts.¹⁰⁷

The American Liberty League's campaign continued for over a year. It would be difficult to assess the exact impact of this campaign of employer resistance to the NLRB just as the agency was setting up operations.¹⁰⁸ Sources of opposition were not always clear. For example, the district judge assigned to hear an important early injunction case that was the first ruling on the NLRA's constitutionality—Judge Merrill E. Otis of the Federal District Court at Kansas City, Missouri—was himself a member of the American Liberty League¹⁰⁹ and, yet, failed to recuse himself or reveal this information.

For nearly a year the members of the [NLRB] litigation staff engaged eminent counsel for industry before the Federal district

106. Raskin, *supra* note 97, at 947; *see also* Kuttan, *supra* note 102, at 425 (explaining that suits for injunctive relief often were paired with requests for declaratory judgment that the Wagner Act was unconstitutional). R

107. 1 NLRB ANN. REP., *supra* note 96, at 46–47; *see also* IRONS, *supra* note 105, at 244–45 (discussing impact of brief). R

108. Gellhorn & Linfield, *supra* note 95, at 339–41 (withholding discussion of early impact of employer resistance); *see also* GROSS, *supra* note 100, at 204–11 (detailing federal court injunctions halting NLRB proceedings); Kuttan, *supra* note 102, at 425 (examining problems attendant to the proliferation of suits enjoining NLRB hearings); Mintz, *supra* note 102. R
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109. IRONS, *supra* note 105, at 246; *Labor Act in the Courts*, 3 U.S.L.W. 1, 19 (1935); *Labor: Federal Regulation—National Labor Relations Act—Constitutionality—Commerce Power of Commerce—Collective Bargaining—Flour Mill*, 3 U.S.L.W. 10–11 (1935). R
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courts of every important industrial center in the country, hoping by the vigor of their counter attacks to discourage still more employers from bringing on what might very well have been a flood of suits too overpowering for a small staff to meet. Relief from this onerous responsibility came gradually, as it began to appear that the majority of both Federal district courts and circuit courts of appeals would sustain the Board's position that, under the act, the proper remedy for alleged irreparable damage by reason of Board activities does not lie in injunction proceedings but rather through review in an appropriate circuit court of appeals.¹¹⁰

Active opposition of this sort only began to dissipate when the Supreme Court upheld the constitutionality of the NLRA,¹¹¹ though, as discussed earlier, efforts to amend the NLRA through legislation and court actions continued.¹¹² In short, although a team of smart lawyers and economists had been assembled to meet the challenges of creating and preserving the NLRA when attacks on its constitutionality would be taken up in the regular course of investigating and trying NLRB cases,¹¹³ they were forced, instead, to spend those critical early years fighting injunctions brought to prevent even beginning the first stage of investigating claims of a violation. That fight involved attacks by well-funded groups that were implacably opposed to unions and collective bargaining.

B. Union Antipathy to the NLRA

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

To be sure, Senator Wagner's efforts to obtain enactment of his bill had powerful allies. The labor organizations brought strong and effective support to bear, considering that their membership was only about 3 million at the time. However, some of the older types of craft unions, fearful of the effect of some of the provisions of the bill upon the structure of their organizations, did not lend their support and may even have worked against it. At one critical stage in the battle on the House side, Chairman William J. Connerly, Jr. of the House Labor Committee came to my office to report that the head of one powerful union had given him the jitters about the bill.¹¹⁴

110. 1 NLRB ANN. REP., *supra* note 96, at 46.

111. Raskin, *supra* note 97, at 948.

112. *See supra* Part IV.A.

113. *See* David Ziskind, *The Use of Economic Data in Labor Cases*, 6 U. CHI. L. REV. 607 (1939); *see also* CORTNER, *supra* note 99 (describing the early history of the NLRB).

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

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Indeed, the American Liberty League attack might have had less impact had the American union movement supported the new law and agency they had lobbied for. Unfortunately, the union movement “split into two warring camps in the fall of 1935 and reduced the support which a unified labor movement would otherwise have supplied it.”¹¹⁵ The American Federation of Labor (“AFL”) “turned much of its wrath on the Labor Board when the Board accepted election petitions from [Congress of Industrial Organizations (“CIO”)] unions on industrial lines, instead of yielding to the AFL view that the demarcation lines of craft unions prevail.”¹¹⁶ Disputes between craft unions—allied formally or informally with the new CIO and industrial unions and allied with the AFL as to the appropriate unit for representation—broke out immediately.¹¹⁷ Bargaining unit issues led to a firestorm of AFL attacks on NLRB as a “kangaroo court” with a CIO bias and by the CIO for NLRB pro-AFL bias.¹¹⁸ In addition to fighting over the unit in which a union election would be held,¹¹⁹ these inter-union battles included fighting for NLRA amendments that would put the other organization at a disadvantage.¹²⁰

As a result, the NLRB was seen more as terrain on which to conduct battle than as support in the larger goal of increasing union membership.¹²¹ The NLRB strove to be neutral but was, nonetheless, seen by the contesting unions as choosing sides.¹²² As one contemporaneous observer put it: “In these disputes the Board is in an unenvi-

115. CORTNER, *supra* note 99, at 90; *see also* GROSS, *supra* note 100, 244–53 (describing the conflict within the union movement). R

116. Raskin, *supra* note 97, at 947; *see also* Note, *Effect on the A.F. of L.-C.I.O. Controversy of the Determination of Appropriate Bargaining Units Under the National Labor Relations Act*, 47 *Yale L.J.* 122 (1937). R

117. William T. Little, *Labor Law—Appropriate Unit for Collective Bargaining*, 12 *Wis. L. REV.* 367, 367 (1937). The AFL had been ambivalent about the NLRA’s inclusion of units for collective bargaining in addition to crafts, but in the end, did support the NLRA’s enactment. Kenneth Casebeer, *Drafting Wagner’s Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relation Act*, 11 *INDUS. REL. L.J.* 73, 90 (1989).

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

119. *See* Note, *supra* note 116. R

120. Note, *supra* note 65, at 980–81. The author referred to this as “a period marked by bitter interunion conflict.” *Id.* at 982. Problems with union support for the NLRA began even before it had become law. Keyserling, *supra* note 114, at 207. R

121. CORTNER, *supra* note 99, at 90–92 (1964); Raskin, *supra* note 97, at 947. R

122. *See generally* Cohen, *supra* note 118 (describing the conflict over how bargaining units were defined by the NLRB); *see also* Little, *supra* note 117, 367–69 (providing an overview of cases and issues in early cases). R

able position, for any decision it renders must necessarily aid either of the rival organizations”¹²³

C. The Effects of Employer Opposition and Union Infighting

Workers impatient for the rights promised under the new law were soon involved in a wave of strikes that swept the country. These included sit-down strikes¹²⁴ that, by involving workers willing to occupy their place of work in defiance of their employer’s ownership rights raised the level of emotion. Indeed, the Fansteel sit-down strikers “claimed that they had rightfully occupied the factories in self-defense of their right to organize, protected under the recently enacted [NLRA].”¹²⁵

Often forgotten today is that the “number of union members in this country went from three million in 1935 to almost 15 million in 1947.”¹²⁶ A five-fold increase in such a short time is remarkable, and even more so given that World War II meant that potential union members were in the military, although women and others—also potential union members—entered the workforce for the first time. Given the power of the anti-NLRA campaigns, it is surprising that employer resistance declined markedly in the period immediately after the NLRA was held constitutional. Early Court successes led employers to prefer to settle anti-union discrimination cases, even when they involved very large amounts of back pay. The cases involved “amounts ranging from \$10,000 to \$51,000” and were settled “without even going to hearing before the trial examiner. . . . Such settlements totaled \$131,083.85 in 1938 for the Board’s Second Region (New York) alone.”¹²⁷ That was, of course, before *Fansteel* and other cases involving judicial amendments were issued. In other words, in that period, the courts sent powerful messages about rights and respect for the rule of law with each case decided. This turnaround by employers is even more dramatic when one considers the aggressive steps taken by the American Liberty League in 1935 and 1936 to destroy the NLRA.

All these complex forces still exist. As discussed earlier, workplace laws—old and new—continue to be weakened as a result of judicial

123. Note, *supra* note 116, at 124.

124. Woods & Wheatley, *supra* note 29, at 846–62 (quoting from state *Fansteel* cases).

125. Pope, *supra* note 92, at 20; *see also* ATLESON, *supra* note 5, at 44–66.

126. Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1126 n.13 (1986). For a detailed discussion of that period, see JAMES B. ATLESON, *LABOR AND THE WARTIME STATE: LABOR RELATIONS AND LAW DURING WORLD WAR II* (1998).

127. Ward, *supra* note 68, at 1152 n.6.

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amendments. It is worth considering, however, whether it is possible to end this erosion of workplace rights.

V. What, Then, Is to Be Done?

The evidence is clear that the question every generation faces is: How do we preserve and enforce the rights we have gained through legislation? Just a few years after the NLRA was enacted, Osmond Fraenkel concluded that the processes that lead to judicial amendments would persist; however, he contended, it was possible to take steps to improve the administration of justice. He said:

Yet it remains inevitable that there should be judges who set themselves up as society's mentors and consider themselves entitled to determine what shall be legal and to pronounce what they believe wise. These men, with the most conscientious motives, destroy statutes either by declaring them unconstitutional as against "natural law," or by emasculating them through interpretation when higher authority has barred the other way. Since they exemplify a persistent type of human thinking and feeling, and since judges are seldom chosen for their psychological qualities, it is foolish to hope that we shall ever be without them.

Therefore, the reformer must be prepared to progress slowly. Often, indeed, he will find that judges send him backward half a pace for every step the legislatures send him ahead. Yet, there *is* forward motion as anyone can testify who was familiar with the state of labor law a brief quarter of a century ago. With persistence and skill we should make even greater strides in this field in the near future. Especially will this be so if the fates give the country judges who are men of good will.¹²⁸

It is likely that, had there been no *Fansteel*, *Southern Steamship*, or *Hoffman Plastics*, employee rights in the United States would not be much different than their present form. There are several impetuses that support this conclusion. First, there is the real problem of how to deal with employee misconduct so serious that an employer could not be expected to retain the employee and that such a situation will occasionally intersect with conduct protected by the NLRA. Second, employee acts of union support, employee mutual aid or protection, and other concerted actions are unlikely to be seen by employers or courts as positive characteristics in employees; rather, employers and courts are more likely to see them as disloyal and as making an employee unfit for employment. Third, employers and courts are likely to regard any employee misconduct as a serious problem. Fourth, our common law tradition views a job as the employer's possession and gives

128. Fraenkel, *supra* note 7, at 606.

employees a status not exactly that of trespassers, but certainly not of having property or other rights in a job, absent tenure. Employers are therefore normally given wide discretion to decide whom they employ.

These views are deeply held in our system and color the way law is interpreted.

If it is correct that these viewpoints are held—to a greater or lesser degree—by employers and judges, then we ignore them at our peril. Surely Congress did not intend that the NLRA's protections could be withheld from employees solely because they had engaged in the very actions protected by the NLRA. It is likely that Congress did intend that the NLRA's protections could be withheld for serious actions forbidden by law and affecting the employee's ability to do the job—but only if those serious actions were the actual reason for terminating the employment, as opposed to a convenient excuse for the employer to violate the law without penalty. The latter paradigm covers pretext cases, where the employer's real motive is an illegal one.

We know that Congress was aware of these issues when the NLRA was drafted. It might have been helpful had it addressed them more explicitly, since we can be confident that these issues will arise with some frequency. On the other hand, the big cases in this area, including *Fansteel*, *Southern Steamship*, and *Hoffman Plastics* are all actually pretext cases with facts that should have made the decisions easy. However, we must take seriously the question: If these were actually easy cases, why was it so difficult for the majorities in each case to make these distinctions?

Some parts of the answer are clear. The restricted NLRA remedies available under *Consolidated Edison* make remedies a subtractive process of list making, rather than a process of enforcing the broad command of section 10(c). The reasoning of the courts also confused issues of legal violations with issues of ordering the appropriate remedy for the violation found. However, these solutions were so obvious and easy that they tell us the real problems lie elsewhere.

To retain laws Congress enacted, we must be prepared to identify and go where the real problems lie and to have a plan to address them. That plan must include a process that identifies areas where problems are likely to arise. It must also distinguish between the benign evolutionary operation of common law statutory interpretation and the rewriting of law under the guise of statutory interpretation. Certainly, far better than this legal treadmill of legislation, judicial

amendment, and, perhaps, re-legislation of the original law would be to change the dynamic that now exists.

One such strategy is mapped out in *Taking Back the Workers' Law—How to Fight the Assault on Labor Rights*.¹²⁹ It was used with great success by the NAACP Legal Defense Fund, starting in the 1930s with cases that led to the integration of southern law schools.¹³⁰ It has been used more recently and successfully by the anti-union National Right to Work Legal Defense Fund (“NRTW-LDF”). The NRTW-LDF says:

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

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

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

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

That’s exactly what we are doing with Right to Work issues through the Foundation’s program.¹³¹

The successes of both the NAACP Legal Defense Fund and the NRTW-LDF strategies show that such a strategy focused on enforcing the NLRA is a viable option. Both of those groups used a two-pronged campaign. One was a litigation strategy that used a group of knowledgeable, thoughtful, and creative people to formulate the outlines of that strategy, to adapt it to meet changed circumstances, and to execute the strategy.

However, neither relied only on litigation, and litigation alone is not sufficient to stem and reverse the erosion of NLRA rights. Both also relied on a values campaign. Protecting and expanding worker rights requires transforming our country’s values from those of individualism to the communal and democratic values of justice and social and industrial democracy, values that are embodied in the NLRA.¹³²

129. See generally DANNIN, *supra* note 45.

130. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (Vintage 2004).

131. NRTW-LDF, *Foundation Legal Strategy & Progress*, <http://www.nrtw.org/b/fl-sap.htm> (last visited Oct. 29, 2009).

132. See generally Dannin, *supra* note 76.

Both international and domestic law, including this country's founding documents, are important sources for improving worker rights,¹³³ because they are legal documents that resonate with this country's traditional values. Other laws also endorse the rights of workers and should be used to support the litigation and values campaign. These include the Clayton Antitrust Act, which declares: "[t]he labor of a human being is not a commodity or article of commerce,"¹³⁴ and the Norris-LaGuardia Act, which supports worker solidarity and also endorses the rights of workers.¹³⁵ Other documents include the U.S. Constitution, which supports freedom of speech and association,¹³⁶ and the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty and the pursuit of happiness."¹³⁷

We must also remember that the NLRA is a pro-union law whose policy statement says it promotes worker collective power and collective bargaining in order to preserve our economy and, thus, our democracy.

When critics accuse the labor laws and the NLRB of being pro-union, as they frequently do, it is a sign that the Act is performing as intended and that the Board is following its mandate. The Act is *supposed* to be biased; no one feared that in a state of nature John Rockefeller would be overwhelmed by individual workers. When the Board or the courts profess to adopt a more neutral approach to interpreting the Act, one that does not favor either side, they fail to acknowledge the balance struck by the law. The sponsors believed that without some statutory advantage, workers are at a disadvantage.¹³⁸

Many attribute the stagnation that led to a declining percentage of union members was the passage of the Taft-Hartley Act.¹³⁹ While Taft-Hartley has long been a target of union anger and blamed for labor's woes,¹⁴⁰ the less visible judicial amendments have been far

133. For more details, see DANNIN, *supra* note 45, at 117-27, and Dannin, *supra* note 76.

134. Clayton Act, 15 U.S.C. § 17 (2006).

135. Norris-LaGuardia Act, 29 U.S.C. § 102 (2006).

136. Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1430-35 (1984). Lynd also says that First Amendment rights are of "the people" and not of the individual. *Id.* at 1432.

137. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

138. Mikva, *supra* note 126, at 1126-27.

139. Labor-Management Relations Act, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. § 141 (1947)).

140. See Boyd Leedom, *Introduction*, 29 GEO. WASH. L. REV. 191, 197 (1960).

more important in repealing worker rights. Judge Abner Mikva has made the following too often-forgotten observation:

Taft-Hartley did not *repeal* the Wagner Act, it *amended* it. It did not remove protections given to labor, it simply outlawed unfair tactics by both sides. The basic protections—the rights to organize, to bargain collectively, and to strike—were largely untouched. Taft-Hartley aimed to equalize bargaining power, *not* to return workers to a primal state of vulnerability.¹⁴¹

Conclusion

Ultimately, *Fansteel* is a case of judicial amendments,¹⁴² as is *Hoffman Plastics*, which builds on it. In both cases, the Court dynamic was to maximize the weight it gave to employee wrongdoing, thus ignoring employer law breaking. Glaringly absent from both decisions was any consideration as to how such an outcome promoted the NLRA's policies and conformed with the NLRA itself. The complexities present in *Fansteel* and *Hoffman Plastics* illustrate the challenges that labor and its allies face. Indeed, the NLRA is a law that has never been in sync with this society's dominant values. To have been effective, therefore, it needed—and still needs—the wholehearted support of unions and those who support communal values and fair treatment of workers. Even three-quarters of a century later, it still needs that support if the communal institutions of unions and collective bargaining are to survive and thrive and if the rights and protections Congress has given workers are to be enforced. Only then can we have equality in fair treatment for all workers rather than equality in mistreatment.

141. Mikva, *supra* note 126, at 1127; *see also* Leedom, *supra* note 140, at 191–92 (explaining that the Labor-Management Reporting and Disclosure Act did not repeal the Taft-Hartley Act).

142. Nathanson & Lyons, *supra* note 51 (examining the Supreme Court's interpretation of the National Labor Relations Act as applied to *Fansteel*); Scheunemann, *supra* note 65, 144–48.

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