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UNION FINES AND PICKET LINES: THE NLRA AND UNION DISCIPLINARY POWER

James B. Atleson*

I. PROLOGUE

Labor law watchers have become quite accustomed to observing judicial tribunals employing interests in industrial stability, efficiency, economy, and industrial peace to justify a wide range of limitations on employee freedom. The claims of dissenters such as wildcat strikers and strikebreakers are often dismissed out of hand. Frequently, less troublesome individual conduct receives only slightly more consideration. Unfortunately, institutional concerns, admittedly weighty, may be employed even in cases where the actual interest in protecting the industrial system is minimal or doubtful.

The law seems to assume that the industrial system will run efficiently only so long as individual disruptions do not interfere with the relationship of union and employer. Thus, the NLRB and the courts have made it difficult for an individual employee to pursue his contractual claims through the grievance system or the courts, and industrial or administrative concerns have led to rules which prevent NLRB representation elections despite the wishes of a majority of the employees.

Undoubtedly, individual interests are often strengthened when courts recognize the institutional or group interests of the union, since only the employer's interests were accorded significance in earlier times. In cases where group or institutional interests conflict with individual interests, however, the result may be to support the interests of two bureaucracies, for the institutional interests of union and employer often coincide. Such an occurrence is not always a blessing for an individual employee. What's good for U.S. Steel may be good for the United Steelworkers, but it may not be good for dissenting steelworkers.

Judicial deference to institutional versus individual interests parallels non-legal forces tending in the same direction. The centralization of decision-making power in international union headquarters,

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with the increased use of experts, causes a loss of local autonomy and, in addition, reduces the effectiveness and likelihood of member involvement. Moreover, the merger of AFL-CIO and the no-raiding pact has removed another spur to development of local union vigor although the impact of the Alliance for Labor Action has yet to be determined.

This article traces one small area of conflict where employee interests and union institutional concerns collide. Many other areas of federal labor law involve the same conflict. The author does not disagree with the consideration of institutional interests, nor with the critical weight given these interests in many situations. What is disturbing, however, is the assumption that the collective bargaining structure, the grievance system, the effectiveness of unions, will come tumbling down if recognition is given to the protection of individual employee interests. Most disturbing of all is the judicial and administrative tendency to automatically assume that stability and industrial peace have no countervailing considerations.

II. INTRODUCTION

One of the major aims of the Wagner Act of 1935\(^1\) was to protect industrial rights of individual employees. The concept of "industrial democracy" included not only the negative right to be free from arbitrary disruption, layoff or discharge, but also encompassed the affirmative, democratic concept of participation in a lawmaking situation. Individual rights would be protected, however, if at all, only by collective action such as organizing unions and engaging in economic warfare through concerted activities. Moreover, the desire to protect collective action led to the restriction of expressions of individual concerns which might interfere with effective concerted activity. Thus, a union representing a majority of the employees in an appropriate bargaining unit under Section 9(a) of the Act will represent all of the employees in that unit, even those who neither belong nor voted for that particular labor organization. The majority union is deemed the "exclusive" representative of the employees in the union, exclusiveness denoting that no other labor union may represent these employees.\(^2\) Similarly, it was early decided that individual contracts of employment may not modify collective agreements,\(^3\) nor may previously drafted individual agree-

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\(^2\) See Plasti-Line, Inc. v. NLRB, 278 F.2d 482 (6th Cir. 1960).

ments excuse the obligation to collectively bargain under the Act. Thus, although individual interests were to be protected, concerted activity was the chosen vehicle. It is only necessary to note at this point that the vehicle chosen had an effect on the nature of permissible individual action and, thus, on the quality of protection afforded individual interests. That is, concerted activity is only effective if some limitation is placed on individual action which might interfere with or thwart collective efforts. The medium, then, is at least part of the message.

Individual interests have also been compromised in the name of industrial stability, efficiency, or protecting the integrity of NLRB elections. For instance, they are the normal justifications for rules giving unions a reasonable period to bargain despite a clear change of employee sentiment and for “contract bar” rules which maintain contractual stability but may deny even the majority the right to change their collective representative. Moreover, an established union is protected from a rival’s economic pressure as long as it is certified (lawfully recognized) or where a valid election has been held within the previous year.

The very existence of a union may affect the protection afforded conduct otherwise protected by the Wagner Act. A critical right granted by the Act was the right to take part in collective activity. Although a union may waive its members’ rights to strike during the term of a collective agreement, the mere existence of the union may restrict the scope of protected activity even in the absence of a no-strike clause. Thus, employees who strike in “derogation” of their representative’s status, for instance, engage in unprotected conduct. Strikes by minorities in aid of the union are protected.

4 J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). “[T]he majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.” Id. at 339.

6 Although unorganized employees may avail themselves of the protection found in § 7, most of the cases have understandably arisen in the context of an established union. See NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

6 See Plasti-Line, Inc. v. NLRB, 278 F.2d 482 (6th Cir. 1960); Harnischfeger Corp. v. NLRB, 207 F.2d 575 (7th Cir. 1953). The NLRB and the Courts have not always been in agreement on this problem. The NLRB found a walkout protected where the strikers’ aim was to demonstrate dissatisfaction with the progress of negotiation and to urge the employer to act promptly. Draper Corp., 52 N.L.R.B. 1477 (1943). The Fourth Circuit, however, held that the protection of wildcat strikers would threaten the principles of collective bargaining and industrial peace. NLRB v. Draper Corp., 145 F.2d 199, 202-203 (4th Cir. 1944). Thus, rather than look at the precise aims of the strikers, the Court held that any unauthorized strike inherently derogates the union’s status. Compare the NLRB’s decision in Sunbeam Lighting Co., 136 N.L.R.B. 1248 (1962), with that of the Seventh Circuit, NLRB v. Sunbeam Lighting Co., 318 F.2d 661 (7th Cir. 1963).
however, even though unauthorized. The cases suggest that minorities lose the right to strike, as well as to bargain, when a majority representative has been selected and designated and when their concerted activity is neither authorized nor ratified by the union. Note that this approach insulates both the union as well as the employer from minority action and, thus, supports the institutional interests of both.

The fact of representation, then, drastically affects the right of a minority to engage in concerted activities. The Taft-Hartley amendments of 1947 sought to widen the scope of freedom granted to dissenting employees by giving employees the negative right to refrain from any of the activities enumerated in Section 7 except to the extent that such right might be affected by a valid union security agreement. To protect the right to refrain from concerted activity, Congress enacted Section 8(b)(1)(A) which makes it an unfair labor practice:

[F]or a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

Thus, the amendment created a right to refrain from concerted activity and, presumably, a right to act in opposition to such activity. Section 8(b)(1)(A) protected against direct interference with this

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7 See NLRB v. R.C. Can Co., 328 F.2d 974 (5th Cir. 1964); Western Contracting Corp. v. NLRB, 322 F.2d 893 (10th Cir. 1963).
9 Even before 1947, the right to engage in concerted activity was not absolute. The most elementary form of collective activity, the strike for economic benefits, can result in replacement of the striker. Since NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), an employer may permanently replace economic strikers. This doctrine was created by dictum and its justification is dubious. See Note, Replacement of Workers During Strikes, 75 YALE L.J. 630 (1966).

Unfair labor practice strikers must be reinstated despite the hiring of replacements. Even if they engage in unprotected conduct, reinstatement may be appropriate as a remedy for the employer's unfair labor practice. See NLRB v. Thayer Co., 213 F.2d 748 (1st Cir. 1954). Although striking employees may be permanently replaced, they are still engaging in protected conduct under § 7. Thus, employer discrimination, such as the refusal to accept their unconditional offer to return to work, will violate § 8(a)(1).

11 Id. § 158(b)(1)(A).
right, and Section 8(b)(2) insulated employment rights from union affairs. Thus, the pre-1947 bias in favor of concerted activity has been modified in that individual employees have countervailing rights protected by the statute.

The right to refrain from concerted action may encompass affirmative action as well as negative refusals to act, for some concerted actions are themselves refusals to act, e.g., the strike. Although strikebreaking, like wildcat strikes, might seem to be conduct in derogation of the union’s status and, therefore, unprotected conduct, the Taft-Hartley amendment obviously seeks to protect some kinds of disobedience. Wildcat strikes also involve disobedience to union rules, but such strikes are not always in response to union concerted action. Thus, even though the “right to refrain” includes some affirmative conduct, the act at present creates a statutory bias in favor of the strikebreaker and against the wildcatter. Such an approach seems unduly narrow, however, as wildcat strikes often are the result of a perceived lack of union action or a disagreement as to timing of union action. As pointed out earlier, however, courts have routinely condemned wildcat strikers without considering the implications of Section 7. Of course, employer discipline will normally arise only in a wildcat situation for employers favor strikebreakers. The problem will arise, however, in cases where union discipline is meted out to dissenters, whether strikebreakers or wildcat strikers. The judicial attitude toward wildcat strikers suggests that if such conduct is unprotected in the sense that employer discrimination will not contravene the Act, then union discipline will not violate Section 8(b). It has been assumed, however, that Section 7 does protect strikebreaking activity to some extent, thus creating the statutory bias favoring strikebreakers over wildcatters. The wildcatter, of course, challenges the institutional interests of both the union and the employer, perhaps explaining the differential treatment.

A trilogy of recent cases deals with the scope of union disciplinary power under Section 8(b)(1)(A). On first glance, the Section might be thought to be a mirror reflection of Section 8(a)(1) which protects against employer interference with Section 7 rights. Since Section 8(a)(1) is basically directed to interferences with organization, Section 8(b)(1) would provide limitations on the use of union power to induce employees to select or join a particular union. Indeed, the use of force for these purposes is undoubtedly prohibited.

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12 Under § 8(b)(2) the union's powers to affect the employment status of an employee is limited to compelling the payment of dues under a valid union security clause. Employment status may not be affected as long as the employee tenders appropriate dues. Id. § 158(b)(2).
under this Section,\textsuperscript{13} and Congress was primarily concerned with threats of force or employment loss directed at securing membership. The recent cases, however, have not involved union pressure to induce employees to join unions or to refrain from joining. They have, ironically, dealt with established relationships and internal union discipline.

The recent cases deal with employees who cross picket lines, file unfair labor practice charges without exhausting intra-union procedures or exceed union-created production ceilings. Each type of conduct threatens the union's strength or solidarity to some extent but, ironically, each type of dissent draws support from the Section 7 right to refrain from participation in union activities or procedures. Courts could be expected to tread lightly on territory thought sacred by labor unions. Discipline is the union's most important device for maintaining internal order and for enforcing membership obligations to the union in order to carry out its role in the collective bargaining arena. Overzealous judicial interference could weaken a union in its capacity of bargaining representative, a role for which it has been delegated Congressional power. State courts had always been aware that the cases reaching them focused on extremely sensitive areas of internal affairs, and one would assume that federal tribunals, operating under a statute not designed for internal union review, would do likewise. Moreover, the protection of concerted activities implies that there are limitations on employee freedom. The conflict between group and individual interests cannot be avoided, however, as both interests can draw support from Section 7.

Under the proviso to Section 8(b)(1)(A), some union discipline will be protected despite the fact that the discipline imposed interferes with Section 7 rights. The scope of this proviso, however, is not significantly clearer than the main provision itself. Although the specific evils to which this section was directed were physical violence and job discrimination, the questions involved in this article will be the applicability of these provisions in situations not involving violence and job discrimination. This article will document the gloomy prediction of Professor Cox after the provision's enactment:

Section 8(b)(1) may plunge the Board into a dismal swamp of uncertainty. Its vagueness alone, not to mention the broad interpretations put upon it during the debates in Congress, encourages the filing of great numbers of charges as weapons in fighting . . . unionization . . . . A long period of uncertainty and heavy volume of litigation will be necessary before the questions of interpretation can be resolved.\textsuperscript{14}

\textsuperscript{13} The freedom of neutral employees from the threat of job loss by picketing is protected by other provisions, §§ 8(b)(4) & 8(b)(7). \textit{Id.} § 158(b)(4) & (b)(7).

Any investigation of union disciplinary power under the NLRA must take account of the Labor Management Reporting and Disclosure Act of 1959. The LMRDA contains detailed provisions relating to union elections, financial regulation and reporting, parent-local relations, and, using a democratic analogy, protects individual rights of union members in Title I. Under that title, members were given the right of speech, assembly, political activity, and the freedom from discipline or discrimination for the exercise of these rights.

Union disciplinary power in relation to rights not enumerated in Title I, however, was seemingly not affected. Thus, the effect of the LMRDA on union discipline for exercising rights granted in Section 7 of the NLRA is not clear. The LMRDA does recognize union institutional interests, however, as provisos expressly permit unions to limit specified rights by rules relating to a member's obligation to the union as an institution. The scope and effect of these provisos must be considered in light of new developments under the NLRA.

The focus of this article, then, will be the substantive limits of union disciplinary power under the NLRA and the problems of accommodating the new scope of Section 8(b)(1)(A) to the LMRDA.

III. A Preliminary Look at Section 8(b)(1)(A)

Before turning to the recent cases, a brief sketch of the scope of Section 8(b)(1)(A) as interpreted by the NLRB and the courts provides useful background data as well as interpretive insights.

The right to refrain from union activity means at a minimum that employees are free to refuse to join a labor union. Congress clearly intended to outlaw two means of achieving this end: (1) the avoidance of strikebreaking, for instance, would seem to be an elemental obligation owed to the union, and thus, discipline for such conduct would not violate § 101(a)(2) of the LMRDA. Although the Supreme Court has reached a similar result under § 8(b)(1)(A) of the LMRDA, the Court implied that the latter section provided limits to the union's disciplinary power. See NLRB v. Allis-Chalmers, 388 U.S. 175 (1967).

Organizational picketing, aimed at inducing non-members to join a particular labor organization was proscribed in 1959 by § 8(b)(7). Not all such pressure is proscribed, however. A union may satisfy § 8(b)(7)(C) by filing a representation petition under section 9 and maintain its picket line at least until the election is held. See Local 840, Hod Carriers, 135 N.L.R.B. 1153 (1962). Furthermore, a proviso protects informational picketing even though "an object" of organization or recognition is present. See Hotel & Restaurant Employees Union, 135 N.L.R.B. 1183 (1962). Such permissible inducement does cut into the § 7 right "to refrain," but given the specificity of § 8(b)(7), could not be a violation of § 8(b)(1)(A). In any event, such picketing would not constitute "restraint or coercion" within § 8(b)(1)(A).
threat or use of force and (2) the threat of employment loss. The right to refrain, however, extends to all of the rights granted by Section 7. Thus, since Section 7 grants the right to engage in concerted activity, the 1947 amendment suggests initially that employees may refuse picket line duty and are also free to cross picket lines.

Although the provision may have been drafted primarily to protect non-members from threats of force and violence, the Board has always treated the provision as applying to union members as well as non-members and as extending beyond organizational campaigns. Thus, assaults and threats of violence committed by a union constitute an unfair labor practice when the activity has a reasonable tendency to restrain employees in the exercise of their right to cross a picket line. The conduct prescribed, therefore, is not only violence directed to employees in order to get them to join the labor organization, but violence directed to get them to take part in protected activity. Unfortunately the violent nature of the prescribed conduct has often obfuscated the nature and scope of the activity being protected.

Further assistance in discovering the scope of Section 8(b) (1)(A) stems from its relation to the anti-discrimination provisions of Section 8. Sections 8(a)(3) and 8(b)(2) are directed toward insulating an employee's job rights from his organizational status, and violations of Section 8(b)(2) are also violations of Section 8(b)(1)(A). Thus, these sections protect against job interference designed to encourage obedience to union rules. The union is prohibited not only from threatening discharge but from interfering with seniority rights and other wage connected benefits as well. The only exception is that under a valid union shop contract the union may cause the firing of one of its members who refuses to

18 See, e.g., Sugar Workers Local 9, 146 N.L.R.B. 154 (1964); Painters Local 6, 97 N.L.R.B. 654 (1951), enforced, 202 F.2d 957 (6th Cir. 1953), cert. denied, 345 U.S. 995 (1953). Even coercive action directed against non-striking employees was found to be an unfair labor practice where it demonstrated to cooperative strikers the consequences of a decision to abandon the strike. Woodworkers Local 426, 116 N.L.R.B. 507 (1956), enforced, 243 F.2d 745 (5th Cir. 1957).

19 See Progressive Mine Workers Union v. NLRB, 187 F.2d 298 (7th Cir. 1951); Steel Workers Local 2118, 153 N.L.R.B. 1561 (1966).

20 Violations of § 8(b)(2) involving unlawful union security arrangements are also violations of § 8(b)(1)(A). See, e.g., NLRB v. Local 269, IBEW, 357 F.2d 51 (3rd Cir. 1966); NLRB v. Filtron Co., 309 F.2d 184 (2d Cir. 1962).


pay dues or initiation fees. Causing employees to be fired for any other reason is a violation of Section 8(b)(2) and is usually held to be a violation of Section 8(b)(1)(A) as well.

This "job discrimination" aspect of Section 8(b)(1)(A) demonstrates that the Section applies to members as well as non-members and covers some aspects of internal union relations. Thus, an attempt to collect intra-union fines by threatening to cause an employer to fire an employee is an unfair labor practice.23 Nor can the union cause a member to be in arrears on dues payments by applying dues to the payment of fines.24 Similarly, unions and employers may not use the threat of job loss to collect strike assessments.25

Additional support for the coverage of union members under Section 8(b)(1)(A) is found in the NLRB's fair representation cases. The obligation of a union to fairly represent all the members of the bargaining unit has been enforced under Section 8(b)(1)(A), and protection has been accorded members as well as non-members.26 The protection stems not from Section 9, the foundation of the judicial development of the doctrine, but from implicit guarantees in the affirmative rights granted in Section 7. Obviously, this development is inconsistent with an argument that the section is limited to organizational efforts.

Although Section 8(b)(1)(A) extends to union members as well as non-members, the proviso would seem crucial to the scope of protection members will receive. The proviso does not protect all intra-union activity; violence directed at union members might be enforced within the union-member relationship, yet it is not protected by the proviso. Until recently, however, it seemed clear that the proviso would protect expulsion from scrutiny. Recent cases, however, suggest that even this reading of the proviso might be limited in certain cases. The Board, for instance, has held that enforcement of union

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25 Brooks, 131 N.L.R.B. 756 (1961). Job rights are protected even though federal involvement may cause serious internal friction. Thus, in a recent case, a union was held to have violated §§ 8(b)(2) and 8(b)(1)(A) when it caused employers to fire and refuse to hire an employee who had been expelled for failure to pay a union fine. The employee had been fined $1000 for striking a union business agent during an argument over contributions to the pension fund, and employees on construction sites refused to work with the employee. Bricklayers Local 11, 162 N.L.R.B. 668 (1967), enforced, 67 L.R.R.M. 2720 (2d Cir. 1968), cert. denied, 69 L.R.R.M. 2434 (1968).
rules, even by expulsion, is proper so long as the effect does not radiate beyond the union-member relationship and enter the employer-employee relationship. The line is unclear, however. Moreover, this formulation cannot explain cases dealing with violence, for violence would have to be treated as a means of enforcement which falls outside of the union-member relationship to explain its prohibition under Section 8(b)(1)(A).

The NLRB's approach has traditionally stressed the means by which the union sought to achieve conformity with its goal, and it has employed the proviso generally to protect internal union discipline. When an employee becomes a union member, the union acquires means of enforcing its discipline other than the clearly prohibited means of force or job discrimination. The NLRB generally protected these internal enforcement processes, despite the fact that union discipline often has an impact beyond the union-member relationship. The Board's attempt to avoid scrutinizing the substantive validity of union rules and union discipline where Section 7 rights were involved, however noble, was doomed to failure. Indeed, the breach in the wall was made initially by the Board itself. The NLRB in *Skura* overruled previous administrative rulings and held that the imposition of fines for filing an unfair labor practice was itself an unfair labor practice.

The Board, however, has not taken the same approach where employees have been disciplined for filing decertification petition under Section 9(c)(1)(A)(ii) of the NLRA. The right to challenge a particular representative would seem to be one method of preserving the employee's right to designate a representative of his own choosing for collective bargaining. In a case involving violence or job discrimination, the Section 7 right to be active in urging decertification is not waived by membership in the union under the proviso to Section 8(b)(1)(A). Yet, in *Tawas Tube*, the NLRB permitted expulsion for the filing of a decertification petition. The critical

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27 See Local 248, UAW, 149 N.L.R.B. 67 (1964). The Board took a similar approach in Local 283, UAW, 145 N.L.R.B. 1097 (1964), where the union imposed the fine upon a member who had exceeded a union-imposed production quota in a shop where employees were compensated on a piece-rate bonus basis.


29 Thus, the General Counsel had ruled that a member could be suspended for filing an unfair labor practice charge. Adm. Ruling of NLRB Gen. Counsel, Case No. 1059, 35 L.R.R.M. 1167 (November 19, 1954).


31 See Aristocrat Inns of America, Inc., 146 N.L.R.B. 1599 (1964); Painters District Council, No. 6, 97 N.L.R.B. 654 (1951), enforced, 202 F.2d 957 (6th Cir. 1953) cert. denied, 345 U.S. 995 (1953).

distinction was that the member in Tawas had appealed to the Board for the purpose of attacking the very existence of the union under Section 9 rather than seeking to compel the union to abide by Section 8 of the Act. The Board said that Skura was not based upon a general Section 7 right to invoke Board processes, but upon a much narrower right—the right to invoke its processes for the sole purpose of compelling the union to abide by the Act. It seems clear, however, that the Board was differentiating among Section 7 rights, and it could not have rested its decision on a distinction between Section 7 and non-Section 7 rights.33

Another problem in interpreting Section 8(b)(1)(A) is the scope of “restraint.” Thus, one question raised in the recent Allis-Chalmers decision was whether fines enforced by judicial process constituted “restraint” under Section 8(b)(1)(A). Fines could certainly fall within the meaning of “restrain or coerce” without overly straining the language, especially since the Section has not been limited to activity which has the physical characteristics of coercion. Fines punishable only by expulsion, however, would seemingly be protected by the proviso, for coercion would stem not from the imposition of the fine, but, rather, from the ultimate sanction of expulsion which is permitted by the proviso. Thus, some fines would seem to be protected by the proviso.34 Subsequent discussion, however, will demonstrate the problems involved in such logical assumptions.

This brief discussion of the development of Section 8(b)(1)(A) sets the stage for a series of Supreme Court cases which forced the Court to face directly the implicit conflict in Section 7 between the protection of concerted activity and the protection of individual acts of resistance to concerted activity. The decisions are illuminating although less than satisfying.

IV. UNION FINES AND PICKET LINES: ALLIS-CHALMERS

One of the most important and most controversial cases involving the scope of Section 8(b)(1)(A) is NLRB v. Allis-Chalmers.35 The question was precisely put by Mr. Justice Brennan:

33 The fact that Skura involved a fine and Tawas involved expulsion would not seem critical. This distinction would make sense only if expulsion did not operate to deter employees in the exercise of their section 7 rights. Although expulsion is expressly permitted in the proviso, the Board did not use the proviso in striking down the fine in Skura and this decision was clearly based on policy grounds.


35 388 U.S. 175 (1967).
[W]hether a union which threatened and imposed fines, and brought suit for their collection, against members who crossed the union's picket line and went to work during an authorized strike against their employer, committed the unfair labor practice under § 8(b)(1)(A) of the National Labor Relations Act of engaging in conduct "to restrain or coerce" employees in the exercise of their right guaranteed by § 7 to "refrain from" concerted activities.

Lawful strikes were conducted at Allis-Chalmers' plants at West Allis and LaCrosse, Wisconsin, in support of new contract demands. In compliance with the United Auto Workers' Constitution the strikes were called with the approval of the International Union after at least two-thirds of the members of each local voted by secret ballot to strike. Perhaps because of historically strife-torn relations at these plants, some members of each local crossed the picket line and worked during the strikes. At the end of the strike, the locals brought proceedings against these union members charging them with violation of the international constitution and by-laws. These charges were heard by local trial committees in proceedings at which the charged members were represented by counsel. Each charged member was found guilty of "conduct unbecoming a Union Member" and was fined a sum varying between $20 and $100. Some of the fined members refused to pay the fine, and one of the locals obtained a judgment in the amount of the fine against one of its members in the Milwaukee County Court. Notwithstanding the imposition of the fines, neither the employment status nor the membership status of the fined members was disturbed.

Unfair labor practice charges were filed by Allis-Chalmers on behalf of the fined employees. A complaint was issued but, after hearing, the trial examiner recommended its dismissal. The examiner was sustained by the NLRB on the ground that even if the action was "restraint or coercion," the conduct was protected by the proviso to Section 8(b)(1)(A) which provides that the Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The NLRB did not focus upon the precise means of enforcement, judicial process, an issue which was to divide both appellate courts. Nor did the NLRB question the propriety of Allis-Chalmers' action as representative of the strikebreakers.

36 Id. at 176.

37 At the time of the Supreme Court decision, an appeal in the County Court was still pending before the Wisconsin Supreme Court. Id. at 177. Dissenting employees had also crossed picket lines in 1959. During a 54-day strike, 175 out of 7400 bargaining unit employees disregarded the strike and went to work. Each was fined in an amount not exceeding $100. Local 248, UAW, 149 N.L.R.B. 67 (1964).
A majority of the Board held that the case was governed by *NLRB v. Wisconsin Motor Corporation.* In this case, union fines against members who had exceeded union-determined production ceilings were held protected by the proviso. The Board had attempted to develop a distinction between discipline which treated members as members and discipline which treated members as employees. Thus, the production-ceiling was protected because "the union deliberately restricted the enforcement of its rule to an area involving the status of a member rather than as an employee . . . ." The Board felt that similar treatment must be given to the complaint in *Allis-Chalmers* since the union had imposed the fine only on their members and no attempt was ever made to affect the jobs or working conditions of the strikebreaking employees. This analysis is not particularly helpful since the union probably could not have imposed fines on non-members, and Section 8(b)(2) would apply if employment was affected by the union's action. The key holding was that a rule prohibiting members from crossing a picket line during a strike was a legitimate union concern and, therefore, could properly be the subject matter of internal discipline. Typically, however, the NLRB has stressed the means of union discipline and has attempted to obfuscate its review of the substantive validity of the union rule involved. As we shall see, this confusion as to the doctrinal basis of the NLRB's approach was to be reflected in the Supreme Court's decision.

The Board was forced to distinguish cases in which violations were found when fines were imposed on union members who filed unfair labor practice charges with the Board without exhausting internal union remedies. In these cases, the Board pointed out, the rules involved went "beyond the competence of the union to enforce since they interfered with the right of union members to seek redress with the Board through the filing of charges." The rule involved in *Allis-Chalmers,* however, involved the loyalty of its members during a time of crisis for the union. The Act does not deprive a union of all recourse against those of its own members who undermine a strike in which it is engaged. When the strike is lawful and the picket line is lawful, a union is not prohibited from taking steps to preserve its own integrity.

The Board admitted that virtually all union rules have some effect on a member's employment relationship. The question, said

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the Board, is whether in enforcing the rule the union goes outside the area of union-member relationship and enters the area of employer-employee relationship.

The original opinion of the Seventh Circuit denied the company’s petition for review; en banc, however, the NLRB was reversed. The opinion on re-hearing begins its retreat with the astounding statement that “the statutes in question present no ambiguities whatsoever, and therefore do not require recourse to legislative history for clarification. The wording used evolved out of extensive Congressional debate and study. Although in our original opinion we rejected a literal reading of the statutes, in effect, we conceded that such a literal reading would require reversal of the Board’s Order.”

The court in its original opinion had relied on statements in Curtis Brothers that Congress was concerned with the elimination of “repressive tactics bordering on violence or involving particularized threats of economic reprisal. . . .” The court now held that it had been incorrect in determining that “economic reprisal” referred only to things such as securing discharge or reducing pay. The new majority felt that since the act protected a member from union threats to take away his wages by securing his discharge, it also protected him from threats to take away his wages by the imposition of fines. “A substantial fine such as permitted here may easily pose a greater threat to a member than simple expulsion from the union.”

The appellate court stressed the potentially expensive cost of crossing picket lines. One hundred dollars was the maximum fine permissible under the union constitution and since crossing of the picket lines could be treated as a separate offense, the fines could have been considerably greater than those actually imposed. The majority was concerned because consecutive fines could run into thousands of dollars and create a far greater burden on employees than expulsion from his union or loss of a job.

A key statement of the court was that membership in this case was not the result of individual voluntary choice but of the insertion of a union security provision in the contract under which a substantial minority of the employees may have been forced into mem-

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40 358 F.2d 656 (7th Cir. 1966).
41 Id. at 660.
43 358 F.2d at 660.
bership. The court, however, referred to no evidence that the membership of the employees in question was indeed involuntary.

The Supreme Court upheld the Board, but the opinion raises as many questions as it answers. Although five justices voted to permit the union’s fines, Mr. Justice White wrote a concurring opinion which states his doubts about the implications of the opinion written by Mr. Justice Brennan. Mr. Justice Black, joined by three colleagues, wrote a strong dissent. The numeral majority therefore, does not represent a clear pronouncement on the issues presented. Given the nature of the issues raised, however, and the range of views on the NLRB and Seventh Circuit, hopes for forthright pronouncements could have been premature. In two subsequent cases, the Court has had the opportunity to clarify and modify the meaning of Allis-Chalmers.

Mr. Justice Brennan’s opinion can be divided into three parts. First, he discussed the impact that a literal reading of Section 8(b)(1)(A) would have upon union effectiveness. Finding that such a reading would lead to drastic results, he then considered whether the legislative history supported a literal reading. Since he placed a great burden on Congressional history to demonstrate the provision’s application to strikebreaking fines, the outcome was never in doubt. Finally, the opinion stressed that “full members” of labor unions bind themselves to disciplinary measures in the union’s constitution and by-laws. None of the Court’s findings are free from doubt, and each must be scrutinized separately.

As expected, Justice Brennan admonished the Seventh Circuit for applying the “clear meaning rule” to Section 8(b)(1)(A). “[E]ven if the inherent imprecision of the words ‘restrain or coerce’ may be overlooked, recourse to legislative history to determine the sense in which Congress used the words is not foreclosed.” Indeed, the Court itself had earlier warned about loose reading of Section 8(b)(1)(A). The Court’s polite rejection of the “clear meaning” rule did not immediately lead the Court into an investigation of the legislative history, however. Rather, the Court discussed the various policy grounds which suggested that Congress could not have in-

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44 388 U.S. 175 (1967).
45 Id. at 179. The Court referred to National Woodwork Mfg. Ass’n v. NLRB, 386 U.S. 612 (1967), as a case in which conduct may have been unambiguously embraced within the literal language but was excluded by the Court’s reading of legislative history. See also NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760, 377 U.S. 58 (1964).
tended a literal reading. The Court stressed that effective collective action was envisioned by Congress:

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvement in wages, hours, and working conditions.\(^\text{47}\)

Since concerted activity is crucial, unions must have the power to enforce rules designed to implement its role. The collective bargaining representative has power “comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents...\(^\text{49}\)” And this legislative power could validly be used to preserve the unity necessary to carry out congressional objectives. The union’s power to protect itself against erosion is particularly vital when it engages in strikes for “[t]he economic strike against the employer is the ultimate weapon in labor’s arsenal for achieving agreement upon its terms...\(^\text{49}\)” and “the power to fine or expel strike-breakers is essential if the union is to be an effective bargaining agent...\(^\text{50}\)” Professor Summers has stated that “[s]trike-breaking is uniformly considered a sufficient reason for expulsion whether or not there is an express prohibition, for it undercuts the union’s principal weapon and defeats the economic objective for which the union exists.\(^\text{51}\)

Provisions in union constitutions and by-laws for fines and expulsion of strikebreaking are common.\(^\text{52}\) The union’s raison d’être is its ability to act as an effective economic force to gain benefits for its members. Any act which weakens the solidarity of the membership is treated as a threat to its existence. Solidarity is essential during a strike, and, accordingly, strikebreaking is seen as treason for it furnishes the opposition with labor, “the weapon with which the battle is fought.\(^\text{53}\)

Provisions for court enforcement, however, are no doubt rare. In a footnote, the Court attempts to skirt this fact by stating that the “potentiality of resort to courts for enforcement is implicit in

\(^{47}\) 388 U.S. at 180 (1967).
\(^{49}\) 388 U.S. at 181.
\(^{50}\) Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951).
any binding obligation.” The Court cites an 1867 case to show that judicial enforcement of fines is not “a rather recent innovation.” Despite the Court’s valiant attempt, however, court enforcement of union fines is extremely rare.

The Court's approach ignores the long-standing antagonism between unions and the courts. It is difficult to believe that court-enforcement of fines was within the reasonable expectation of the union, let alone the members. Union by-laws contain many provisions aimed at avoiding public notice of intra-union problems. Thus, disclosing union business outside the union hall is a common offense. Even more relevant here is the common provision which penalizes the resort to judicial administrative bodies until intra-union appeals procedures have been exhausted. An obvious factor militating against judicial enforcement is that the action broadcasts the union's inability to internally control its members and induce compliance with its rules.

The rarity of court enforcement of fines suggests that this disciplinary device is inconsistent with the expectations of employees. The Court, however, finding that judicial enforcement is implicit in any binding obligation, suggests that state courts should enforce such fines. The basis for such enforcement is the traditional view that the provisions of a union's constitution and by-laws constitute a “contract” between the members and the union which could be judicially enforced.

The contract notion was used by state courts to provide a vehicle to protect individual rights without appearing to create external standards. Thus, the “contract,” as read by the courts, provided the appropriate standards, and the court merely enforced union obedience to their privately established standards. The approach, then, is a legacy of judicial reluctance to interfere with private associations. Professor Summers has shown, however, that this approach permitted courts to exercise great power to interpret union constitutions and by-laws in attempting to protect democratic rights, and the vagueness of many provisions provided judicial opportunity for reading in public policy standards. Even when

54 388 U.S. at 182 n.9.
57 Summers, Legal Limitations on Union Discipline, 64 HARV. L. REV. 1049, 1055 (1951).
58 A question subsequently to be discussed is the extent to which the Court's pronouncements will affect state court actions. One way in which state courts provided
discipline was based upon a charge specifically set forth in the
union's laws, and the court agreed with the union's interpretation,
courts sometimes used public policy to invalidate obnoxious clauses.
And that, in a sense, is the question in Allis-Chalmers—does the
union's exercise of power, court enforcement of fines, interfere with
federal public policy as expressed in Section 8(b)(1)(A)? Although
Congress did not want to interfere with internal union discipline in
1947, the legislative history supports only the view that Congress
did not want to interfere too much—how much was never made clear.
Since this Section was clearly aimed at union members as well as non-
union members, Section 8(b)(1)(A) must have some impact on
union discipline.

The Court stressed that Congress could not have meant to limit
unions in the powers necessary to the discharge of their role as
exclusive bargaining agents by impairing the usefulness of labor's
cherished strike weapon.90 The Court stated that where a union
is strong and membership is valuable, expulsion, permissible under
the proviso, would create a far more severe penalty upon the member
than a reasonable fine. It follows that Congress could not have
intended to bar a lesser penalty. On the other hand, where the union
is weak and membership therefore of little value, the Court feared
that the union faced with further depletion of its ranks may have no
real choice except to condone the members' disobedience. "Yet, it is
just such weak unions for which the power to execute union deci-
sions taken for the benefit of all employees is most critical to effec-
tive discharge of its statutory function."60

Although the Court is undoubtedly concerned that unions be
able to protect themselves in strike situations, the strike weapon
has been limited in other situations, especially when faced with the
competing interest in the employer's maintenance of operations.
Thus, an employer may hire permanent replacements during a lawful
economic strike and, furthermore, current lockout doctrine permits
anticipatory and defensive lockouts which substantially diminish the
right to strike.61 The interests of the strikebreaker, however, were
neither weighed nor considered by the Court despite Section 7.

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90 388 U.S. at 183.
91 Id. at 184.
60 See generally Meltzer, The Lockout Cases, 1965 SUP. CT. REV. 87; Oberer,
Moreover, the Court’s assumptions about the situation in strong and weak unions are not fully convincing. Where a union is strong and membership is valuable, for instance, strikebreaking might not be a realistic threat to organizational stability, and expulsion may even be a threat when a labor union is weak. The Court’s reference to the “strength” of a union is unclear for strength could be measured in a number of ways. If the threat of expulsion is sufficient to induce compliance with union policies, the reasons may not relate to the bargaining effectiveness of the union, the most common referent for estimating the strength of unions. Employee compliance could be induced because the employee places a high value on the right to participate in union affairs, because the union provides substantial health or welfare benefits, or because of the social costs of exclusion. The relative costs of the threat of expulsion vis-à-vis the threat of judicial enforcement of a fine involves a host of variables, among them being the amount of the fine, the individual’s personal attachment to the union, and the credibility of the threat.

In a particular case expulsion may be more severe than a fine because of the loss of union benefits such as group insurance and pensions. Indeed, loss of membership is serious for another reason often ignored by courts. Expulsion means that the right of participation would be lost, a right to participate in the political process which results in work place legislation. Union government is a political process, and membership is required to vote and speak out on critical issues, officer elections, and bargaining matters. Furthermore, membership is critical because of the union’s important role in day to day administration of the agreement as well as the union’s control of the grievance system. Although participatory rights have been recognized in the LMRDA, the act provides no remedies for employees who are excluded from membership for it applies only to members.62

Whether or not fines are more severe than expulsion, the need of unions, especially weak ones, for the power to judicially enforce fines is far from clear. Justice Black, in dissent, felt that “the real reason for the Court’s decision is its policy judgment that unions, especially weak ones, need the power to impose fines on strikebreakers and to enforce those fines in court.”63 This assertion is not without foundation, although the majority was concerned about the union’s power to maintain discipline during the strike, feeling that

63 388 U.S. at 201.
the right to strike was critically important in order that the union might carry out the role that Congress had envisioned for it. Where a union is weak, however, it is questionable whether the imposition of fines will instill a high sense of solidarity and discipline. Although the Wagner Act looked to the formation of strong unions, it is doubtful that discipline, as opposed to persuasion and results, is a preferred means of becoming strong. Finally, it is difficult to understand the definitional standards used by the Court to define strong and weak unions. Strikebreaking would be a relevant factor, one would think, in categorizing a union as strong or weak. Yet the Court assumes that this might occur in either type of union. Combining the act of judicial enforcement of union fines with strikebreaking aids in characterizing the union, but the value for purposes of analysis is unclear. One could argue that a union which cannot count on full membership support during a strike would call few strikes and, thus, the problem raised by the Court would rarely arise.

Although the need of weak unions for the power to judicially enforce fines is debatable, there is no doubt that expulsion can be self-defeating. As Professor Summers has noted:

Since the union’s effectiveness is based largely on the degree to which it controls the available labor, expulsions tend to weaken the union. If large numbers are expelled, they become a threat to union standards by undercutting union rates, and in case of a strike, they may act as strike-breakers. . . . Therefore expulsion must be limited to very small numbers unless the union is so strongly entrenched that it cannot be effectively challenged by the employer or another union.64

In Allis-Chalmers the disciplined members were already strikebreakers, and, given the determination required to cross picket lines, it is doubtful that these employees would have become even more of a threat to the union after being expelled.

A. The Legislative History of Section 8(b)(1) (A): The Case of the Uneasy Rider

After having decided that a literal interpretation of Section 8(b)(1) (A) would produce “extraordinary results,” the Court in Allis-Chalmers turned to legislative history to determine whether this “extraordinary” meaning was confirmed. One has little doubt about what the Court’s investigation of that history would discover.

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64 Summers, Disciplinary Powers of Unions, 3 IND. & LAB. REL. REV. 483, 487-88 (1950). Professor Summers was describing protected limitations on the power of unions to discipline, rather than suggesting that court enforced fines would be more useful tools for obtaining internal conformity. Indeed, in discussing strikebreaking as a punishable offense, Professor Summers refers only to expulsion as a penalty. Id. at 495-96.
Although not clearly expressed, the burden is apparently on the legislative history to affirmatively demonstrate that Congress meant to outlaw fines for strikebreaking. Thus, the Court stated that "what legislative materials there are dealing with Section 8(b)(1)(A) contain not a single word referring to the application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in particular. On the contrary, there are a number of assurances by sponsors that the section was not meant to regulate the internal affairs of unions." Since court enforcement of union fines is rare, one would expect that a search through the legislative history would be unrewarding. Mr. Justice Black, writing in dissent, assumed that fines do "restrain" and looked for affirmative proof that fines were permissible under Section 8(b)(1)(A). Since the cupboard is bare, however, the search by each group of judges merely confirms the assumption each had before the search began. Thus, the question asked was more important than the discoveries made.

The Court found two substantial limitations on the scope of Section 8(b)(1)(A) in the legislative debates. First, "Congress expressly disclaimed . . . any intention to interfere with union self-government or to regulate a union's internal affairs." Second, the "mischief against which the statement is weighed was restraint and coercion by unions in organizational campaigns." Although both assumptions accurately state the prime concerns and themes in the legislative history, neither the history nor the subsequent legal development of the provision excludes other concerns.

The Court dealt exclusively with debates in the Senate, although the history of Section 8(b)(1)(A) begins in the House with Representative Hartley's bill, H.R. 3020. The bill provided a number of restrictions on union power, including a section which presaged the passage of the LMRDA in 1959. Section 7 was to be amended, but the amendment referred exclusively to internal union affairs. Thus, members were to be given the right to be free from discriminatory financial demands, the right to freely express their views, and to have the affairs of the organization conducted in a manner that is fair and in conformity with the free will of the majority of the members. These rights were to be enforced by unfair labor practice provisions, including Section 8(c)(4) which made it an unfair labor
practice "to deny to any member the right to resign from the organization at any time...."\textsuperscript{70}

Far reaching provisions were included in Section 12 entitled "Unlawful Concerted Activities." Section 12(a)(1) focused on union activity which threatened employment, but it was seemingly directed only to the use of force:

By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or the accepting or refusing employment by, any employer; or by the use of force, violence or physical obstruction or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon any employer's premises or from freely leaving an employer's premises and from going to any other place.\textsuperscript{71}

Section 8(b)(1), as it passed the House, was primarily concerned with organizational pressure and was designed to closely parallel Section 8(a)(1):

By intimidating practices to interfere with the exercise by employees of rights guaranteed in Section 7(a) or to compel or seek to compel any individual to become or remain a member of any labor organization.\textsuperscript{72}

As the bill passed the House, the unlawful concerted activities provision, Section 12, remained in the bill.\textsuperscript{72}

Thus, it was an unfair labor practice under Section 12(a)(1) to use force or violence to prevent an employee from continuing his employment or accepting employment. Also banned was the use of force or threats to prevent an individual from freely going onto or leaving the employer's premises. These provisions were not accepted by the Senate, nor were they rescued by the Conference Committee, but it should be noted that they were specifically directed to force

\textsuperscript{70}H.R. 3020, 80th Cong., 1st Sess. 22 (1947), reprinted in, 1 National Labor Relations Board, Legislative History of the Labor Management Relations Act, 1947, at 53 (1948) [hereinafter cited as L.H.].

\textsuperscript{71}Id. § 12(a)(1), at 48, 1 L.H. at 78.

\textsuperscript{72}The direction of the House can be seen from the opening paragraph of the House Committee Report. "American working men... have been cajoled, coerced, intimidated and on many occasions beaten-up, in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete denomination and control of unregulated monopolists. He has on many occasions had to pay them a tribute to get a job. He has been forced into labor organizations against his will. At other times when he has desired to join a particular labor organization, he has been prevented from doing so and forced to join another one... He has been denied any voice in arranging the terms of his unemployment. He has frequently against his will been called out on strikes which have resulted in wage losses representing years of his savings." H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947), 1 L.H. at 293.
and violence. The House Conference Committee report explained that Section 8(b)(1)(A) was intended to cover the activities specified in Section 12(a)(1) of the House bill, suggesting that Section 8(b)(1)(A) prohibits interference with employment rights of employees and, presumably, strikebreakers.

The Senate draft bill was approved in committee by a narrow vote without many of the provisions of the House bill. Under the Senate bill, as reported, it was an unfair labor practice to interfere with an employer's selection of his representative for collective bargaining but there was no provision barring interference with an employee's exercise of Section 7 rights. Supplemental views, however, made it clear that amendments would be added from the floor. Thus, Senators Taft, Ball, and Smith among others, indicated that amendments would be offered on the floor making it an unfair labor practice to coerce employees in the exercise of rights guaranteed in Section 7. There was, apparently, no perceived need to amend Section 7 by granting the right to refrain from the exercise of the enumerated rights. This amendment, however, was added in joint conference on the demand by House conferees.

The supplemental views were concerned primarily with coercion exercised in organizational campaigns. Thus, the statement referred to "many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence."

Senator Ball moved that the present Section 8(b)(1) be added from the floor, explaining that the Section was merely parallel to Section 8(a)(1):

The purpose of the amendment is simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices such as

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75 Senator Taft felt that the right to refrain from the exercise of § 7 rights was already included in § 7. He felt that "the new language, therefore, merely makes mandatory an interpretation which the Board itself had already arrived at administratively." Similar language had appeared in the House bill, and "since section 8(b)(1) of the Senate Bill, which was retained by the conferees, made it an unfair labor practice for labor organizations to restrain or coerce employees in the rights guaranteed them in section 7, the House conferees insisted that there be express language in section 7 which would make the prohibition contained in section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or picket line." 93 Cong. Rec. 7001 (1947), 2 L.H. at 1623.
77 93 Cong. Rec. 4136 (1947), 2 L.H. at 1018.
making threats, false promises or false statements, the unions shall also be guilty of unfair labor practices.\textsuperscript{78}

Senator Ball's catalog of cases which would fall within the provision dealt solely with organizational campaigns, including the use of force and misrepresentation in such situations.\textsuperscript{79} A broader purpose, however, is suggested by a case in which membership was sought to be induced by the threat that initiation fees would be doubled unless employees joined the union before the election.\textsuperscript{80} The phrase "restraint and coercion" was clearly not intended to be limited to threats of force.\textsuperscript{81}

To the Court in \textit{Allis-Chalmers}, the Senate's organizational focus suggested that the Section did not protect union members but, rather, only prospective members. Legislative history indicates that although the primary thrust was directed to the use of force, misstatement, and threat of job loss in organizational campaigns,\textsuperscript{82} the provision was not limited to this situation. Thus, the new provision at a minimum protected union members as well as non-members during the organizational phase. Senator Pepper, opposing the amendment, stated that "[t]his amendment is an effort to protect the worker against their own leaders, chosen by them under their own constitution and bylaws."\textsuperscript{83} In reply, Senator Taft tended to de-emphasize coercion of union members, and, rather, emphasized the protection which the Section gave to all employees. However, he always maintained that the union members were covered. "Mr. President, let me point out that the amendment protects men who may not be members of unions at all. In fact, many of these cases of coercion are cases in which there never have been certification of a

\begin{footnotes}
\item[78] \textit{Id.}, 2 L.H. at 1018. \textit{See also id.} at 4560, 2 L.H. at 1202.
\item[79] \textit{Id.}, 2 L.H. at 1202. \textit{See also id.} at 4398, 4558, 4560, 2 L.H. at 1139, 1199, 1203.
\item[80] \textit{Id.} at 4136, 2 L.H. at 1018. \textit{See also Id.} at 4138, 2 L.H. at 1020-21.
\item[81] Senator Ives offered an amendment on April 30, 1947, to delete the phrase "interfere with" from § 8(b)(1), and it was removed by unanimous consent. Senator Ives feared that it could be construed to include any conversation or persuasion designed to solicit membership. \textit{Id.} at 4398, 2 L.H. at 1138. The House Conference Report (H.R. Rep. No. 510, 80th Cong., 1st Sess. 43, 1 L.H. 547), explains that the omission would have no appreciable effect since, in applying § 8(b)(1) of the Wagner Act, the Board held that acts which constitute interferences were not violations if they did not also constitute restraint or coercion. Thus, omission of these words was not meant to have the effect of broadening the scope of § 8(b)(1).
\item[82] \textit{See, e.g.}, 93 CONG. REC. 4136-38, 4398, 4588, 4560 (1946), 2 L.H. at 1018-21, 1139, 1199, 1203 (remarks of Senator Ball). Many apparently felt that the provisions went beyond organizational campaigns and covered elections as well. Thus, the section was thought necessary because it was alleged that the Board would not set an election aside because of union misconduct. In response to this allegation, Senator Morse referred to a number of cases in which elections were set aside on the basis of union misconduct or misstatements. \textit{Id.} at 4456, 2 L.H. at 1194-95.
\item[83] \textit{Id.} at 4023, 2 L.H. at 1029.
\end{footnotes}
union. . . [Furthermore], [c]oercion is not merely against union members; it may be against all employees. Senator Taft also stated that "[m]ere to require that unions be subject to the same rules that govern employers, and that they do not have the right to interfere with or coerce employees, either their own members or those outside the union, is such a clear matter, and seems to me so easy to determine, that I would hope we would all agree. Again stressing a broader application of Section 8(b)(1)(A) which would apply to members as well as non-members and to non-organizational situation campaigns, Senator Taft stated:

If there is anything clear in the development of labor union history in the past 10 years, it is that more and more labor union employees have come to be subject to the orders of labor union leaders. The bill provides for the right to protest against arbitrary powers which have been exercised by some of the labor union leaders.

Another problem with the Court's approach in Allis-Chalmers is that Section 8(b)(1)(A) refers to any violation of Section 7 rights, and the right to join or refrain from joining labor organizations is only one of the rights granted. Thus, Section 7 refers to the right to collectively bargain and the right to take part in concerted activities, and these rights would often be relevant to the relationship of union members to an organized union.

Senator Taft explained the addition of the amendment to Section 7 in conference as making the "prohibition contained in Section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or picket line."

Ironically, strikebreaking in organizational strikes may be far more serious to a union than the same conduct during an economic strike by an established union. The Court avoids this dilemma by suggesting, despite its narrow reading of Section 8(b)(1)(A), that strikebreaking fines are generally valid whenever they occur. Indeed, the Court impliedly admits that the provision is not limited to organizational situations. The Court upholds the fines as not constituting "restraint or coercion" within Section 8(b)(1)(A), implicitly acknowledging that the right to cross picket lines is generally protected by Section 7.

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84 Id. at 4144, 2 L.H. at 1029-30 (emphasis added).
85 Id. at 4145, 2 L.H. at 1032 (emphasis added).
86 Id. at 4143, 2 L.H. at 1028. See also remarks by Senator Taft, id., 2 L.H. at 1028.
87 Id. at 7001, 2 L.H. at 1623. See also id. at 4561-62, 2 L.H. at 1205-06 (remarks of Senator Taft).
88 The Supreme Court has not limited the scope of § 8(b)(1) to organizational strikes in the past. See NLRB v. Teamsters Local 639, 362 U.S. 274 (1962); Radio Officers v. NLRB, 347 U.S. 17 (1954).
Senator Taft's remarks seem to support these assumptions. In response to expressed fears that strike effectiveness would be reduced by Section 8(b)(1)(A), he stated:

I can see nothing in the pending measure which . . . would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way. . . . All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.

It is possible that Senator Taft is only referring to organizational strikes and perhaps non-bargaining unit employees. The latter is probably too narrow, however, as the statement seems to include at least all non-members of the union. The difficulty comes in that Section 7 draws no lines among members and non-members, and Section 8(b)(1)(A) probably applies to both. Thus, Section 7 would seem to encompass the right of members to cross a picket line as well as non-members. Of course, the question is the scope of that right.

It may also be possible to limit Senator Taft's remarks by interpreting "restraint and coercion" to include only force and violence. Thus, Congress may not have been concerned about legal process. Probably, however, Congress was concerned about the effects on freedom of various kinds of restraints rather than the kind of restraint used. Thus, Senator Taft stated that "[t]here are plenty of methods of coercion short of actual physical violence." Examples were given of cases where a union threatened to double the dues of employees who waited later to join. It is difficult to see how fining a member is less coercive than doubling his dues, or how one is more within the ambit of internal union affairs than the other. If this is the approach to be taken, then fines must be included under the phrase "restrain or coerce," since fines can have the same inhibiting effect as can force or threats of bodily harm.

The second conclusion reached by the Court from its reading of the legislative history is that Congress did not mean to regulate internal union affairs. Indeed, this theme was repeated many times

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89 See 93 Cong. Rec. 7001 (1947), 2 L.H. at 1623 (remarks of Senator Taft).
90 Id. at 4563, 2 L.H. at 1207.
91 Id. at 4145, 2 L.H. at 1031.
92 Id. at 4137, 4559, 2 L.H. at 1020, 1200.
93 Further support for a reading of § 8(b)(1) which encompasses members of unions stems from Senator Taft's statement that the amendment to § 7 was added by the Conference Committee to "make the prohibition contained in § 8(b)(1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line." Id. at 7001, 2 L.H. at 1623. Non-members would normally not be expected to participate in a strike, let alone a picket line.
in no uncertain terms. Senator Ball stated that the provision was not designed to interfere with the internal affairs of a union which is already organized: "All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees."94 Senator Holland, in proposing the proviso to Section 8(b)(1)(A), stated: "Apparently it is not intended by the sponsors of the amendment to affect at least that part of the internal administration which has to do with the [admission] or expulsion of members, that is, with the questions of membership."95

As one would expect, however, conflicting statements exist in the legislative history. Thus, Senator Wiley stated that "None of these provisions interferes unduly with union affairs, except to the extent necessary to protect the individual rights of employees."96 However, a contrary view was stated by Senator Ball in supporting Senator Holland's proviso to Section 8(b)(1)(A). He stated that the amendment "...is perfectly agreeable to me. It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions."97 This would suggest that Senator Ball felt that the proviso had no meaningful effect but merely enforced what was already implied in Section 8(b)(1)(A) without the proviso. Under traditional statutory interpretation doctrines, however, a proviso relates to subject matter covered by the main portion of the provision. Therefore, but for the proviso, a court could well assume that some purely internal union affairs are included under the provision. The presence of the proviso suggests that disciplinary powers which are not exempted by the proviso fall within the main provision of Section 8(b)(1)(A). Senator Ball's comments, however, suggest that perhaps the proviso is not technically a proviso, but, rather, an attempt to clarify one question which arose during the debates.

Perhaps Congress was only interested in excluding the power to expel or to admit members from legal scrutiny, for these were the only valid aspects of union power which were mentioned in the debates and expressly inserted into the statutory language.98 This would be consistent with the debates under Section 8(b)(2). Thus Senator Taft stated:

94 Id. at 4559, 2 L.H. at 1200.
95 Id. at 4398, 2 L.H. at 1139. See also id. at 4144, 2 L.H. at 1030 (remarks of Senator Taft).
96 Id. at 5132, 2 L.H. at 1472 (emphasis added).
97 Id. at 4400, 2 L.H. at 1141. See also id. at 4561, 2 L.H. at 1204 (remarks of Senator Smith).
98 See id. at 4399-4400, 2 L.H. at 1139-41 (remarks of Senator Holland).
The pending measure [the union shop provision] does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they will be able to try any of their members. All of them will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion.99

Thus, although a union may expel or refuse to admit, an employee's job cannot depend upon such action. But Section 8(b)(1)(A) must turn on other considerations or otherwise it is superfluous since the role of Section 8(b)(2) is to insulate employment from union membership. It is clear that Section 8(b)(1)(A) applies to threats or other means of intimidation to join a labor organization. It is not difficult to stretch that to include threats of force in relation to any other infringements of Section 7 rights.

The next question is whether or not union disciplinary action may in a particular case amount to coercion under Section 8(b)(1)(A). Since the proviso excludes some union conduct from NLRB sanction, one might have expected the proviso to play a major role in the Court's analysis. The Court, however, found that the proviso to Section 8(b)(1)(A) gave only “cogent support for an interpretation of the body of Section 8(b)(1) as not reaching the imposition of fines and attempts at court enforcement. . .”100 Although the Board had held that it was the proviso that protected the U.A.W.'s fines, the Court in Allis-Chalmers reached the same result without reliance on the proviso. The proviso was helpful, however, in reaching its conclusion: “At the very least it can be said that the proviso preserves the right of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion . . . for nonpayment.”101

The Court seems to hold that the proviso might indeed protect fines, but only when they have a lesser impact than expulsion. But the Court admits that fines can be more serious to an individual employee than expulsion. If this is the case, it seems strange that a hypothetically lesser penalty, expulsion, would be protected by the proviso, but fines, a greater penalty, would be protected, not because of the proviso, but because it was not “restraint or coercion” under the provision itself. If fines are to be protected because a union needs to have this power to carry out the wishes of Congress as well as to protect itself, it seems axiomatic that it also has the power to expel.

99 Id. at 4318, 2 L.H. at 1097.
100 388 U.S. at 191.
101 Id. at 191-92.
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Yet, it is precisely this power to expel which is protected by the proviso. What, then, is the purpose of the proviso? The Court seems to imply that, first, all internal union affairs are excluded from the proviso. If that is so, the proviso has absolutely no effect, for the proviso only has operational significance if some internal union matters fall within the ambit of the provision. If expulsion was not conduct included within the phrase "restrain or coerce," there would be need for a proviso. The result of the Court's approach is that the proviso is not a proviso in strictly technical sense, but merely an example of Congressional concern that internal union affairs should be left free of governmental interference. Although the Court defers to the proviso to the extent that "at the very least" the proviso preserves the right to impose fines as a lesser penalty than expulsion, the rest of the Court's opinion implies that a union can impose fines even if they are not a lesser penalty, for the Court makes no inquiry into the relative impact of expulsion and fines under the facts before it. Therefore, the proviso becomes merely a warning that "internal union matters" must be left free of Section 8(b)(1)(A).

Finally, the Court tends to finesse the question by saying that they are loathe to impute to Congress a "concern with the permissible means of enforcement of union fines and to attribute to Congress a narrow and discrete interest in banning court enforcement of such fines. Yet, there is not one word in the legislative history evidencing any such Congressional concern." Congress, however, was indeed concerned about "means," as the addition of Section 8(b) clearly demonstrates. Again, the Court seems to be placing a burden on the appellant to prove that the legislative history specifically meant to prohibit fines.

Despite the Court's deference to the union's institutional interests, the opinion in Allis-Chalmers may have ironically opened the door to further federal intrusion into union disciplinary proceedings. The Court did set a number of limits to its holding but perhaps more importantly, abolished any real distinction between court-enforced fines and fines enforceable only by expulsion. The latter would seem protected by the proviso, and court-enforced fines could have been treated as a distinct means of seeking compliance to union norms. The Court, however, treated the precise method of enforcement, excepting violence and job discrimination of course, as irrelevant.

The proper approach to Section 8(b)(1)(A) problems, as presented subsequently, is a balancing of interests similar to that followed under Section 8(a)(1). The Court seems headed in that

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102 Id. at 192.
direction as further analysis will demonstrate, and the Court's reliance on "coercion" in Allis-Chalmers suggests that the balancing formula will not accord independent significance to the proviso. If the "coerciveness" of the union's action does not involve a consideration of the method of enforcement, then fines punishable by expulsion will be treated similarly to judicially enforced fines. The scope of NLRB scrutiny, then, will presumably not turn on the method of enforcement.

Statements in the legislative history to the effect that Section 8(b)(1) would impose the same restrictions on unions that Section 8(b)(1) applies to employers suggest that the provision applied to union members as well as non-union members. The Court, however, disagreed strongly with this assumption. Rather than merely taking the case of strikebreaking fines, the result of its approach is very nearly to exclude all internal union discipline from the scope of Section 8(b)(1)(A). Thus, in relation to the above argument, the Court stresses that the parallel between the provisions is "inapplicable to the relationship of a union member to his own union. Union membership allows the member a part in choosing the very course of action to which he refuses to adhere, but he has of course no role in employer conduct, and nonunion employees have no voice in the affairs of the union." The relevant inquiry, however, is whether Section 8(a)(1) provides helpful guides in interpreting the scope of employee freedom under Section 8(b)(1)(A). Subsequent discussion will prove that this is the case.

In summary, an analysis of the debates supports the broad assumption that the section was primarily designed to protect non-members from threats of force or job loss. There are fairly strong implications, however, that the sponsors viewed the section as applying to other situations as well. If the protections do extend to members as well as non-members, however, the strong statements concerning the avoidance of interference with the internal affairs of unions must be explained. The only explanation is that the Senate felt internal affairs must be left free from federal intervention but only so long as union power, albeit exercised internally, does not tread on federally protected rights. The introductory comments demonstrate that the NLRB has protected union members under Section 8(b)(1)(A) and has applied the section in non-organizational situations. Indeed, the following discussion dealing with the scope of the Court's ruling in Allis-Chalmers will demonstrate that,
despite the broad language found in the opinion, the Court does not exclude all union disciplinary power from NLRB scrutiny. This approach is confirmed by the Court's *Marine Workers* decision\(^\text{105}\) in which the Court limits the area of "internal union affairs" to conduct which does not violate federal labor policy.

In any event, confident reliance on the provision's legislative history is not warranted for any position. Fines are nowhere mentioned. Given the rarity of court enforcement of fines, this lack of consideration is understandable. Furthermore, Section 8(b)(1)(A) was added from the floor of the Senate, the Conference Committee's report is unilluminating, and the debates contain all the weaknesses which make them the least satisfactory aspects of legislative history. Whether one agrees with Mr. Justice Black's dissent or not, it is hard to completely disregard his characterization of the legislative history as "only the remarks of a few Senators during the debate on the floor."\(^\text{106}\) Much of the history of labor legislation could be similarly criticized, however, suggesting that legislative history is often scrutinized to support policy judgments already made.

The problem with the legislative history is that it often can be read to support both sides. Common denominators tend to be those general principles which are useless in concrete cases. One has his choice of "internal union affairs," which is sufficiently comprehensive to include (and thus protect from NLRB scrutiny) all union discipline, or the proviso, which if read literally, excludes from the scope of Section 8(b)(1)(A) only discipline in the form of expulsion.

The key motivating factor for Mr. Justice Brennan may have been the feeling that Congress would not have weakened unions by preventing fines because the resultant loss of unity would have undercut the ability of unions to carry out the Congressional design. The Court, therefore, relies on the rubric "internal union affairs" to exclude from judicial scrutiny union discipline thought necessary for union effectiveness. Mr. Justice Black, finding the legislative history unilluminating, is persuaded to apply a "clear meaning" rule in order to secure the widest possible protection for individual freedom.

Given these problems, one is forced to look elsewhere for assistance. The LMRDA is one source, state law may be another, and the use of analogies to other provisions of the Act are a third possibility. The latter possibility relates back to the Court's rejection of the analogy to Section 8(a)(1) as "clearly . . . inapplicable to

\(^{105}\) See text accompanying notes 158-206 *infra.*

\(^{106}\) 388 U.S. at 208.
the relationship of a member to his own union.” This is not obvious, however. Of course, the union cannot be equated with the employer since the employee participates directly in the decisions of his union. The employee who dissents from a strike vote, however, is given a right not to participate, just as he had a right to strike in objection to a policy of his employer. Carrying this comparison further, it would seem useful to look at the development of Section 8(a)(1). After all, there was a constant refrain throughout the legislative history that the function of Section 8(b)(1)(A) was to impose upon unions the same restrictions that Section 8(a)(1) placed upon employers.

B. Relevance of the Development of Section 8(a)(1): The Lost Parallel

A look at the development of Section 8(a)(1) immediately reveals that “restrain and coerce” is not simply a factual question but, rather, the legal conclusion reached when employee interests have been balanced against legitimate employer concerns. Thus, the employer may bar solicitation during work time and may prohibit distribution in the work place, although any limitation of employee freedom to solicit “restrains” organization in fact.\(^{107}\) A working time rule is only presumptively valid, however, and anti-union motivation will invalidate the rule despite the fact that the employer’s valid concerns about efficiency are not necessarily affected and, importantly, despite the fact that the addition of bad motive does not really increase the quantum of restraint on union solicitation. Indeed, the Court has taken a similar approach in cases under Section 8(b). Thus, the Court has upheld consumer picketing which urges a product boycott while holding that Section 8(b)(4) prohibits picketing which urges a total boycott of the secondary establishment.\(^{108}\) It cannot be argued that product picketing does not or cannot “restrain” neutrals in fact, however, despite the holding that such conduct is not “restraint” within the meaning of Section 8(b)(4).

The history of Section 8(a)(1) also reveals that Section 7 interests are often overbalanced by the employer’s interest in maintaining operations or by more general policy considerations.\(^{109}\) Thus,

\(^{107}\) Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).


\(^{109}\) NLRB v. American Ship Bldg. Co., 380 U.S. 300 (1965). An employer may lock out his employees, preempting the union’s valuable weapon of choosing the time to strike to strengthen his collective bargaining position. Moreover, concerted activity normally protected by § 7 is often subordinated to the interests of industrial stability and union effectiveness. See text accompanying notes 5-7 supra.
in *Mackay* it was held that an employer may permanently replace strikers to maintain operation despite an obviously discouraging effect on union organization.\(^{110}\)

The question, then, is whether court enforcement of fines is a *reasonable* restraint on Section 7 rights. The answer unfortunately is more difficult to formulate. Certainly union effectiveness is a relevant consideration and is, perhaps, the counterpart of the employer's right to "protect and continue his business."\(^{111}\) By giving the employer the right to permanently replace strikers, *Mackay*, in effect, protects strikebreakers from the logical extension of the right to strike. Thus, *Mackay* gives the employer an economic counterweight to the union's concerted activity, and also permits him to protect strikebreakers filling strikers' jobs. *Allis-Chalmers* can be seen as a parallel case. The union's interest in its effectiveness permits it to coerce or penalize dissenters because, on balance, the collective gain outweighs the loss of individual interests. A similar approach is used to deny protected status to wildcat strikers, and perhaps both groups of employees should be treated alike. This resolution is not clearer, however, even when wildcatters are lumped in, for acts of dissent convey valuable information to unions and employers.\(^{112}\) Submerging these interests within the union hierarchy may aid industrial stability only temporarily, and the cost in terms of member resentment may be high. Doctrine, however, treats both groups of dissenters as unworthy of protection despite the fact that their acts possess most of the attributes of protected activity.

The statement of the problem as one of the conflicting interests, however, is an act of recognition, not solution. The NLRB must articulate the interests which can be justifiably considered and assign relative degrees of importance to those interests. The Court has given significant weight to the union's collective internal-security interest and the compatible Congressional concern that unions serve as effective bargaining agents.

The union's interest in survival, however, is not as convincing as one might suppose. If court enforcement of fines was critically important, one would assume it would be a more common occurrence than it is. Apparently, solidarity has been sufficiently protectible by the use of social pressure, fines punishable by expulsion, or


\(^{111}\) This suggestion was made in *C. Summers & H. Wellington, Cases and Materials on Labor Law* 1121-22 (1968).

\(^{112}\) Given the spontaneous nature of many wildcat strikes, an argument exists that wildcatters should receive a more sympathetic reception than strikebreakers. *See generally A. Gouldner, Wildcat Strike* (1954).
other forms of union discipline. Furthermore, it is not obvious that court enforcement of fines has the effect of strengthening weak unions. The Court stresses that strong unions may not need this power since the fear of expulsion would be sufficiently threatening. Yet, *Allis-Chalmers* involves the United Auto Workers, and so the equation is not obvious. Any union which faces the threat of member-strikebreakers could be considered a weak union, and strikebreaking could be a result of that weakness rather than the cause. The union's resort to external assistance indicates that it cannot enforce obedience internally. Strikebreakers normally disagree with the strike call or bargaining demands, and their action, undeterred by social pressure, may reflect factional strife involving a substantial minority.

In any union, "weak" or "strong," it is doubtful whether the imposition of fines will encourage "better" members. Fines may encourage withdrawals from membership, either as a result of the fines or to avoid future fines, and this would leave the union with depleted ranks—a situation the Court wished to avoid. Even if the members do not leave the union, as was apparently the case in *Allis-Chalmers*, their attachment to the union is not likely to be stronger. That does not mean that seeking judicial enforcement was a wasted effort, however, for it may achieve union objectives precisely. Members may refrain from strikebreaking in the future and other members are reminded vividly of their institutional obligations. This result cannot be criticized if the Court is correct in determining Congressional purpose; however, that purpose is certainly not blindly clear in the debates. It is unfortunate that the Court rejected contextual analogies to Section 8(a)(1) for, ironically, developments under Section 8(a)(1) could have supported the result in *Allis-Chalmers*.

On the other hand, the Court also overlooked the fact that the impetus of many of the Taft-Hartley provisions was the protection of the individual from the institutional interests of the unions. Indeed, that concern echoed louder than the interest in collective effectiveness. Furthermore, it is difficult to disagree with Justice Black's statement that the "fundamental error of the Court's opinion is its failure to recognize the practical and theoretical difference between a court-enforced fine, as here, and a fine enforced by expulsion or less drastic intra-union means."8 The fear of judicial process and its costs will no doubt be a powerful incentive to avoid exercise of an admitted Section 7 right. Indeed, the size of the fine may absolutely foreclose the exercise of this right rather than merely "rea-

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8 388 U.S. at 203-04.
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sonably" limit it.\textsuperscript{114} It is true that the Court suggests that there are limits—fines must be "reasonable" and the offender must be a "full member," but these qualifications are probably too vague to give employees confidence of ultimately succeeding in the union's action to collect the fine or in an unfair labor practice proceeding before the Board.\textsuperscript{115}

Justice Black was doubtful that any union fine for picket line crossing was valid, even though the fine was enforceable only by expulsion from membership. That is, despite the fact that the proviso permits the union to expel, he was not at all sure that Congress gave unions the power to act by lesser means. Basically, however, Justice Black's concern was that fines might not really be a lesser penalty. He was especially concerned about fines because they were "a direct economic sanction for exercising [the] right to work. [Thus], the direct threat of a fine, to a member normally unaware of the method the union might resort to for compelling its payment, would often be more coercive than a threat of expulsion."\textsuperscript{116}

Of course, the threat of expulsion alone could also "absolutely restrain" some union members from crossing the picket lines. On the other hand, if employees are willing to cross a picket line, they are probably not very concerned about union membership. Finally, a member may always resign from a union, thereby freeing himself from the penalty provision of the union's by-laws.

In sum, the result in \textit{Allis-Chalmers} seems correct although the route traveled was not satisfactory. The collective interest in security may outweigh the individual interest, although the court failed to even raise this statutorily recognized concern. The interests of the strikebreaker are the protection of his job, since strikers may legally be replaced, and the maintenance of his income. A large number of variables exist, however, making it difficult to estimate the importance of these interests without particularistic fact-finding. Most employees, for instance, may not fear replacement during their strike effort, perhaps because they are skilled or otherwise difficult to replace or because the employer has traditionally refused to replace strikers. Thus, the labor history of the community, the expectations of employees, and the state of the labor market, are all relevant factors. Moreover, the interest in income maintenance may be less

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\textsuperscript{114} A joint union brief submitted to the NLRB proposes that fines which equal the strikebreakers' earnings should be permissible. 71 L.R.R.M. 415 (1969).
\textsuperscript{115} See 388 U.S. at 204 (Black, J., dissenting). Citing Professor Summers, the Court seems to rely upon state courts to strike down discipline which involves a severe hardship. Summers, \textit{Legal Limitations on Union Discipline}, 64 Harv. L. Rev. 1049, 1078 (1951).
\textsuperscript{116} 388 U.S. at 203.
\end{footnotesize}
than critical if employees may easily find interim employment or can expect to mitigate losses due to post-strike overtime gains. The difficulties of accurately gauging the institutional and individual interests may give additional support to the result reached in *Allis-Chalmers*.

C. The Relevance of State Law: A Doubtful Use of Dubious Doctrine

The Court's resolution of the problems in *Allis-Chalmers*, and its refusal to give significant weight to individual interests, is based on its assumption that "full members" bind themselves to intra-union discipline. Thus, the Court turns to state law and holds that court enforcement of fines stems from the "consent" theory of internal union affairs. Although this approach is generally discredited in the writings, it is still commonly employed. The doctrine is normally used to determine the propriety of union action against employees. Because state courts use the contract approach with varying degrees of strictness, results in state courts will vary. The employee, raising a federal right, must seek vindication as a defendant in a state court action to enforce a fine or file with the NLRB. It is doubtful that this legal framework will encourage employees to test their Section 7 rights.

Indeed, it is possible that the Court's opinion in *Allis-Chalmers* may even affect the very state law it purports to recognize. The Court felt that court enforcement of fines was implicit in binding obligations. The union's by-laws and constitution are not commercial agreements; and, indeed, courts have often required that the penalty or means of enforcement, as well as the offense, be spelled out in the union's laws. Since court enforcement is rare, hardly assumed, and significantly different than expulsion and suspension, state courts could be expected to deny court enforcement where no provision for such action exists. The limited number of relevant cases support this assumption. Although some state courts have enforced fines without discussing whether the union had specific authority to proceed in that manner, court enforcement has been permitted where specifically authorized by the union charter or rules.

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118 See, e.g., Division 1478 of Amalgamated Ass'n v. Ross, 90 N.J. Super. 391, 217 A.2d 883 (1966). Defendant was fined for violation of union order prohibiting members from entering the dispatcher's office and answering telephone calls. The Court said that since neither the defendant's union membership nor his employment status was involved in any way, the activity was not arguably subject to the NLRA.
119 Master Stevedores' Ass'n v. Walsh, 2 Daly 1 (New York 1867). A by-law provided for a fine for working less than a certain wage and provided that it could
Moreover, courts have denied the union's right to bring such action in cases where it was found that the union's constitution and by-laws did not authorize such suits. In one case a member was fined for violation of an agreement not to work behind an authorized picket line. The union constitution provided for suspension or expulsion for a member who failed to pay a fine, but there was no provision for recovery of a fine in court. The court held that the remedies provided in the constitution were exclusive, and rejected the union's action for enforcement of the fine.

Ironically, then, although the Court purported to rely on doctrines developed under state law, it may have affected its substance by encouraging state courts to ignore the absence of court enforcement provisions in union constitutions and by-laws. Indeed, the Wisconsin Supreme Court upheld a fine growing out of the Allis-Chalmers situation on the basis of the Supreme Court's analysis.

Not all fines will be enforced, states the Court, for the offenders must be "full members." Not content to rely on state courts for this protection, however, the Court reads this limitation into Section 8(b)(1)(A), suggesting that less than full members may not be fined without violating Section 8(b)(1)(A). Thus, the Court acknowledges that court enforcement is a significant restraint of Section 7 rights. Moreover, it would seem that the employee need not await the resolution of the state court action, for it is the institution of the action or the threat of such action which logically restrains within Section 8(b)(1)(A). Again, then, the Court may have affected the contours of state law, since state courts would not be expected to enforce fines which constitute unfair labor practices.

A union security clause does not compel full union membership, but rather, an employee is required to become and remain a member only to the extent of paying his monthly dues. The Court suggests that if he does more than that, as the fined employees in Allis-Chalmers had, they became "full members" subject to the penalties of the union's constitution and by-laws.

It is clear that the fined employees involved herein enjoyed full union membership. Each executed the pledge of allegiance to the
UAW constitution and took the oath of full membership. Moreover, the record of the Milwaukee County Court case against Benjamin Natzke discloses that two disciplined employees testified that they had fully participated in the proceedings leading to the strike. They attended the meetings at which the secret strike vote and the renewed strike vote were taken.\footnote{128}

The Court refused to “presume” the contrary because Allis-Chalmers had not suggested that the fined employees enjoyed less than full union membership, and, indeed, Allis-Chalmers argued that the prohibition should apply whatever the nature of the membership. If this fact is critical, however, surely the case should have been returned to the NLRB for appropriate fact-finding. Furthermore, it would seem advisable to place the burden of proving “full” membership on the union which is, after all, seeking to restrain employee conduct.

The Court’s opinion does not characterize employees who are covered by a union shop provision but who refuse to accept the formal membership rites such as oath-taking, nor does the Court define employees under agency shop clauses. The Court merely cited IAM v. Street,\footnote{124} permitting dissenters to prevent use of their dues for political causes they opposed, under the proposition that “dissent is not to be presumed—it must affirmatively be made known to the union. . . .”\footnote{125} But the question is not one of clearly demonstrating dissent, for strikebreaking is as clear a demonstration of dissent as one would desire. The Court must, then, mean that a full member’s clear notice of resignation from the union is required to escape union discipline for violation of union law.

The Court is not necessarily suggesting, as some of the dissenters on the Seventh Circuit had, that an employee waives rights under Section 7 by joining a union. Indeed, the waiver argument made below is difficult to fathom. The right to be free from union fines cannot be waived upon becoming a member, because the union would have no authority to impose the fines on an employee who was not a member of the union. The significance of Allis-Chalmers is that union members can be restrained from exercising Section 7 rights whereas non-members, because they are not subject to the union constitution, are not subject to union discipline.

Because of the Court’s reliance on the contract approach and its reliance on the obligation of membership in defining Section 8(b)(1)(A), the unenforceability of fines imposed on less than full

\footnote{128} 388 U.S. at 196.  
\footnote{125} Id. at 774.
members can be assumed. Yet, the Court's approach could logically lead to the conclusion that no distinction should be made between full and reluctant members. If a union must protect itself, especially a weak union, it would see that it must protect itself against all who belong to it, no matter what the extent of their union participation. Moreover, the Court's concern over the depletion of union ranks would seem to apply to partial as well as full members. To have to expel partial members would seem to thwart the purpose of the union security clause in the first place. Would not the Court's approach suggest that if a union could only fine full members, the result might induce full members to become less than full members?

The union shop provision, however, was added in 1947 and was designed to limit compulsory membership to its financial core. Given the addition to Section 7, employees who are forced to join because of a union security clause would probably be protected from union fines despite the argument that the union interest in solidarity extends to reluctant members as well. Moreover, the voluntary-involuntary distinction does not undercut the Court's view that internal union affairs are excluded from the provision, for internal union affairs can only be defined by a truly voluntary relationship. One who in fact joins because of a union security clause has joined only because the Act permits such clauses. Thus, a true "union member" relationship is not created, and these employees cannot be coerced into paying union fines.

Of course, union membership may realistically be "involuntary" even in the absence of a union security clause. The union becomes the exclusive bargaining agent if it secures the support of a majority of the employees in an appropriate unit. One may not wish to join, but it certainly behooves one to join and take part in internal union activities which critically affect the lives of the employees. Thus, in a sense, involuntary membership may realistically be much broader than simply membership induced by a union security clause. This would suggest that the distinction is doubtful at best. It also places upon the Board the difficult task which, given the above, may be impossible.

The separation of voluntary and non-voluntary membership under union security clauses is supported by the purposes of Sec-

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126 The NLRB has reached a similar result in a recent case without relying on this distinction. NLRB v. Molders, Local 125, 178 N.L.R.B. No. 25 (1969).

127 Arguably, this discussion merely confuses wise choices with involuntary decisions. A choice may be reasonable and perhaps the only reasonable alternative, without becoming necessarily involuntary.
tions 8(a)(3) and 8(b)(2). The proviso to Section 8(a)(3) limits the membership required under a union shop clause to tendering "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." A union security clause can be used for no other purpose than requiring employees to help bear the financial burdens of their statutory bargaining representative. The Supreme Court stated in Radio Officer's Union v. NLRB:

This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

If unions are permitted to require membership under a union security clause and rely upon this membership for imposing judicially enforceable fines upon employees who are unwilling to participate in union activities, the union security agreement would be used for a purpose other than to compel payment of union dues and fees. This seems to be the approach taken by the Court in Allis-Chalmers, although the Court was wise to look beyond the mere existence of a union security clause to see whether the fined employees actually participated in union activities. This suggests that involuntary members can be fined, but those fines could be enforceable only through threats of suspension or expulsion from membership. The member fined under such circumstances is not compelled to pay the fine, but only to choose whether to obey the union rule or lose union membership. On the other hand, it is possible that the only limitation on union security clauses is that the union may not threaten or cause a discharge as long as dues are tendered. It could still be argued that involuntary members must pay fines as long as their jobs are not affected, since the primary aim of the statutory provisions is to insulate employment from union activity. Irrespective of the scope of Section 8(b)(2), however, the Court has apparently made the voluntary-involuntary distinction critical for Section 8(b)(1)(A).

The Court, however, draws no clear line between full and partial membership. Justice Brennan stresses that the Allis-Chalmers' em-

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130 Id. at 41.
ployees executed a pledge of allegiance to the U.A.W. constitution and took the oath of full membership, but it is not clear whether taking the pledge and the oath was a "voluntary act by the employee with full knowledge of its consequences or was merely the automatic and unthinking response of an individual covered by a collective bargaining contract making membership a condition of continued employment." As pointed out above, membership can hardly be deemed voluntary when it is the only way to participate in legislative and political decision-making which affects the rules of the work place, and oath-takers may not realize that their action may permit judicial enforcement of union fines.

Besides the "full member" condition to the application of the Court's decision, the opinion notes that it does not purport to determine "whether § 8(b)(1)(A) proscribes arbitrary imposition of fines, or punishment for disobedience of a fiat of a union leader. . . ." The Court does not explain what constitutes "arbitrary" punishment or "fiat" or why the factor should be relevant to a determination under Section 8(b)(1)(A).

The factor is apparently important for the Court, however, for it was repeated in Scofield v. NLRB. The Court in Scofield upheld union fines against members who exceeded union-created production quotas, in part, because the union's rule was "duly adopted and not the arbitrary fiat of a union officer . . . ." To the extent that the union's action violates its own organic law, of course, state courts would refuse to enforce the fine. Again, however, the institution of an action to enforce a fine rather than its resolution, should be the critical event. Since some union fines can validly be enforced in state courts, the mere institution of the action will not bring Section 8(b)(1)(A) into play unless the Court's standards of validity are violated. The NLRB, therefore, is obliged to review the procedural regularity of the rule's adoption for this will be an important factor in determining the boundaries of legality. Unfortunately, the case by case method of determining these questions will certainly not give assurance to dissenting employees, nor does it aid labor organizations which desire to remain within the boundaries of the law.

A further relevant criteria is, apparently, the amount of the fine.

131 388 U.S. at 196.
132 Christensen, supra note 55, at 275.
133 See, e.g., Blumrosen, Legal Protection Against Exclusion from Union Activities, 22 Ohio St. L.J. 21, 25 (1961), where the author argues, in a different context, that membership is critical to ensure that decisions reached treat all employees fairly.
134 388 U.S. at 195.
136 Id.
Justice Brennan stated that "it is not argued that the fines for which court enforcement was actually sought were unreasonably large," implying that unreasonable fines may be vulnerable to attack. Recently, fines were levied against four members of a radio-televisi-

on employees' union amounting to $14,000, $12,000, $11,400 and $10,600. A local of the Bakery and Confectionary Workers union assessed six members $1000 each purportedly for strikebreaking. How is the Court or NLRB to determine a reasonable fine? The harm to the union's institutional interests caused by strikebreaking can hardly be estimated in dollars. Furthermore, if fines and indeed the whole area of internal union affairs are to be excluded from the prescription of Section 8(b)(1)(A), as the Court implies, how can an exception be made for arbitrary fines? Obviously, despite the sweeping language of the opinion, not all fines even for strikebreaking will be protected from sanction under Section 8(b)(1)(A). Again, however, the Court fails "to recognize the practical and theoretical difference between a court-enforced fine, as here, and a fine enforced by expulsion or less drastic intra-union means."

[F]ines [could] be so large that the threat of their imposition will absolutely restrain employees from going to work during a strike. Although an employee might be willing to work if it meant the loss of union membership, he would have to be well paid indeed to work at the risk that he would have to pay his union $100 a day for each day worked. Of course, as the Court suggests, he might be able to defeat the union's attempt at judicial enforcement of the fine by showing it was "unreasonable" or that he was not a "full member" of the union, but few employees would have the courage or financial means to be willing to take the risk.

The spectre of the NLRB regulation of the amount of union fines has stirred union concern. The AFL-CIO and the Alliance for Labor Action have filed a joint position statement to the NLRB. A key portion of that brief argues that although the entire area of union fines should be excluded from NLRB scrutiny, fines, if they are to be regulated at all, should extend to the amount strikebreakers can earn during the strike. In other words, the fine should remove

138 N.Y. Times, Oct. 11, 1967, at 95, col. 4. The New York Times article quoted an official of the union as stating that "the fines were not the highest ever imposed by the union against its members and are in no sense precedent-making."


140 388 U.S. at 203-04 (Black, J., dissenting).

141 Id. 204. A trial examiner has recently upheld a fine levied by Local 2390, CWA, even though the fine exceeded gross wages earned behind the local's picket line. AFL-CIO News, Jan. 24, 1970, at 2, col. 4.

all the benefits received by the strikebreaker as the result of his violation of union rules. Such an approach would deter the crossing of picket lines entirely, the precise fear stated by Justice Black.

It is true that consideration of the amount of fines would place the NLRB in a thicket, resulting in time-consuming litigation of dubious value. The Court upheld fines since they might be a lesser penalty than expulsion, but that does not necessarily suggest that fines must be less coercive than expulsion to be valid. First, that determination would generally be extremely difficult to make sure; the "cost" of expulsion and the "value" of membership is incalculable. Second, the thrust of the Court's opinion is to validate fines, if "reasonable," even though they are more onerous than expulsion. The N.A.M. has suggested that the employee be given a choice between a fine or expulsion. An employee might choose expulsion, informing us which he feels is less punitive, and yet the Court's opinion stresses that unions should not be limited to expulsion and the subsequent depletion of its ranks. Since the amount of the fine is directly proportional to the protection of the institutional concern in solidarity and effectiveness, it is unclear when a fine will be so high as to be unreasonable and, thus, an unlawful "restraint." Perhaps this matter might best be left to state courts determining the scope of the "contract" in union actions to enforce such fines.

A further difficulty with the Court's opinion in Allis-Chalmers is the definition of restraint. Any union activity which restrains the exercise of Section 7 rights would seem to fall within Section 8(b)(1)(A). Thus, if not protected by the proviso, even the threat of fines punishable only by expulsion would theoretically constitute restraint. Justice Brennan reasoned that collecting a fine by court action is on its face no more restraint and coercion than collecting a penalty for non-payment of taxes or damages for breach of contract. This implies that it is the means of enforcement which is the key to the operation of Section 8(b)(1)(A), because, of course, justifiable legal action cannot be deemed "coercive." But the Court subsequently makes clear that its holding goes beyond the means of collection and involves an inquiry into the substantive justification for the union rule itself. The Court assumes that an employee will be deterred from strikebreaking because of the threat of court enforced fines, because the Court was concerned that a weak union have the power to seek judicial enforcement of fines. Since physical violence cannot be used against an individual who wished to cross a picket line and exercise his Section 7 right, the decision fails to establish why a somewhat more civilized and less dramatic,
but nevertheless effective, device for obtaining the same result is not a restraint within the statutory phrase. As Professor Christensen has observed, the Brennan opinion "says little more than the lesser penalty could not have been regarded by Congress as a restraint because it is a penalty which must be and is accepted as an integral part of member's relationship to this union." 144 Although union constitutions typically penalize strikebreaking, "enforcement of a fine by court action simply cannot be accepted as a means of discipline which has been historically or realistically present as an element of the union-member contract." 145 The rarity of union actions to enforce fines makes it difficult to believe that the union and the member implicitly accepts the possibility of court enforcement of their "contract."

The Brennan opinion represented the views of only four members of the court as Justice White concurred. Justice White seemed to assume that the act protected the right to cross picket lines and felt that the difference among the justices stemmed from different evaluations of the relative harshness of court enforcement on one hand and expulsion of the other. Since the Court seemed unanimous in upholding a rule against crossing picket lines during strikes and its enforceability by expulsion, Justice White thought the Court's opinion was the "more persuasive and sensible construction of the statute and I therefore join it, although I am doubtful about the implications of some of its generalized statements." 146

Predictability is muddied by the following statement:

I do not mean to indicate, and I do not read the majority opinion otherwise, that every conceivable internal union rule which impinges upon the § 7 rights of union members is valid and enforceable by expulsion and court action. There may well be some internal union rules which on their face are wholly invalid and unenforceable. 147

Justice White, thus, did not read the majority as excluding the entire area of internal union affairs from the ambit of this statute. Where that dividing line should be drawn is certainly unclear, but it may well be what the Court had in mind.

D. The Relevance of the LMRDA: Problems of Accommodation

Another external source to which the Court could have looked for assistance is the LMRDA of 1959. The LMRDA attempted to insure democratic and fair processes in the conduct of union
affairs, and the Court felt that its passage in 1959 demonstrated that union self-government was not regulated in 1947. Of course, the question is much narrower, i.e., whether the aspect of union self-government involved in Allis-Chalmers falls within the ban of Section 8(b)(1)(A). The Court noted that Congress expressly recognized that a union member may be "fined, suspended, expelled or otherwise disciplined and enacted only procedural requirements to be observed." It does not follow, however, that fines which satisfy the procedural provisions of the LMRDA thereby satisfy the substantive provisions of the NLRA.

Moreover, fines for strikebreaking do not solely affect internal union affairs. The Allis-Chalmers employees were fined for going to work, that is, for refusing to take part in a union activity. The Court may be implying, although it nowhere asserts, that the procedural protections of Section 101(a)(5) of the LMRDA are to be the only protection in cases of union fines. Such a view would be unjustified, however. The passage of this procedural provision in 1959 hardly established that no substantive limitations were created in 1947. Indeed, Title I expressly states that it does not limit previously existing rights or remedies under state or federal laws.

The LMRDA approached internal union problems in radically different manner than prior labor legislation. The rights granted are stated in terms of a citizen's democratic and constitutional rights, and enforcement of much of the Act is left to private litigation. Title I of the LMRDA, protecting individual rights of speech, assembly, and fair treatment, did not attempt to establish a comprehensive code of rights for union members. Rather, the act was intended to create minimum standards. Congress was aware that the act supplemented a body of state law and expressly recognized this extensive development as a concurrent source of rights and remedies.

148 29 U.S.C. § 411(a)(5) (1964). One question would be whether the union penal provision in this case is clear enough to satisfy § 101(a)(5). State courts often interpreted vague provisions to protect democratic rights and notice may be a requirement under § 101(a)(5), the due process provision. Constitutional parallels can be used to argue that overly broad or vague provisions deter the exercise of protected rights. The chance of federal court review, however, may not actually affect the deterrence created by the imposition of union discipline. See Atleson, A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights, 51 MINN. L. REV. 403, 473 (1967). In cases of strikebreaking, however, members can hardly complain that they had no notice of the potential consequences of their acts since penal provisions were vague.


150 See generally Atleson, supra note 148.

Title I provides explicit recognition of union institutional interests, and the specified rights may be limited by reasonable rules regarding membership obligations to the union as an institution. Strikebreaking, urging members to support or join a rival union, or filing decertification petitions would seem to violate a member's obligation to the union as an institution and, therefore, discipline for such conduct would not seem to violate the speech and assembly provisions of Title I. In attempting to accommodate the LMRDA and the NLRA, it is arguable that permissible discipline under one act should pass muster under the other. Reasonable rules may legally infringe rights otherwise granted under LMRDA Title I. Since these federal rights would not seem less important than the "right to refrain" under the NLRA, reasonable union discipline should arguably be treated similarly under the NLRA.

Attempts at accommodation, however, merely state the problem since it is not clear that court enforced fines are "reasonable" under either act, or that Congress was more aware of this method of enforcement in 1959 than it was in 1947. Section 101(a)(5) does refer to "fines," but neither in the Act nor in the legislative history are court enforced fines mentioned. Indeed, challenged discipline under these provisions have normally involved expulsion or lesser focus of discipline such as suspension. Even the express recognition of institutional interests in Title I, permitting limitation of protected rights, merely describes a typology similar to Section 8(b)(1)(A) which also expressly permits some union discipline. Thus, although strikebreaking would seem to be a proper object of union discipline under the language and history of Section 101(a)(2) of the LMRDA, not all methods of enforcements or all penalty provisions will necessarily be held reasonable.

Finally, permissible union discipline under the LMRDA does not necessarily validate the activity under the NLRA. First, the LMRDA grants rights to members not unions; thus, a holding that court-enforced fines do not violate a union member's Title I rights is not the same as a holding that the union has a right to impose the discipline.

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152 This view has been tentatively presented by Professor Wellington. See Hearings on Oversight of Administrative Agencies, before Subcomm. on Separation of Power of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. pt. 1, at 163 (1968).
154 See, Atleson, supra note 148, at 465.
155 See, NLRB v. SuCrest Corp., 409 F.2d 765 (2d Cir. 1969), where special dues assessments had complied with LMRDA § 101(a)(3), but, nevertheless, the compulsion to pay these dues violated §§ 8(b)(2) and 8(a)(3).
More importantly, although Title I rights are limited by institutional obligations, the NLRA expressly permits members to ignore or disobey union standards or procedures. Thus, although strikebreaking or dual unionism may properly lead to expulsion, the union cannot affect the dissenter's employment status. The right to cross picket lines is protected by Section 7 and even the imposition of fines may effectively deter such conduct. The right to file de-certification petitions would seem to be protected by the Taft-Hartley rights to join and support labor unions or to refrain from union activities. These rights would seem to protect union members who wish to change their bargaining representative. Yet, such conduct is admittedly disloyal and presumably violative of a member's obligation to his union as an institution.

The proper approach is not to limit rights embodied in Section 7 by obligations owed to the union, but, rather, to define those obligations so as not to conflict with federal law. This formulation does not, admittedly, clear up the fog, but it does suggest that the LMRDA is a less than perfect indicator of rights under the NLRA.

Congress' primary concern in passing the LMRDA was to protect individual rights—surely much the same argument can be made for Section 8(b)(1)(A)—and this suggests that an accommodation liberally protecting individual rights is necessary. Thus, although the protection of the union's right to discipline strikebreakers in Allis-Chalmers helps define the scope of Title I of the LMRDA, impermissible discipline under Section 8(b)(1)(A) must also be impermissible under Title I.

V. MARINE WORKERS: THE RETREAT FROM ALLIS-CHALMERS

The confusion generated by the Court's decision in Allis-Chalmers returned to haunt the Court in the Marine Workers case in 1968. Realizing that its earlier language was too sweeping, the Court wrote a narrower opinion which clarifies Allis-Chalmers, although the maneuver could accurately be deemed a retreat.

In Marine Workers an employee, Edwin Holder, was charged with the violation of the international union's constitution which provided that:

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156 Atleson, supra note 148, at 478-83.
157 Support for a rival union during a representational election, for instance, may well be protected under the NLRA. See Dunau, Some Comments on the Bill of Rights of Members of Labor Organizations, in N.Y.U. 14TH ANN. CONF. ON LABOR 77, 84-85 (1961).
Every member . . . considering himself . . . aggrieved by any action of this Union, the [General Executive Board], a National Officer, a Local or other subdivision of this Union shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union.1

Holder had filed charges with Local 22 accusing its president of violating the international constitution. Local 22 found that its president had not committed the alleged violation. Without pursuing the intra-union appeal procedure which provided for appeals to the general membership, to the Executive Board, and finally to the national convention, Holder filed an unfair labor practice charge with the Board based on the same facts as his earlier charges filed with the union. He alleged that Local 22 had violated Sections 8(b)(2) and 8(b)(1)(A) “by causing U.S. Lines to discriminate against him because he had engaged in certain protected activities with respect to his employment by U.S. Lines.”2 He was then charged with violation of the Union’s constitution and by-laws, found guilty, and expelled from the Local. He appealed, and the General Executive Board affirmed the Local’s action. He then filed another unfair labor practice charge, alleging that his expulsion for filing the earlier charge violated the act. This unfair labor practice charge generated the instant case.

The Board, following an earlier decision, held that the union’s action was an unfair labor practice. In Local 138, IUOE3 the Board had held that “the act confers on any person the right to file an unfair labor practice charge, that a fine is by nature coercive, and hence, that the union’s imposition of the fine against Skura for filing a charge with the Board was violative of his statutory rights.”4 In Marine Workers the NLRB ruled that union discipline which coerces members, whether by fine or expulsion, is

... unlawful when administered to punish employees who file unfair labor practice charges with the Board seeking redress of their grievances against the union or its officials, and is immaterial to this holding that the charges were filed with the Board in contravention of this union’s constitutional or by-law provisions compelling exhaustion of internal union procedures before resort to the Board’s processes.

The union was ordered to cease and desist from expelling members

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159 Id. at 420-21.
for filing charges with the Board and to reinstate Holder without any loss of status.

The Third Circuit, however, read the proviso literally and set aside the Board's order. It found that the union's rule only required that the union be given a fair opportunity to correct its own wrong and, therefore, did not offend public policy or impede the normal and proper administration of the act.

The Supreme Court upheld the NLRB, finding access to the NLRB more important than the asserted values of intra-union exhaustion of remedies. Since access to the NLRB was involved, the Court found that Holder had stepped out of the shadowy confines of internal union affairs and into the public domain.

Justice Douglas dealt first with a "threshold" question raised below as to adequacy of Holder's first charge filed with the NLRB. Before determining whether the right to file charges was protected in this situation, the Court found it necessary to ask whether Holder's charge was a "sufficient way to allege an impairment of section 7 rights." This was summarily dealt with, however, as the charge was found to be within the ambit of Section 7 because no party had questioned it before the NLRB.

The Court's language is unsatisfying, for it suggests that not all employees filing charges with the NLRB will receive federal protection. Because of the Court's reference to the question as a "threshold" step, the Court may have impliedly affirmed the approach suggested by the NLRB that the charges must only be brought "honestly and in good faith." Alternatively, the Court may require that the employee's charge "adequately" allege a violation of Section 7. If the Court is willing to reject the values of exhaustion of intra-union remedies, it should not place upon the employee the risk that his "honesty and good faith" might be questioned or that his view of the NLRA may be incorrect. This may not be a substantial risk, but it may nevertheless deter some employees from approaching the NLRB, a consummation the Court did not desire. Moreover, since the right protected is one of access to the NLRB, the precise nature of the employee's charge seems irrelevant.

Turning to the merits, the Court distinguished *Allis-Chalmers* on the ground that Section 8(b)(1)(A) assured self-regulation only where "legitimate internal affairs" are concerned. Filing unfair labor practice charges, unlike strikebreaking, was affected by para-

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mount considerations of public policy. "The overriding public interest makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs are involved."\[165\]

Furthermore, "a whole complex of public issues was raised by Holder's original charge." Since the charge implicated the employer as well as the union, internal union proceedings could not fully explore the public issues involved nor could they provide comprehensive remedies. "There cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of a complex problem concerned with the union, and employee member."\[166\]

The policy of free access to the NLRB was recently affirmed in *Nash v. Florida Industrial Commission*\[167\] where the Court held that Florida's policy of denying unemployment compensation to employees who filed unfair labor practice charges against their employer restrained employees in the exercise of their rights to file charges with the Board. The Court explained that unions and employers are forbidden to engage in coercive activities which have "a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board."\[168\]

This policy has received explicit statutory recognition, but only in relation to employer retaliation. Section 8(a)(4) makes it an unfair labor practice for an employer to discriminate against an employee because he had filed charges under the Act. It has long been recognized that an employer's interference with an employee's resort to the Board may constitute a violation of "the general prohibition in Section 8(a)(1) against coercion of employee in the exercise of the right guaranteed in section 7."\[169\] Similarly, it has been held that an employer violates this section by encouraging or inducing employees to withdraw charges filed with the Board.\[170\]

One of the expressed purposes of Section 8(b)(1)(A) was to

\[165\] 391 U.S. at 424.

\[166\] Id. at 425.


\[168\] Id. at 239.


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impose upon union conduct restrictions comparable to those Section 8(a)(1) imposes upon employers. The Court, however, had earlier rejected the parallel between the two provisions. In Allis-Chalmers Justice Brennan had rejected the view that there was a close parallel between Section 8(a)(1) and Section 8(b)(1)(A): "However ap-posite this parallel might be when applied to organizational tactics, it clearly is inapplicable to the relation of the union member to his own union." Yet, in International Ladies Garment Workers Union v. NLRB, the Court itself had concluded that by adding Section 8(b)(1)(A) Congress intended to "impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights."

A question arises because Congress provided a specific bar against employer interference, but did not specifically outlaw union interference. A similar provision was considered in 1947, but the conference committee deleted a paragraph which made it an unfair labor practice to fine or discriminate against

... any member, or subject him to any ... penalty, on account of his having criticized, complained of, or made charges or instituted pro-ceedings against, the organization or its officers or on account ... of his having supported or failed to support any proposition submitted to the labor organization or to citizens generally for a vote. This provision would have been much broader than a mere prohibi-tion against union discipline for filing a charge, and, therefore, its deletion throws little light on Congress' view of that particular practice. It is possible that Congress thought it was unnecessary to make specific that which might be already an unfair labor practice under Section 8(b)(1). Indeed, Section 8(a)(4) itself probably only made specific what was implicit under Section 8(a)(1). Consis-tent with this approach, the Board has long held that a union unlawfully restrains and coerces when it threatens an employee with physical violence or job loss because he has filed charges with the Board or has decided to give testimony in a Board proceeding. Moreover, the Board had expanded its reading of Section 8(b)(1)(A)

171 See, e.g., 93 Cong. Rec. 4142 (1947), reprinted in, 2 L.H. supra note 70, at 1025 (remarks of Senator Taft); Id. at 4156, 2 L.H. at 1018 (remarks of Senator Ball).
172 388 U.S. at 190-91.
175 H.R. 3030, 80th Cong., 1st Sess. § 8(c)(5) (1947) (Hartley Bill), reprinted in, 1 L.H. supra note 70, at 180.
to include expulsion for filing charges with the Board despite the proviso, since expulsion entails the loss of union strike funds, pension and insurance benefits and loss of a voice in the decisions made by his collective bargaining representative.\textsuperscript{178} The Court, then, read Section 8(a)(4)'s protection into Section 8(b)(1). If retaliation by an employer violates Section 7, then union retaliation should also be protected under Section 8(b)(1)(A).

Unlike the cases dealing with employers, however, the union's rule in \textit{Marine Workers} did not deny access to the NLRB but merely delayed the invocation of NLRB assistance. Despite the fact that courts have long recognized the value of internal union exhaustion, the judicially created exceptions have tended to swallow up the rule.\textsuperscript{179} Moreover, the NLRA itself provides in Section 10(a) that the Board's power to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." The NLRA supports a policy of promoting promptness in filing charges since Section 10(a) forbids issuance of a complaint based upon conduct occurring more than six months earlier.\textsuperscript{180}

As stressed by the Court, however, the key factor is that union procedures are inadequate to give effect to the policies of the Act.\textsuperscript{181} Although the individual's charge may trigger an unfair labor practice proceeding, the scope of the proceeding is not limited to the violation there alleged. The complaint may encompass numerous related unfair labor practices discovered in the course of investigating the charge.\textsuperscript{182} Once invoked, the Board's power to adjudicate and remedy violations may not be restricted by the private agreement of the parties.\textsuperscript{183} The individual's conception of an adequate remedy for the deprivation of his statutory rights may not coincide with the Board's which is charged by Congress to administer the Act in the public interest.

\textsuperscript{178} Cannery Workers (Van Camp Sea Food Co.), 159 N.L.R.B. 843, 846 (1966).
\textsuperscript{180} 29 U.S.C. § 160(b).
\textsuperscript{181} Similar views have affected judicial views dealing with substantive protections under the LMRDA. \textit{See} Atleson, \textit{supra} note 148, at 465-470.
\textsuperscript{182} \textit{See} NLRB v. Fant Milling Co., 360 U.S. 301 (1959). Ironically, the involvement of the employer in this case actually cuts in favor of the union's rule. If the unfair labor practice charge involves union attempts to cause the employer to discriminate against the employee, complete relief can probably be obtained in an unfair labor practice proceeding against the employer under § 8(a)(3).
\textsuperscript{183} \textit{See} Lodge 743, IAM v. United Aircraft Corp., 337 F.2d 5, 8-11 (2d Cir. 1964), \textit{cert. denied}, 380 U.S. 908 (1965); \textit{Electrical Workers, Local 613 v. NLRB}, 328 F.2d 723, 727 (3d Cir. 1964); NLRB v. Local 450, Operating Engineers, 275 F.2d 413 (5th Cir. 1960).
Moreover, an individual's charge against his union is often coupled with the corresponding charge of job discrimination against the employer, as was Holder's in this case. Both employer and the union may be made parties, and the question of motives of both can be resolved in a single proceeding and comprehensive and coordinated remedies may then be imposed. These issues cannot be fully explored, nor can such effective remedies be provided, in an internal union proceeding to which the employer is not a party.

Holder may have been able to secure protection under LMRDA Section 101(a)(4) which prohibits a union from limiting the right of any member to institute an action in any court or before any agency. This section prohibited those restrictions on the right to sue which courts had generally regarded as contrary to public policy. State courts have looked with a jaundiced eye upon all discipline which restricted the members' freedom to use the judicial process. Indeed, members were protected not only when a member was found to have a good cause of action; he was protected as long as his suit was brought honestly and in good faith.

The judicial hostility to union restrictions on access to courts is not inconsistent with the judicial doctrine that a court will not entertain a member's action until a member has exhausted all reasonable remedies within the union. This is a rule of judicial administration and applies to actions involving the internal affairs of all forms of voluntary associations, as well as to actions upon contracts, such as collective bargaining agreements. Unlike the union's rule on exhaustion, which has a deterrent effect on a member's resort to a court, the judicial doctrine merely permits a court, after the member had freely resorted to it, to make a judgment as to whether the issue presented might adequately be resolved under the union's own procedures. The courts, however, have created many exceptions, and "by applying the exceptions [they] have sapped the rule of almost all vitality except in random cases."

The problem, however, is that Section 101(a)(4) contains a proviso which states that any member "may be required to exhaust reasonable hearing procedures (but not to exceed a four-month

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184 See Summers, Legal Limitations on Union Discipline, 64 HARV. L. REV. 1049, 1068 (1951).
185 Id. at 1068.
lapse of time) before instituting legal or administrative proceedings against such organization or any officer thereof."

A logical reading of the entire provision would suggest that unions could require a member to follow union appeal procedures for a four month period before instituting legal proceedings. This reading seems consistent with the language as well as Congressional desire to encourage internal union responsibility.\(^n\) The Court, however, interpreted the proviso as merely fixing the outer limits of the traditional *judicial* doctrine of exhaustion of remedies.\(^n\) Thus, the proviso is not a grant of authority to unions with which to compel a four month exhaustion period, but a "statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union."\(^n\)

It is interesting that the Court found it necessary to discuss Section 101(a)(4). The rights created by Title I of the LMRDA, including the right to sue under Section 101(a)(4), are enforceable in federal court. No matter how the proviso is to be read, it is a limitation on the right to sue under Title I and does not necessarily limit rights under the NLRA. Section 103 of the LMRDA provides that nothing in Title I "shall limit the rights and remedies of any member of a labor organization under any State or Federal Law or before any tribunal or other tribunal."\(^n\) Despite rather conflicting statements in the generally unilluminating legislative history, Congressman Griffin clearly stated:

"The proviso was not intended to limit in any way the right of a union member under the Labor-Management Relations Act of 1947, as amended, to file unfair labor practice charges against a union, or the right of the NLRB to entertain such charges, even though a four-month period may not have elapsed."\(^n\)

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\(^\text{188}\) See Sheridan v. Carpenters Local 626, 306 F.2d 152 (3d Cir. 1962).


\(^\text{190}\) NLRB v. Shipbuilding Local 22, 391 U.S. 418, 426 (1968). Interestingly, the Court's reasoning that exhaustion could not be required because of the inability of union tribunals to give complete relief has been used in LMRDA cases to excuse even the limited four-month judicial exhaustion doctrine. Detroy v. American Guild of Variety Artists, 286 F.2d 75, 79 (2d Cir.), cert. denied, 366 U.S. 929 (1961).

\(^\text{191}\) See Int'l Ass'n of Machinists v. King, 335 F.2d 340, 347 & n.29 (9th Cir.), cert. denied, 379 U.S. 920 (1964). *See also* § 603(b) of Title VI of the LMRDA, 29 U.S.C. § 523(b), which provides that nothing in the earlier titles shall be construed to "impair or otherwise affect the . . . rights . . . of any . . . person . . . under the National Labor Relations Act, as amended."

\(^\text{192}\) 105 CONG. REC. 18152 (1959).
Furthermore, the NLRB has not developed an exhaustion doctrine similar to that of the courts. Interestingly, one court has held that Section 101(a)(4) is violated when discipline is imposed on a member who files charges with the Board without exhausting intra-union remedies. This would suggest that Section 101(a)(4) protects access to relief whether the right sought to be vindicated is based upon the LMRDA or not. This is a dubious extension of Section 101(a)(4), and Marine Workers demonstrates that the NLRB can protect itself.

Since the right protected in Marine Workers is the public right to access to the NLRB, the precise form of union discipline accorded employees exercising this right should not be relevant. Thus, although fines were involved in Marine Workers, the policy of that case is broad enough to include expulsion as well, despite the proviso. Public policy, then, limits the proviso, for otherwise expulsion would seem to be without the proscriptions of the Act. This narrowed reading of the proviso is consistent with the Court's admission in Allis-Chalmers that expulsion could be a more severe sanction than the imposition of fines.

Despite the Court's emphasis on the right of access to NLRB processes, the NLRB had not previously defined the right involved in the same manner. Rather, it has described the right as one of compelling obedience to the act. This reading is important, for it provides the NLRB with the theoretical justification for distinguishing between access to Section 8 and Section 9 of the Act. Thus the Board has found no violation of the Act when a member was disciplined for filing a petition under Section 9(c)(1)(A)(ii) to decertify the union as the bargaining representative. The Board held that there was "a fundamental distinction between union disciplinary action aimed at the filing of charges seeking redress for asserted infringement of statutory rights . . . and union disciplinary action aimed at defending [the union] from conduct which seeks to undermine its very existence." The issue is important since many union constitutions and by-laws require members to exhaust internal union procedures governing intra-union disputes before resorting to judicial or administrative litigation.

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193 McGraw v. United Ass'n of Plumbers, 341 F.2d 705 (6th Cir. 1965). See also Ryan v. I.B.E.W., 361 F.2d 942 (7th Cir. 1966) (expulsion for instituting an action before exhaustion invalidated).
194 Tawas Tube Products, Inc., 151 N.L.R.B. 46 (1965), enforced, Price v. NLRB, 373 F.2d 443 (9th Cir. 1967).
196 See U.S. LABOR DEP'T, BUREAU OF LABOR STATISTICS, DISCIPLINARY POWERS AND PROCEDURES IN UNION CONSTITUTIONS, 28 (Bull. No. 1350, 1963). "Premature resort to civil courts, considered by some to be a flagrant display of disloyalty was specifically prohibited in 64 constitutions. The grave consequences of this conduct were
In justifying such disparate treatment, the NLRB has stated that:

In the fluid rather than fixed circumstances of a contest for support, the union and its adherents can perform their legitimate function effectively only if they are unified. To require them to tolerate an active opponent within their ranks would undermine their collective action and thereby tend to distort the results of the election. To permit the union and its members to discipline the hostile members is therefore not inconsistent with the purposes of the Act and impinges on no legitimate interest of others. . . .

The employee who files a decertification petition attacks the very existence of the union as an institution, and the union may expel such a member who otherwise would remain privy to the union's strategy. The power to discipline, then, is considered a necessary defensive weapon. Moreover, the NLRB feels that an employee who seeks to decertify the union hardly values his union membership and, this, his expulsion from the union would not effectively deter his resort to the Board. If this were true, then the NLRB's approach would be a reasonable resolution of the need to protect access to the NLRB on one hand and the union's need to defend its status on the other. The problem is that the non-deterrent effect of expulsion is debatable; if the decertification attempts fail, the employee may be stuck with the current bargaining representative.

If the right to file an unfair labor charge is included in the right granted in Section 7, then the right to attempt to decertify a union could well be included also. After all, such action is arguably part of the right to refrain from "engaging in concerted activities for the purposes of collective bargaining." However, the Board's "preservation of the union's existence" rationale is similar to the rationale adopted by the Court in Allis-Chalmers, that is, the right to fine strikebreaking is necessary for union effectiveness. But even an unfair labor practice charge can adversely affect group goals, such as a charge filed during an election campaign which induces the NLRB to stay the election. The Board's approach would probably also apply to a member who filed a Section 9(c)(1)(A)(i) representation petition, since a petition to certify a rival could prove just as effective as a decertification petition in undermining an incumbent's existence. Again, however, the right to file decertification

also illustrated by the number of times it appeared as a ground for summary discipline. Id. at 32.

188 Price v. NLRB, 373 F.2d 443, 447 (9th Cir. 1967).
189 The Board seems to have adopted this position in Cannery Workers Union, 159 N.L.R.B. 843, 849-50 (1966), where it broadly distinguishes cases arising under § 8 of the act from cases arising under § 9.
petitions would seem to fall within the rights encompassed by Section 7, since Section 9 rights do not seem less important than those expressed in Section 8. Indeed, to an employee at odds with his union, Section 9 rights may be vastly more important. If even a relatively mild union exhaustion rule is invalid when applied to employees who file unfair labor practice charges, it is hard to see how discipline can be permitted for employees exercising rights under Section 9.

The NLRB’s approach, however, does roughly approximate the approach taken in Section 101(a)(2) of the LMRDA which permits union discipline to enforce obligations owed to a union as an institution. Since a union has little raison d’être if it does not possess collective bargaining functions, a member who files a decertification petition challenges the union as an institution. As argued earlier, however, discipline may be improper under the NLRA even though the same union conduct does not violate Title I of the LMRDA. The recognition of institutional interests in Title I is directed to the scope of Title I rights which are not coterminous with rights under the NLRA.

The NLRB’s rationale, then, turns on its belief that access to the NLRB is not deterred by the threat of expulsion, since membership cannot be highly valued by one who wished to undermine the union’s representative status. Although the NLRB fails to appreciate the value of being able to participate in union affairs, the union does have a justifiable interest in removing from its midst one who is actively seeking to destroy its bargaining status. Since the deterrent effect of expulsion is unclear, and the union’s interest strong, the Court will probably uphold the NLRB even though expulsion may have some effect on access to the NLRB. Surely, however, expulsion for filing decertification petitions would not be unexpected by the dissenting member and it would not violate his expectations. Such an approach would make the scope of Section 8(b)(1)(A) consistent with the LMRDA. If the Court upholds the NLRB’s approach, however, it must be on the ground that access to representation proceedings is not unreasonably restrained by expulsion. The NLRB’s attempted distinction between the right to invoke Section 8 and Section 9 seems inconsistent with the thrust of Marine Workers and is, moreover, inconsistent with the policies of the Act.

The NLRB has recently broadened its approach to coincide with the thrust of Marine Workers by holding that fines for circulating a decertification petition violated Section 8(b)(1)(A). The

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NLRB held that the imposition of fines does unlawfully restrain members from seeking access to the Board's processes while expulsion has only a minimal deterrent effect.\(^1\) The NLRB corrected its previous suggestion that access to procedures under Section 9 was not protected. No doubt responding to the broad language in *Marine Workers*, the NLRB held that the right involved is access to the procedures of the NLRB, whether the member seeks to secure "obedience to the act" under Section 8 or to avail himself of self-help remedies under Section 9. Moreover, the NLRB found the relevant question to be the deterrent effect of the union's form of discipline. Thus, the NLRB held that fines are punitive, rather than defensive, and the effect of fines is to discourage access to the NLRB rather than to defend the union. Expulsion is proper since the employee should not be able to remain a member, having access to the union's strategy, while campaigning against the union.\(^2\)

Of course, the prime motivation for any form of discipline in a decertification case may be to discourage the activity. The NLRB, however, has deemed this motivation improper and has defined the union's only valid interest as one of immediate self-protection.\(^3\)

The NLRB's distinction between expulsion and fines is reasonable in this context, despite its seeming inconsistency with *Allis-Chalmers*. The Court upheld union fines in that case, partly on the ground that expulsion, expressly protected by the proviso, could be a greater penalty. In cases involving the filing of unfair labor practice charges, the NLRB has also rejected a distinction between fines and expulsion.\(^4\)

The suggestion in *Allis-Chalmers* that fines may be less onerous

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\(^1\) There was evidence in this case that expulsion was indeed a non-existent threat. The employee did not appear before the trial board or before the membership, although she was afforded an opportunity to do so. Instead, she wrote the union that the petition was being circulated in accordance with NLRB advice and that "... if you feel you want to suspend me from your union ... be my guest." *Id.* at n.9, 72 L.R.R.M. at 1030 n.9.

\(^2\) A recent trial examiner's decision deals with a case falling between expulsion and fines. An employee was prevented from attending union meetings but was not otherwise expelled. This question remains unanswered, however, as the examiner relied upon the union's threat to seek the employee's discharge. United Steelworkers Union Local 4186, Case No. 3-CB-1192 (Oct. 22, 1969).

\(^3\) Oddly, the NLRB did not rely upon the fact that the dissenting member was not a "full member" but, rather, limited her participation to tendering dues under the union shop clause. *Allis-Chalmers* implied that such "financial core" members could not be fined under § 8(b)(1)(A) for violating union rules.

\(^4\) See Cannery Workers Union, 159 N.L.R.B. 843 (1966). The union may not punish members who seek NLRB assistance in the guise of fines or strikebreaking fines. For a case involving strikebreaking and unfair labor practice charges, see NLRB v. Bakery & Confectionary Workers Local 300, 167 N.L.R.B. No. 76 (1967), enforced, 411 F.2d 1122 (7th Cir. 1969).
than expulsion seems no more than a makeweight. Initially, one would assume that fines would be a greater deterrence to protected activity since strikebreakers are obviously aware of the significance of their actions and the likelihood of expulsion. In any event, any qualitative estimate of the relative severity of expulsion and fines is nearly impossible.

The NLRB, however, has now recognized that fines for filing decertification petitions exceed union power under Section 8(b)(1)(A). It cannot be assumed that fines provide greater deterrence to this type of action than to strikebreaking. The explanation, then, must lie with the union's interest. The NLRB has limited this concern to the removal of troublemakers by expulsion, while prohibiting effective deterrence. In Allis-Chalmers, however, fines were upheld partly on the ground that expulsion would not be an effective deterrent. This apparent conflict may be explained by focusing on the nature of the conduct involved and the impact of this conduct on the union.

The cases may well be consistent, assuming a balancing approach as suggested herein, if filing decertification petitions deserves greater protection than strikebreaking. As already noted, the Court in Allis-Chalmers did not even discuss the individual right to refrain from union activity protected by Section 7, yet the interest in access to the NLRB in Marine Workers swept away a union exhaustion rule. The conclusion, then, is that the Court and the NLRB have given great weight to traditional notions of access to legal tribunals, weight exceeding that given to express rights in the act.

The legal dislike for limitations on the rights of access to legal institutions is long standing, and the Court's deference to this interest is understandable. Moreover, this difference in weight accorded dissenting conduct could also be explained by its impact on the union. Strikebreaking presents the union with an immediate threat to its exercise of concerted activity, rights also protected by Section 7 of the NLRA. The impact on the union, therefore, also affects the public interest in collective bargaining. On the other hand, the union's interest in deterring decertification petitions is not as strong. Although union security is consistent with the policies of the Act, the union's interest may be inconsistent with the majority's wish to replace the union with another. Union deterrence in this case, then, does not draw its essence from Section 7. Congressional objectives of effective collective bargaining can only be carried out if employees are represented by unions of their own choosing.

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205 Strikebreaking also has a more recognizable economic impact on union members than filing decertification petitions since the strike may thereby be prolonged.
In noting that *Marine Workers* limited union disciplinary power because of the policies of the Act, two aspects of this case should not go unnoticed. First, despite its language, the Court probably balanced the possible interference with the Act's remedial processes against the value of the union's asserted interest. The union's attempt to require exhaustion of internal remedies before a member resorts to an outside tribunal is far from illegitimate. Although judicial economy and efficiency support traditional doctrines, substantial values exist for the association as well. The exhaustion rule encourages internal resolution of disputes and permits higher authorities to uniformly apply the association's policies. Moreover, exhaustion may save the expense of litigation. The benefits of encouraging a responsible and efficient internal settlement procedure also benefits the public at large, for unions provide important power centers in a pluralistic society. Thus, the result in *Marine Workers* could have been more reasonably reached by analogizing Section 8(b)(1)(A) to the development under Section 8(a)(1).

A second aspect of *Marine Workers* is that union discipline was limited not because of the impact on individual interests but, rather, because of the institutional structure of the Act. The point is significant because in neither *Allis-Chalmers* nor *Marine Workers* did the Court feel inclined to discuss the effect of the challenged discipline upon the individual, despite the presence of Section 7. Although this point will be discussed further in the next section, it is disturbing to note that institutional interests have been used to permit or prohibit union discipline, with little recognition of the individual concerns at stake.

VI. SCOFIELD v. NLRB—A FURTHER CLARIFICATION

Two years after the Court's decision in *Allis-Chalmers* the Court was faced with yet another union fine situation. The *Scofield* case was somewhat easier than *Allis-Chalmers*, but the Court indicated that it had clarified some of its thinking. The decision in *Scofield* was seven to one and the absence of concurring opinions suggests that some of the *Allis-Chalmers* dissenters had accepted the majority's views. Mr. Justice Black, the lone dissenter, relied upon his earlier dissent.

The union in *Scofield* represents production employees, some

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208 Justice Marshall did not take part in the decision.
of whom are paid on a piece work or incentive basis. In 1938 the union had initiated a ceiling on the production for which its members would accept immediate piece-work pay. This was done by a gentlemen’s agreement at the beginning, but since 1944 the union rule has been made enforceable by fines and expulsion. At present, members may produce as much as they like each day, but may only draw up to the union-determined ceiling rate. The additional production is “banked” by the company, that is, wages due are retained by the company and paid out to the employee for days on which the production ceiling has not been reached because of machine breakdown or some other reason.

The following description illustrates the operation of the banking system. When an employee is unable to produce because his machine is not operating, the contract provides that the company will compensate him at either the “machine rate” or the lower “day rate,” depending upon the specific reasons for non-production. At these times, the union permits the member to draw upon his bank and, thus, by collecting for work previously produced but not reported for compensation, permits the employee to earn the higher ceiling rate for the period during which he produced nothing. The company permits the employee to “bank” excess production for later payment providing that all banks are depleted by annual inventory time. If the member demands to be paid in full each pay period over the ceiling rate, the company will comply, but the union will assess a fine of one dollar for each violation. Cases of repeated violation may result in fines up to $100 for “conduct unbecoming a union member.” Failure to pay the fine may lead to expulsion.

The banking system is realistically part of the agreement since the parties have bargained about it in the past and the employer participates in this system. A “machine rate” is guaranteed to each employee, and, the parties in the past have bargained about the margin between the machine rate set by the contract and the ceiling rate set by the union. Management must obviously consider the ceiling rate during its negotiations. The ceiling rate, then, has become part of the law of the shop. Indeed, the company has regularly urged the union to abandon the ceiling. Moreover, the parties have bargained over the ceiling rate and the company has at various times extracted from the union promises to increase the ceiling rate.

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210 The 1944 Union by-law required that members “turn in no more than two cents per hour over and above machine rates.” This rule has remained in force over the years with minor modifications, but the ceiling has been raised several times as a result of collective negotiations with the company. At the time of the Board proceed-
The instant case arose in 1961 when a random card check by the union showed that petitioners, among others, had exceeded the production ceiling. They were fined from $50 to $100 and were suspended from the union for a year. When they refused to pay, the union brought an action in state court to collect the fines. The Board found that the NLRA had not been violated, and the Seventh Circuit and Supreme Court affirmed.

Like Allis-Chalmers, this case involves sensitive issues going to the core of labor-management relations. Management opposes ceilings as an invasion of managerial prerogatives. Unlike management's opposition to the expansion of the obligation to bargain in good faith in cases like Fibreboard, the production limitation here is unilaterally set by the union. The spectre of featherbedding and make-work practices raises public policy questions in an economy where productivity reigns as a supreme virtue.

Employees, on the other hand, have often felt the need for production ceilings. The practice is an old one, predating union development. Tacit limitations on productivity exist in many work places, and such practices are undoubtedly considered critical by employees working under incentive systems. Despite the logic of an incentive system which rewards higher production, the logic of workers often concludes that “higher production would only lead the company to raise the piece rates, cancelling out whatever additional earnings they might have made.” The immediate stimuli to restrictions of output may be protracted periods of unemployment which demonstrate that the market cannot absorb all of the workers’ efforts, retiming of jobs or rate cuts requiring the worker to deliver additional work at lower rates of pay. The workers’ interest, then,

ing, the ceiling rate was between $.45 and $.50 per hour above the machine rate. Brief for Respondent at 4 n.3, Scofield v. NLRB, 394 U.S. 423 (1969).


This restrictive norm often applies to group members who produced at levels below informal norms as well as to those who exceeded it. “Low producers were called ‘chiselers’ and were admonished for not carrying their own weight.” Id.

The famous Hawthorne research reported that the formation of a tight-knit group in the relay-assembly test room seemed to be responsible for an increase in productivity. F. ROETHLISBERGER & W. DICKSON, MANAGEMENT AND THE WORKER (1964). Increased productivity is not the inevitable result of the formation of cohesive groups, however, as groups may be formed in opposition to the organization. A. TANNENBAUM, supra, at 65. The group provides support for members who oppose the introduction of innovations in work methods, for instance. See, e.g., Coch & French, Overcoming Resistance to Change, 1 HUMAN RELATIONS 512 (1948). An observed tendency of cohesive work groups is not greater or lesser productivity than workers in non-cohesive groups, but, rather, a greater uniformity in productivity. This uniformity is brought about by pressures against deviancy, perhaps even more effective than union fines. See id. See also A. ETZIONI, MODERN ORGANIZATIONS, ch. 4. (1969); S. MATHEWSON, RESTRICTION OF OUTPUT AMONG UNORGANIZED WORKERS (1931); S. SEASHORE, GROUP COHESIVENESS IN THE INDUSTRIAL WORK GROUP (1954).
is not to increase production, but, rather, to keep the supply of labor and its output down.

Since employees might create such production ceilings even without union sponsorship and encouragement, the element of union solidarity and effectiveness is not as critical as in *Allis-Chalmers*. The union does have an institutional interest, however, independent of its role as an enforcer of employee group mores. Without ceilings, jealousies among members, especially between old and young, proficient and average, affect the internal security of the union. Even the absence of a union institutional interest, however, would not bar consideration of the work place rules as counterweights to the employer's interest in productivity. The Act is aimed at employees primarily, and union activity is protected as a means of insuring that worker demands and concerns receive attention and protection.

In referring to *Allis-Chalmers*, the Court said that it had "distinguished between internal and external enforcement of the union rules" and held that "Congress did not propose any limitation with respect to the internal affairs of unions, aside from barring enforcement of union's internal regulations to affect the members' employment status." This distinction between internal and external enforcement was not so clearly expressed in *Allis-Chalmers*, nor is it consistent with the Court's recognition of competing public policies in *Marine Workers*. The Court provides little guidance for distinguishing between "external" and "internal" enforcement of union rules, and the return to this troublesome dichotomy is difficult to fathom.

The distinction stems originally from the NLRB's opinion in *Minneapolis Star and Tribune Company* where the Board held that a union could fine a member for violating a rule against working during a strike but that same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority without violating Sections 8(b)(1), 8(b)(2), 8(a)(1) and 8(a)(2). In agreeing with the NLRB, the Court categorized these sections as a "web of which § 8(b)(1)(A) is only a strand preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rule." This statement seems to give Section 8(b)(1)(A) no independent significance, since Section 8(b)(2) expressly protects against job discrimination. Furthermore, the Court has moved from an inquiry into the substantive

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214 394 U.S. at 429.
215 This limited construction of § 8(b)(1)(A) is reinforced by a footnote, n.5, which refers to insulating employee jobs from their organizational rights. See *Printz Leather Co.*, 94 N.L.R.B. 1312 (1951).
validity of the union rule, considered in Allis-Chalmers, to a question involving the means of enforcement. Yet, even the Court admits that "internal" rules fall within the provision if the union uses force or violence.216

The Court's acceptance of the "internal-external" dichotomy in Scofield and its attribution of this standard as the basis of Allis-Chalmers is perplexing. Although the NLRB did stress this distinction in its brief in Allis-Chalmers, the Court did not rely on this rationale. This rejection was wise since the test is unworkable—many kinds of union discipline have effects which radiate beyond the union-member relationship. The Board must also avoid an undue emphasis on job rights in defining the scope of Section 8(b)(1)(A) for, as mentioned above, such a reading would make Section 8(b)(1)(A) simply a mirror image of Section 8(b)(2). Moreover, such a limited reading would be inconsistent with the prohibition of violence even when job rights are not involved and inconsistent with the implied restrictions on union discipline imposed by the Court itself in Allis-Chalmers.

To further muddy the waters, Mr. Justice White, after sweeping "internal union affairs" out of Section 8(b)(1)(A)'s ambit, and after stressing that the question turns on the union's means of enforcement, turns to an inquiry into the substantive validity of the production ceiling. The reader is reminded to follow what the Court does rather than what it says, for, as in Allis-Chalmers, the Court has apparently determined that its role is to determine the "reasonableness" of the union's restraint. This is the only reasonable explanation for the Court's action as the broad language about "means" and "internal union affairs" is simply inconsistent with an investigation into a union rule's substantive validity. The Court would have reached the same position if it had attempted to analogize Section 8(b)(1)(A) in light of the development of Section 8(a)(1).

Despite his early language, then, Mr. Justice White expressly rejected an emphasis on the particular sanction imposed rather than the union rule itself, holding that the Board should judge the fairness of particular union rules. "[I]t has become clear that if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating §8(b)(1)."217 The Court, thus, places a limit even on the proviso—there is a certain category of rules which, despite their enforcement by expulsion, will not be protected by the proviso. Just as there are

216 394 U.S. at 428.
217 Id. at 429.
restraints which do not fall within the provision, as in *Allis-Chalmers*, some restraints which do fall within Section 8(b)(1)(A) will not be protected by the proviso despite their enforcement by expulsion. Note that this is inconsistent with the Court's earlier statement that the need is merely to distinguish between internal and external enforcement of union rules. The Court has now clearly shifted the inquiry from one involving the means of enforcement to an inquiry into the substantive validity of the union rule.

Thus, another layer of statutory gloss has been placed on the provision, creating a difficult set of questions. The Court must now determine whether the union's policy is within the "legitimate interest" of the labor organization and whether it violates an overriding policy of the labor laws. *Marine Workers* can then be explained on the ground that the union had no legitimate interest, or, more accurately, insufficient interest, in frustrating an important Congressional policy of protecting access to the NLRB. Although the union in *Allis-Chalmers* had a valid interest in seeking a united front during a strike, there was a countervailing interest which received little attention, i.e., the explicit recognition in Section 7 of an employee's right to refuse to participate in concerted activities. Moreover, the strikebreaker is interested in the wages he would lose if he respects the strike and picket line. Indeed, since the employer can validly hire permanent replacements, his very job was at stake. The union's interest in *Allis-Chalmers* may well have been greater than the interest in internal exhaustion of remedies relied upon in *Marine Workers*, but surely express statutory safeguards are entitled to as much respect as considerations of policy. The disturbing aspect of *Allis-Chalmers* was the failure of the Court to consider as a valid interest in its calculations the rights of members to cross picket lines without "restraint or coercion."

The Court's explanation of *Allis-Chalmers* as being based upon "internal" means of enforcement suggests that the Court is not aware of the inconsistency of its approach in that case and in *Marine Workers* and, indeed, *Scofield*. The enforcement of a production-ceiling rule is surely as "internal" in nature as a rule against strike-breaking, and both cases involve the scope of employee freedom from union rules which touch upon Section 7 rights. This suggests that the decision in *Allis-Chalmers* might have taken on a far different complexion if it had not arisen first. In any event, *Marine Workers* and *Scofield* suggest that a balancing of institutional and individual interests is called for under Section 8(b)(1)(A), although the Court's reference to the "internal-external" dichotomy will cause confusion in the future.

Assuming that a balancing of interests is the proper approach
in union disciplinary cases, critical questions arise concerning the operational effect of the proviso. The proviso seems designed to represent institutional interests, although legislative history does suggest that the proviso may have no real independent significance. The Court assumes this is so, and it generally ignores the proviso.

Another unresolved question arising from both *Allis-Chalmers* and *Scofield* is the Court's reference to union rules which are "duly adopted and not the arbitrary fiat of a union officer ..."218 In *Scofield* the Court states that "§ 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rules."219 The Court thus suggests that a punitive union rule must be properly adopted to pass muster under Section 8(b)(1)(A). Does the Court simply mean that the rule must be adopted in a manner which is consistent with the union's by-laws and which, therefore, could be enforced in state courts, or does the Court seek to impose a higher standard in those cases where democratic rights are not adequately protected under the union's by-laws? Common law courts often read by-laws so that they protected democratic rights. The Landrum-Griffin Act protects against invasions of various specific democratic rights and against invidious discrimination, but goes no further.

The Court's approach suggests that external standards will not be applied. The Court assumes that union members bind themselves to policies and procedures adopted by the majority. Apparently, they can only be bound by those rules which are adopted by methods prescribed in the by-laws. Since the Court requires that membership be voluntary before union sanctions may be validly imposed, the Court seems to reject any external standard of proper adoption. Thus, if the union's by-laws are complied with, the member is bound to union discipline as long as the discipline is not inconsistent with federal labor policy. The converse, however, is not necessarily true—enforcement of every invalid rule cannot violate Section 8(b)(1)(A). Enforcement of a rule which involves only "internal union affairs," as defined by the Court, would not seem to run afoul of Section 8(b)(1)(A) for the rule would not infringe a right protected

218 *Id.* at 428.

219 *Id.* at 430 (emphasis added). The "free to leave" statement is also unclear, since all members are free to resign under current labor law provisions. Various unions, however, require notice of resignation or acceptance by some official before the action is final. State courts will have to wrestle with questions involving when an employee has satisfactorily removed himself from the ambit of union disciplinary power, and the Court suggests that the NLRB will have to make the same inquiry.
in Section 7. Yet, inexplicably, the Court seems to suggest that if the rules in *Allis-Chalmers* or *Scofield* had been invalidly adopted, the enforcement of these rules would have been an unfair labor practice. Specifically, the Court upheld the anti-strikebreaking rule as being within the ambit of "internal union affairs" and, therefore, not within Section 8(b)(1)(A). Yet the Court implies that "internal union affairs" will not protect a rule, albeit "internal," if it is improperly adopted. Obviously, the method of adoption does not affect the "internal union" nature of the situation nor does it relate to the amount of coercion involved. The "internal" rubric, then, may then be a rationalization for a decision reached on other grounds. The method of adoption is relevant, however, to the doctrinal basis of the Court's opinions—the contract theory of union membership. Union members are simply not bound by procedurally invalid union rules. The Court will use federal law to protect against the enforcement of such by-laws, despite the fact that state courts probably would not enforce such rules anyway. The approach of the Court hearkens back to the judicial development of Section 8(a)(1), where employer motivation may invalidate an otherwise valid rule even though the amount of "factual" restraint remains the same. The criterion, then, is a relevant factor, although its importance remains to be determined.

The "properly adopted" condition again raised questions about the significance of the proviso. The method of adoption would seem relevant for the proviso also. If a court found that the enforcement of a union rule by expulsion was coercion under Section 8(b)(1)(A), and if the proviso had any operational significance, it should protect the enforcement of this rule. The Court, however, implies that the proviso would not validate even expulsion if the rule was improperly adopted. Thus, despite the literal language of the proviso, it cannot be used to immunize action under an invalid rule.

Turning to the application of these principles to *Scofield*, the Court states that the union had cleared four possible obstacles:

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220 Some courts had interpreted the proviso to shield expulsion from judicial inquiry. In American Newspaper Publishers Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951), aff'd on other grounds, 345 U.S. 100 (1953), the union threatened to expel members for violation of the rules forbidding them to work in a shop with non-members. Even though this expulsion might involve a loss of employment and other economic benefits, the court upheld the rule. "Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as § 8(b)(1)(A) is concerned," 193 F.2d at 800-01. See also NLRB v. Amalgamated Local 286, UAW, 222 F.2d 95 (7th Cir. 1955), where the union's threat to deprive members of group and hospitalization insurance coverage because they had refused to pay various union disciplinary assessments was upheld under the proviso. Yet, the court felt compelled to further argue that "restrain or coerce" did not encompass internal affairs of unions. But if internal union discipline was not among the prescribed restraints, then the court had no need to rely on the proviso.
In the case at hand, there is no showing in the record that the fines were unreasonable or the mere fiat of a union leader, or that the membership of petitioners in the union was involuntary. Moreover, the enforcement of the rule was not carried out through means unacceptable in themselves, such as violence or employer discrimination. It was enforced solely through the internal technique of union fines, collected by threat of expulsion or judicial action. The inquiry must therefore focus on the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated by the union-imposed production ceiling.\(^2\)

As mentioned before, the Court provides no guidelines, nor are any readily obtainable, to determine whether a fine is unreasonable or not or whether membership was involuntary or voluntary.\(^2\) The Court adds a fourth point—whether the means used were unacceptable. There is no doubt that violence in relation to Section 7 rights was banned by Section 8(b)(1)(A). Employer discrimination, despite the Court's discussion of it, is generally encompassed by Section 8(b)(2). The last stage of the inquiry concerns a balancing of the union's interest and the policies of the Act, ignoring again the statement at the beginning of the opinion that the question was merely one of internal or external enforcement. Indeed, this is a case of "internal enforcement" according to the Court's reading of Allis-Chalmers! Despite the fact that the Court ultimately upholds the production-ceiling rule, it felt compelled to proceed further and scrutinize the substantive justification for the rule. Such an approach is consistent with the theme of this article, and the Court's failure to explain clearly what it is doing is baffling.

The Court upholds the rule on obvious grounds. First, the Court notes that union opposition to unlimited piece-work pay systems is historic, and production limitations are common even in unorganized plants.\(^3\) Unions fear that such systems would encourage employees to increase production, resulting in a lowering of piece-work rates, so that at the new, higher level of output, employees would earn little more than they did before. Alternatively, greater production could lead to an increase in the production minimum so that the piece-work rate would apply to fewer producible products. Furthermore, there is a fear that the competitive pressure generated will endanger workers' health, create or intensify jealousies, and, perhaps, reduce the work force. Excessive productivity-pay differentials which arise in the absence of ceilings may cause rivalry and bad feelings

\(^3\) See generally S. Slchter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management (1960).
among workers—particularly in the ranks of older employees unable to work at a pace comparable to young men.224

Thus, as in Allis-Chalmers, the production-ceiling rule is an internal protective device. Note that the operation of the ceiling rule is far less severe than the no strikebreaking rule in Allis-Chalmers. The production limitation does no more than to hold workers to a pay maximum who would otherwise outdistance others on the payroll because of their exceptional working speed and endurance. The rule merely forbids union members to take advantage of benefits the employer is willing to confer. In Allis-Chalmers, however, the union’s rule barred any wages during a strike, even though the employer might fill their positions with replacements. As in Allis-Chalmers, the union’s rule restricted the employees’ work output and earnings. The Court, however, assumed that the rule merely deferred earnings. The rule was seen as not retarding the flow of production but, rather, merely limiting the amount of current earnings which members may receive. In accordance with shop practice, members are required to “bank” their earnings in excess of the ceiling and hold them in reserve for occasions when they earn less than the ceiling, instead of reporting excess production to the company for immediate compensation. Without more facts, however, the Court’s view of the rule’s operation is mere conjecture. For instance, how much of this over-production is wasted, i.e., not consumed by annual inventory time? If it is all consumed, then the union’s rule probably has little effect on production and employees are probably not adversely affected. Moreover, although no company discipline is meted out to complying employees, it would be relevant to ask if other employment opportunities are affected. Does compliance, for instance, affect an employee’s chances for promotion?

The Court admits that the rule has and was intended to have an impact beyond the confines of the union organization. The same was true of Allis-Chalmers. But the Court states the enforcement of the rule does not violate Section 8(b)(1)(A) unless some impairment of statutory labor policy can be shown. The plaintiffs, however, argued that the impairment of statutory labor policy was the violation of the Section 7 right not to take part in union activities. The Court, as in Allis-Chalmers, attaches little weight to these interests despite the Congressional recognition of these concerns in Section 7. The Court, rather, stresses union institutional concerns and managerial interests. Thus, the Court discusses seriously the petitioner’s contention that the rule impedes collective bargaining, and is, therefore, a violation of statutory policy. Although the NLRA seeks to

promote collective bargaining, the particular provision of the act involved here is directed to individual rights.

The Court finds the production ceiling is a bargainable issue; indeed, the employer never refused to bargain about it, and the union has at various times agreed to raise the ceiling in return for an increase in the piece rate. The ceiling has also been regularly used to compute the new piece rate. Shop practice and bargaining history suggest that the ceiling is part of the agreement.\textsuperscript{225}

Furthermore, it is clear that the company participated in the actual operation of the union's production limitation. The company honored an employee's choice by permitting him to "bank" excess production for latter payment (provided that all banks be depleted by annual inventory time), and paid employees for this production during subsequent non-productive periods. The company respected the system by supplying the union with the employees' work cards to permit checking for individual compliance with the union system.\textsuperscript{226} The company used the ceiling rates as a point of reference in computing new piece rates after an increase in the hourly machine rate has been negotiated. Furthermore, when a piece-work job was retimed, the affected employees were guaranteed a minimum rate equal to their previous average earned rate for that job. The average rate for most employees closely approximated the ceiling rate, and it—rather than the machine rate—may actually have been the de facto basic wage rate. In light of these and other factors the Board reasonably concluded that the company has accepted the ceilings as an integral part of its \textit{modus operandi}.

As in \textit{Allis-Chalmers}, the Court's opinion suggests that state courts should enforce these fines. The union constitution established

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\item \textsuperscript{225} The company has frequently proposed the elimination of the union's rule, but then compromised on an increase in the ceiling. Thus the 1953 contract provided that the previous agreement be modified to "Increase the ceiling on all piece work jobs a total of $.13 per hour effective July 1, 1953, over the ceilings of piece work jobs in effect on April 30, 1953." Similarly, the strike settlement agreement on August 14, 1956, provided that "The ceiling [sic] on earnings is to be raised ten cents ($.10) of five-one-fifty-six or a total of twenty-three cents ($.23) per hour." To achieve this raise in the ceiling, the company agreed to satisfy certain grievances and to increase vacation benefits. Again, in the course of the 1959 negotiations, the company requested that the ceilings be increased ten cents ($.10) per hour. See Brief for Respondent at 7, \textit{id.} As part of the 1962 settlement, the union agreed to raise production ceilings three cents ($.03). See Brief for U.A.W. app. B, \textit{id.}
\item \textsuperscript{226} For the system's advantages to management, see Local 283, UAW 145 N.L.R.B. 1097, 1119-20 (1964). Although company witnesses complain that the banking system resulted in periods of voluntary worker idleness, especially before vacation period or annual inventory time, the witnesses on cross-examination conceded that the company had recently promulgated orders which curbed unnecessary idleness and these rules were effective in resolving the problem.
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penalties, including suspension and fines from one dollar to one hundred dollars; expulsion may follow non-payment of fines. This section says nothing, however, about enforcement of fines. Common law courts might well restrict this provision to make non-payment of fines punishable only by expulsion. In this light, the discussion of the contract approach in *Allis-Chalmers* perhaps provides another weapon to the power of a union to seek conformity with union policies.

There is some doubt that state courts before *Scofield* would acknowledge the substantive validity of production ceilings. Although courts have recognized discipline for strikebreaking, fines for exceeding production limitations have not received judicial favor:

> [i]f a voluntary trade organization should ordain that a member who in the pursuit of his occupation exceeds the average level of industry and production of his fellow-workers, shall be expelled for conduct unbecoming a member, I would experience no hesitation in invalidating such a regulation as positively repugnant and inimical to our traditional public policy. The freedom of an individual to excel in any field of lawful activity is one of our national ideals and a substantial right which the individual may not himself barter away.

Thus, again, the Court may have altered state law while purporting to rely upon it. One aspect of state law, however, is interesting here. As mentioned above, state courts gave strikebreakers little more protection than wildcat strikers. Although courts avoided the merits of a strike, courts "did limit the union's power to those strikes which are properly called and which are legal. If the strike violates the union constitution, or if it is illegal and has been enjoined, the members cannot be punished for refusing to cooperate." This is perhaps a parallel to the Supreme Court's condition that rules be properly adopted, and, more importantly, suggests the properly

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230 *Summers, Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1066 (1951). Although courts avoided the merits of a strike, courts "... did limit the union's power to those strikes which are properly called and which are legal. If the strike violated the union constitution or if it is illegal and has been enjoined, the members cannot be punished for refusing to cooperate."

231 *Id.* at 1066-67 nn.87-89.
analytical framework for resolving the clash of interests arising in cases under Section 8(b)(1)(A).

VII. UNION DISCIPLINARY POWER UNDER THE NLRA: AN ANALYTICAL FRAMEWORK

*Marine Workers* demonstrates that, despite the broad language in *Allis-Chalmers*, union disciplinary action will be invalid when it violates statutory policy. A particular policy, however, may be only one of the interests involved in a particular case, as various statutory policies may conflict. The fines for strikebreaking in *Allis-Chalmers* were upheld although the Court admits that strikebreaking fell within the ambit of Section 7. Moreover, Section 8(b)(1)(A) reaches some forms of union retaliation against strikebreaking, *e.g.*, the use of force or violence. Surely these fairly explicit protections in the Act should not receive less respect than implicit policies, such as the protection of access to the NLRB. The fines were upheld, and individual interests denied protection, because the Court felt that the fines were a necessary incident to the union's Congressionally-delegated role as collective bargaining agent. Thus the fines were consistent with federal policy and overbalanced rights of disobedience seemingly encompassed by Section 7. The relevance of public policy, then, is acknowledged rather than rejected by *Allis-Chalmers*.

The question which will no doubt bedevil the NLRB will involve the application of the above formulation to concrete cases. The NLRB cannot invalidate disciplinary penalties simply because it disapproves of them. The excessive governmental intrusion into internal union affairs would be inconsistent with, first, the desire to encourage private decision-making and union democracy and, second, the awareness that unions serve as autonomous power centers in the society whose independence is critical for democratic government.

The initial step in the formulation of a workable approach is a return to the Court's rejected analogy to Section 8(a)(1). The NLRB and the courts have defined the scope of "protected activity" under Sections 7 and 8(a)(1), giving generous scope to the Congressional policy of protecting concerted activity from employer interference. Activity like strikebreaking is directly contrary to group goals and, in a real sense, inconsistent with a policy of encouraging and protecting concerted activity. Yet, the right to refuse to participate is granted in the same provision of the Act which protects concerted activity, and must, therefore, receive equal respect.

The clash of interests in *Allis-Chalmers* is a direct result of
this inconsistency within Section 7. The resolution in that case turned on the Court's reading of federal labor policy. This suggests a rough guideline—union discipline aimed at implementing underlying federal policy, or the exercise of union power to protect the union's federally assigned role, will be protected. On the other hand, where discipline deters protected activity without the presence of compensating union interests, such as fines for decertification attempts, it will not be upheld. Similarly, union conduct which itself is inconsistent with federal labor policy cannot lead to justifiable discipline. Thus, a union may not discipline members for violating union rules when those rules compel the commission of a crime or an unfair labor practice. Such an approach merely applies to the scope of union disciplinary power the same considerations which define protected concerted activity.232

An analogy to the scope of protected conduct suggests that employees who violate a union by-law in order to avoid a violation of the Act or statutory policy may not be punished for such action. Thus, in a situation similar to that in Scofield, no discipline should be permitted if the union's ceiling itself is inconsistent with the collective agreement. The NLRB may be moving in this direction, for it recently held that a union may not fine employees who cross picket lines when the strike is in breach of a no-strike clause.233 The fine constituted a penalty for the strikebreaker's refusal to "violate" the collective agreement. The result parallels the approach taken under Section 8(a)(1) as a violation of a collective agreement is not a protected activity, and strikers lose the normal protection of Section 7.234 Since the union's actions are not protected by Section 7, the balance of interests in Allis-Chalmers leads to a different result. The union's interest in solidarity and strength remains the same, but here the union's action infringes an important policy of the Act. The case suggests, then, that strikebreaking may lead to discipline only when the strike itself offends no policy of the Act. This approach is hardly novel. In NLRB v. Bricklayers

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and Masons Local 2,235 members were fined for refusing to cross a picket line. The Board found that observance of the picket line would constitute a secondary boycott and, as part of the remedy for the Section 8(b)(4)(B) violation, ordered the union to refund the fines paid.238

The variety of possible cases boggles the mind and difficult problems of accommodation will arise. The attempt to distinguish "internal union affairs" from internal rules which radiate beyond the union may well fail in the end, aground on the shoals of impossibility. For instance, unions such as the musicians typically discipline members for working with non-members. The union's interest in resisting the presence of non-union workers who may undercut union standards and threaten the union's base of support has been traditionally recognized, and the NLRB has upheld such discipline.237

The effect of this rule, however, is to induce the employer to discriminate in favor of union members. Section 8(b)(2) will not be violated, however, unless the union makes a direct approach to the employer for the purpose of causing him to discriminate by accommodating his hiring practices to the union's by-law.238 In many cases, however, no affirmative approach to the employer will be required, and the internal enforcement of the union's by-law will produce the same results.239 Should the employer be approached, or should the NLRB reverse this latter rule to accord with the realities of the situation, the union's discipline then becomes suspect although union interests have not been lessened.

One problem with making the nature of the union's conduct a critical factor in determining the propriety of discipline under Section 8(b)(1)(A) is that the approach is essentially retrospective. The validity of union discipline would turn, at least in part, upon a legal determination of the protected nature of the union's conduct to be made at a later time. To the employee, however, the critical time is when he must decide whether to disobey union dictates. Placing the risk of proper interpretation of the NLRA upon him

235 166 N.L.R.B. No. 26 (1967).
236 See also NLRB v. Local 751, Carpenters, 285 F.2d 633 (9th Cir. 1960).
238 See Glasser v. NLRB, 395 F.2d 401 (2d Cir. 1968).
239 The NLRB has invalidated discipline aimed at a supervisor-member who ejectioned against the union and hired non-union employees. The NLRB held that the discipline violated the company's right under § 8(b)(1)(B) to select its representative for collective bargaining. Although it is arguable whether the fine really interferes with the employer's freedom, the NLRB also considered the discipline a direct attempt to get the supervisor, as the employer's representative, to violate the act, by discriminating against non-union employees. New Mexico Carpenters' Council, 176 N.L.R.B. No. 105 (1969).
may seem unfair. He cannot be expected to be as knowledgeable as union officials on these matters, and the risk of error might induce him to forego the exercise of a statutory right protecting disobedience.

There are, however, strong responses to these arguments. First, there may be no reason to protect individual acts of disobedience when the employee has made an erroneous analysis of either the facts or the applicable law. Surely the Court’s stress on the necessity for the effective prosecution of group goals suggests a lack of great concern over individual decision making. Indeed, the court in *Allis-Chalmers* did not even consider the substantial economic interests of the strikebreakers, despite their explicit protection in Section 7 of the Act. The union itself often acts at its peril, for instance, when it determines whether the employer has committed an unfair labor practice during the term of a collective bargaining agreement. A strike in response to such an unfair labor practice will lead to a characterization of the strike as protected; an error, however, may subject the union to damages for breach of a no-strike clause under NLRA Section 301.240

Finally, it is true that the risk of an improper assessment might discourage the resort to protected activity. The Court, however, seems hardly disposed to give weight to this common dilemma. Thus, in *Allis-Chalmers* the Court seemed unconcerned that the threat of court enforced fines might effectively restrain completely the exercise of the right to cross picket lines. Surely Justice Black was correct in noting that the possibility that the Board might find the fine to violate the NLRA, or that a state court might refuse to enforce the fine, will hardly induce employees to take action they feel is proper. Given the vague and uncertain contours of union discipline power under Section 8(b)(1)(A), this additional risk may not add significantly to the burden already placed on the employee. The very pronouncements of the Court make it less likely that individual acts

240 29 U.S.C. § 185 (1964). A typical no-strike clause will not be read to bar strikes in response to employer unfair labor practices. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). Thus, in a case involving a strike during the term of an agreement containing such a clause, the protected nature of the strike will turn on whether the strike was provoked by an employer unfair labor practice.

Unfair labor practice strikers, unlike economic strikers, cannot be permanently replaced and the employer is obligated to reinstate strikers upon request. See, e.g., Mastro Plastics Corp. v. NLRB, id.; NLRB v. Beles Colman Lumber Co., 96 F.2d 196 (9th Cir. 1938). An unfair labor practice strike does not lose its character despite the fact that economic reasons may have contributed to or even precipitated the work stoppage. Brown Radio Service, 70 N.L.R.B. 476 (1946). If an unfair labor practice occurring during an economic strike prolongs the strike, the strike is converted to an unfair labor practice strike. See Harcourt & Co., 98 N.L.R.B. 892 (1952).
of disobedience will occur, and the additional risk of an erroneous interpretation of law provides only one of many factors making such acts of disobedience ultra-hazardous.

Two alternative approaches could be considered, but both suffer by comparison with the position taken above. First, Section 8(b)(1)(A) could be read to protect employees from the imposition of union discipline when the employees acted upon a good faith belief that the union's action was unprotected. Under the previously-mentioned approach, the employee would be protected when the union's conduct is indeed unprotected, irrespective of the employee's state of mind. This alternative, then, would protect an employee who incorrectly viewed the situation where, in fact, the union's conduct was protected. This approach, although it does provide a greater measure of protection to individual interests, weakens union institutional interests in cases where federal policy affirmatively promotes concerted activity. Thus, the approach seems inconsistent with the emphasis in *Allis-Chalmers* and *Scofield* on the legitimacy of the union's goals. There is no suggestion in *Allis-Chalmers*, for instance, that the fines would have been improper if the strikebreakers had honestly believed the strike was illegal. Moreover, the approach would create administrative difficulties because of its reliance on the employee's state of mind. It is doubtful that union trial tribunals are capable, even if willing, to make the fine distinctions required, nor is it clear that such a task is justified in light of the lack of knowledge concerning the occurrence of such acts of disobedience. A good faith belief does not usually protect employees from discharge when they strike in violation of a no-strike clause, and the substantial interests in union effectiveness suggest that employees should receive no greater protection from union retaliation.

Alternatively, Section 8(b)(1)(A) could be interpreted to protect union discipline irrespective of the protected nature of the union's conduct. Such an approach, however, may give greater deference than necessary to the union's role as collective bargaining agent and interpreter of group goals. It is true that the union can be expected to generally avoid conduct which could subject itself to institutional penalties, but individual employees may lose their jobs if they participate in unprotected conduct. The employee deserves the ability to protect his own interests when he correctly recognizes that the actions of his union transgress the collective agreement or the NLRA. As noted above, the common law considered the legality of concerted activity when evaluating the propriety of union discipline for refusing to participate in such conduct. Since the justification for the imposition of discipline under *Allis-Chalmers* and *Scofield* is the legitimacy of the union's interests, discipline
should not be permitted when that interest cannot be justified under federal labor policy. After all, the evaluation is not made on a clear slate—Section 7 gives employees the right to refrain from participation in union activities. Some recognition of this interest is required, although there is a need to weigh the union's institutional interests as well. Thus, it is submitted that union discipline be evaluated in light of the "protected" nature of its conduct, and despite the good faith beliefs of the disciplined employee.

Again, the suggested approach merely parallels the approach taken under Section 8(a)(1). Employees who engage in wildcat strikes in derogation of the union's status are not protected from employer discrimination despite their good faith belief in the legality of their conduct. Union discipline for the same conduct seems justifiable. Indeed, taking the Court's approach in Allis-Chalmers, union discipline for wildcat strikes is far less serious to employees than the employer's right to permanently replace the same strikers. The same analysis should be applied to employees who refuse to participate in authorized union activity which is in fact unprotected. Employees should be permitted to disobey union commands and protect their jobs, however, when union conduct violates the collective agreement or Section 8(b) of the NLRA. Since the Act either prohibits or does not protect such conduct, the protection of union discipline for disobedience would be inconsistent with the policies of the Act.

The resolution of these problems in a case by case manner will hardly advise employees of the extent of their freedom or assist unions who wish to abide by legal restraints. Predictability might be aided to some degree by the use of experience under other provisions of the Act. The experience and knowledge stored in the interpretation of Section 8(a)(1) and in the attempts to define the scope of protected activity are, as this article has attempted to demonstrate, relevant to the solution of problems under Section 8(b)(1)(A). Nothing is gained by balkanizing the Act and its history into tiny compartments and, indeed, much is lost.