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JUSTICE BRENNAN AND UNION DISCIPLINE UNDER THE NLRA: THE FIGHT FOR SOLIDARITY IMPINGES UPON INDIVIDUAL RIGHTS

In devising rules to govern the scope of a labor union's disciplinary power, the United States Supreme Court has repeatedly endeavored to balance the unions' asserted need for disciplinary authority over its members against the rights of individual employees. In the Court's decisions dealing with this area of labor law,¹ an examination of Justice William J. Brennan's treatment of internal union affairs² reveals a primary concern for unions and union self-government.³ Justice Brennan has generally upheld union attempts to discipline union members, balancing a union's need for authority over its members and national labor policy. As the author of more opinions in the area of labor law than any other justice, much of what Justice Brennan has written is current law.⁴ Although Justice Brennan's concern for individual rights is prevalent where a union has used extremely coercive measures to enforce its rules, his decisions reflect a marked concern for strong unions and often subrogate the individual employees' interests to those of the majority.⁵

In an effort to explain Justice Brennan's refusal to regulate internal union affairs in the interest of the collective group rather than the individual employee, Part I of this comment examines the

1. The area of labor law is dictated primarily by the National Labor Relations Act, as amended. 29 U.S.C. §§ 141-187 (1982). The Act announced substantive rules of labor law and established the National Labor Relations Board (NLRB) with power to interpret and administer the law. *Id.* § 156. The NLRB consists of five members who are appointed for five year terms by the President with the advice and consent of the Senate. *Id.* § 153(a). The NLRB's primary functions include determination of employee representatives within industries under the jurisdiction of the Act, and to decide whether a particular challenged activity constitutes an unfair labor practice. *Id.* § 160.

2. Internal union affairs include, but are not limited to, disciplinary measures which do not jeopardize a union member's employment status. See Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1032 (1976). Examples of permissive union discipline include suspension, expulsion, reprimands, and removal from office. *Id.* at 1032.

3. See *Pattern Makers' League of North America, AFL-CIO v. NLRB*, 105 S. Ct. 3064 (1985); *American Broadcasting Co. v. Writers Guild*, 437 U.S. 411 (1978); *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974); *Scofield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

4. See Dorman, *Justice Brennan: The Individual and Labor Law*, 58 CHI-KENT L. REV. 1003 (1982).

5. See *infra* notes 21-42 and accompanying text.

statutory framework within which the Court must evaluate union discipline. Part II evaluates the impact that the Court's union discipline cases have had on the rights of union members as individuals. The comment concludes that although Justice Brennan's misinterpretation of the relevant labor law has bolstered union strength and solidarity, it has concurrently deprived the individual union member of his guaranteed rights.

I. STATUTORY UNDERPINNINGS OF THE NATIONAL LABOR RELATIONS ACT

Section 7 of the National Labor Relations Act (the "Act")⁶ grants employees two basic rights: the right to form, join or assist unions, and engage in concerted activities,⁷ and "the right to refrain from any or all of such activities."⁸ The rights guaranteed to employees under this section of the Act are protected from union interference and restraint under section 8(b)(1)(A) of the Act,⁹ which prohibits a union from restraining or coercing employees in their ex-

6. Section 7 of the National Labor Relations Act, as amended, provides:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have *the right to refrain from any or all such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

29 U.S.C. § 157 (1982) (emphasis added).

7. In order for an activity to be protected under § 7 of the Act, such activity must contain an element of "concert" pertaining to more than one employee. See *NLRB v. Office Towel Supply Co.*, 201 F.2d 838 (2d Cir. 1953) (individual complaints regarding working conditions are not protected as "concerted activities"). The NLRB has taken a stringent view as to what constitutes "concerted action" on the part of an employee. See, e.g., *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967) (an employee must be dealing with a condition of employment of mutual concern to other employees). *But see* *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971) (activity by an individual employee will be protected if it is "looking toward group action").

In contrast, unlawful or violent activity by an employee will not be protected under § 7. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). In addition, the Supreme Court has gone so far as to hold that activity which constitutes a breach of "loyalty" to the employer will not be protected as "concerted" under § 7 of the Act. See, e.g., *NLRB v. International Bhd. of Elec. Workers Local 1229*, 346 U.S. 464 (1953) (employees who circulated handbills disparaging television programs of employer held not to be protected under § 7 of the Act).

8. See *supra* note 6.

9. Section 8(b)(1)(A) of the National Labor Relations Act, as amended, provides:

It shall be an unfair labor practice for a labor organization or its agents —
 (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title; *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 thereip . . .

29 U.S.C. § 158(b)(1)(A) (1982).

exercise of the rights guaranteed under section 7 of the Act.¹⁰ While the proviso to section 8(b)(1)(A)¹¹ protects union self-regulation if the union's interest is legitimate, union discipline may nevertheless be held incompatible with section 7's protection of individual freedom to choose whether to engage in collective action.

In determining what forms of union discipline Congress intended to declare unlawful under section 8(b)(1)(A),¹² the terms "restrain or coerce" must be defined.¹³ The National Labor Relations Board ("the NLRB")¹⁴ has interpreted the legislative history of the Act as suggesting that "Congress was interested in eliminating physical violence and intimidation by the unions or their representatives, as well as the use by unions of threats of economic action against individuals in an effort to compel them to join."¹⁵ Conversely, the United States Supreme Court has taken the position that union discipline involving economic sanctions against a member is permissible under section 8(b)(1)(A) of the Act.¹⁶

In a number of cases reaching the United States Supreme Court, complaints have been brought against unions for disciplining employees who have engaged in conduct arguably protected under section 7 of the Act.¹⁷ The number of discipline cases, however, cannot adequately measure the impact on the individual employee in light of the fact that the Court's sanctioning of union fines results in economic coercion. Such coercion is in direct violation of the Act, not only affecting the union membership status of the employee, but also affecting the employment relationship between the employee

10. For the full text of § 7 of the Act, see *supra* note 6.

11. The proviso to § 8(b)(1)(A) provides for the right of a union to prescribe its own rules with respect to the "acquisition or retention of membership." 29 U.S.C. § 158(b)(1)(A). This proviso has been interpreted to give unions broad authority to promulgate and enforce rules regulating internal union affairs. *See, e.g., Scofield v. NLRB*, 394 U.S. 423 (1969) (Court upheld a union rule which imposed fines on members under a piecework production system).

12. For the full text of § 8(b)(1)(A) of the Act, see *supra* note 9.

13. In a case coming before the NLRB shortly after enactment of the Taft-Hartley Act, the NLRB stated that "[t]he Act contains no affirmative definition of the terms 'restraint' and 'coercion' as they are used in Section 8(b)(1). . . ." *Sunset Line & Twine Co.*, 79 N.L.R.B. 1487, 1504 (1948).

14. *See supra* note 1.

15. *National Maritime Union of America*, 78 N.L.R.B. 971, 985 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949).

16. *See infra* notes 21-42 and accompanying text.

17. For the full text of § 7 of the Act, see *supra* note 6.

A representative sample of union discipline cases upholding union discipline for various "internal" transgressions include: *Scofield v. NLRB*, 394 U.S. 423 (1969) (exceeding production quotas); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) (strikebreaking); *Glasser v. NLRB*, 395 F.2d 401 (2d Cir. 1968) (working with nonunion employees); and *Local 5795, Communications Workers*, 192 N.L.R.B. 556 (1971) (reporting a co-worker for drinking on the job in violation of union rule against informing).

and those he works for.¹⁸

II. THE SUPREME COURT'S INTERPRETATION

The first significant¹⁹ decision construing section 8(b)(1)(A)²⁰ was *NLRB v. Allis-Chalmers Manufacturing Co.*,²¹ in which the United States Supreme Court addressed the issue of whether a union, which threatens to fine and does subsequently fine its members for refraining from engaging in an economic strike,²² restrains or coerces employees in the exercise of rights guaranteed to them under section 7 of the Act.²³ In *Allis-Chalmers*, members of two locals of the United Automobile Workers Union crossed the union's picket lines to work during a strike.²⁴ These members were thereafter fined,²⁵ in accordance with the union's by-laws, for "conduct unbecoming a Union member."²⁶

In upholding the imposition of fines on the strike-breaking union members, the *Allis-Chalmers* Court relied heavily on the legislative history of the Act in discussing what is considered the "inherent imprecision" of the language in section 8(b)(1)(A).²⁷ Writing

18. See *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966), where the United States Court of Appeals for the Third Circuit stated:

But to equate union fines with total wages earned . . . is the grossest form of economic coercion affecting not only the union membership status but also the relationship between the employee and his employer in violation of the Act. Such economic coercion is calculated in design and effect to force an employee to act in concert with the union in future labor-management strife.

Id. at 536. See also *NLRB v. The Boeing Company*, 412 U.S. 67, 73 (1973) ("all fines are coercive to a greater or lesser degree").

19. The first Supreme Court decision to analyze the scope of 8(b)(1)(A)'s prohibition on restraining or coercing an individual employee in the exercise of their § 7 rights was *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274 (1960), where the Court held that the underlying intent of § 8(b)(1)(A) was to outlaw union engineered violence or direct economic reprisal. *Id.* at 287.

20. See *supra* note 9 (text of section 8(b)(1)(A) of the Act).

21. 388 U.S. 175 (1967).

22. An economic strike, engaged in for the purpose of obtaining an economic benefit, may be distinguished from an unfair labor practice strike, which is aimed at compelling an employer to cease engaging in an unfair labor practice. R. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 339-53 (1976). Because most collective bargaining agreements contain no-strike clauses proscribing strikes for the duration of the agreement, an economic strike cannot be called until the termination of the agreement. *Id.* at 340. Such no-strike clauses are not a waiver by the union of its right to conduct an unfair labor practice strike, however, unless the union expressly waives that right. See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956) (employer's right to discharge strikers for violating a no-strike clause is a matter of contract interpretation).

23. For the full text of § 7 of the Act, see *supra* note 6.

24. *Allis-Chalmers*, 388 U.S. at 176.

25. *Id.* at 179.

26. *Id.* at 177. The union argued that the fines were judicially enforceable under the theory that the terms of its constitution constituted a contract between the member and the union and was therefore a legal obligation. *Id.*

27. See *supra* note 9.

for the majority,²⁸ Justice Brennan concluded that the legislative history giving rise to section 8(b)(1)(A)²⁹ indicated that this section was primarily directed at union restraint and coercion during organizational campaigns. The remarks of the principal proponents of section 8(b)(1)(A), Senators Ball and Taft, manifested an intent not to interfere in any way with the internal affairs of unions.³⁰ Justice Brennan emphasized that the ban on union restraint and coercion contained in section 8(b)(1)(A)³¹ was altogether irrelevant in the context of union fines for strikebreaking.³²

Furthermore, Justice Brennan found that membership support of a union strike effort is central to the union's success in collective bargaining.³³ To support this finding, Justice Brennan noted that in 1947 when Congress passed section 8(b)(1)(A),³⁴ it did not intend to

28. Justice Black, writing for the dissent in *Allis-Chalmers*, argued that Justice Brennan's opinion was contrary to the express language of the Act, its legislative history and its policies. *Allis-Chalmers*, 388 U.S. at 199 (Black, J., dissenting). He further contended that the Court was compelling a union member to waive his § 7 right to refrain from participating in concerted activity and was engaging in a policy judgment by trying to strengthen weak unions by providing them with the power to impose fines enforceable in court. *Id.* at 216-17. In this regard, he argued that:

[i]t is one thing to say that Congress did not wish to interfere with the union's power, similar to that of any other kind of voluntary association, to prescribe specific conditions of membership. It is quite another thing to say that Congress intended to leave unions free to exercise a courtlike power to try and punish members with a direct economic sanction for exercising their right to work. Just because a union might be free, under the proviso, to expel a member for crossing a picket line does not mean that Congress left unions free to threaten their members with fines. Even though a member may later discover that the threatened fine is only enforceable by expulsion, and in that sense a "lesser penalty," *the direct threat of a fine, to a member normally unaware of the method the union might resort to for compelling its payments, would often be more coercive than a threat of expulsion.*

Id. at 203 (emphasis added).

29. For the full text of § 8(b)(1)(A) of the Act, see *supra* note 9.

30. *Allis-Chalmers*, 388 U.S. at 185-92.

31. See *supra* note 9 (text of § 8(b)(1)(A) of the Act).

32. *Allis-Chalmers*, 388 U.S. at 190-91.

33. *Id.* at 181.

34. Section 8(b)(1)(A) of the Act was enacted in 1947 with the passage of the Labor Management Relations (Taft-Hartley) Act of 1947 (an amendment to the original Act passed in 1935), ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1982)).

Congress added § 8(b)(1)(A) to the Act, which makes it an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in section 7," to implement the "right to refrain" language afforded in § 7. See 93 CONG. REC. 3554, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 733 (1948) (the "right to refrain" language means only "that a man shall have the right to join or not to join, to be bound by or not to be bound by, union rules") (remarks of Rep. Hoffman). When § 8(b)(1)(A) was introduced on the Senate floor, Senator Taft explained its purpose as necessary to protect union members from the "arbitrary powers which have been exercised by some of the labor union leaders with their rights as American citizens." 93 CONG. REC. 4023 reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, at 1032.

regulate the internal affairs.³⁵ That was to be accomplished via the Landrum-Griffin Act.³⁶ Justice Brennan, therefore, concluded that section 8(b)(1)(A)³⁷ could not "strip unions of the power to fine members for strikebreaking."³⁸

Finally, Justice Brennan's *Allis-Chalmers* opinion indicates that section 8(b)(1)(A)³⁹ cannot be read to allow expulsion from membership as the only discipline a union may lawfully impose.⁴⁰ For the proviso to section 8(b)(1)(A)⁴¹ "preserved the rights 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."⁴²

The inherent inequity with Justice Brennan's opinion in *Allis-Chalmers* is not in its approval of union discipline itself, but its approval of the forms that union discipline may take. The effect of Justice Brennan's decision to grant unions the right to fine employees is to promote situations whereby unions can make and secure their demands. This results in practically preventing an employee from ceasing strike activity, regardless of the personal economic consequences that a strike may produce. The end result of the *Allis-Chalmers* holding is not merely to permit unions such disciplinary power so as to render their strikes effective, but to grant the power to guarantee their success. Such enforced solidarity has never been a policy of the labor laws.⁴³

It is important to understand that the rights protected under section 7 of the Act⁴⁴ are those of individual employees. Except to

35. *Allis-Chalmers*, 388 U.S. at 185.

36. The Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 518 (1959) (codified as amended at 29 U.S.C. §§ 153, 158-160, 187, 401-531 (1982)), was enacted to remedy many union abuses which had developed, primarily with respect to internal union affairs subject only to the proviso of institutional loyalty. 29 U.S.C. §§ 401, 411 (1982). For a complete commentary on various aspects of this amendment to the Act, see Cox, *Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959); Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727 (1969); Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195 (1960).

37. For the full text of § 8(b)(1)(A) of the Act, see *supra* note 9.

38. *Allis-Chalmers*, 388 U.S. at 183.

39. See *supra* note 9.

40. *Allis-Chalmers*, 388 U.S. at 191.

41. See *supra* note 11.

42. *Allis-Chalmers*, 388 U.S. at 191-92.

43. In this regard, Dean Wellington has noted:

[U]nions are meant to be democratic institutions. If unfettered freedom to resign so depletes a union's ranks over time that the strength of its strike is sapped, one is tempted to say that the members have spoken, the consensus has evaporated, and the strike should come to an end.

Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. at 1045 (1976).

44. See *supra* note 6 (text of § 7 of the Act).

the extent of the obligations authorized by section 8(a)(3) of the Act,⁴⁵ nothing can be more clear from the language of section 7⁴⁶ itself than that the employees' individual right to refrain from concerted action is unfettered and unrestrained. Much of Justice Brennan's attempt in *Allis-Chalmers* to narrow the scope of the individual employees' rights under section 7 was based upon the proviso to section 8(b)(1)(A).⁴⁷ This reliance, however, was misplaced. Section 8(b)(1)(A) was not enacted to further the functioning of unions in the pursuit of their goals. Rather, it was enacted to protect the exercise of employees' rights, under section 7, to be free from union imposed restraint and coercion.⁴⁸

Unfortunately, Justice Brennan's *Allis-Chalmers*⁴⁹ opinion has led unions to believe that it is possible to turn any employment matter or section 7 right into an internal union affair. This is accomplished through the simple expedient of adopting a union rule or by-law dealing with the subject, and then disciplining employees pursuant to that rule. The negative implications of Justice Brennan's *Allis-Chalmers* opinion are evident in the Court's decisions that followed from it.⁵⁰ These decisions attempt to balance the employee's right to refrain from engaging in concerted activities against the union's need for strength and solidarity.⁵¹

45. Section 8(a)(3) of the National Labor Relations Act, as amended provides:

[N]o employer shall justify any discrimination against an employee for non-membership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(a)(3) (1982).

With this section of the Act, Congress permitted only union security agreements that required employees to become a union member after 30 days of employment. See S. REP. NO. 105, 80th Cong., 1st Sess. 7, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 413 (1948). However, under § 8(a)(3), only "financial" membership can be required. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963) (prohibiting union discrimination on grounds related to membership obligations other than failure to pay dues or fees meant that "union membership" as a condition of employment is "whittled down to its financial core.").

Under the union security provisions authorized by the Act, employees are free to change their status to "financial core" membership having previously chosen full membership. See *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975); *Local 749, International Bhd. of Boilermakers v. NLRB*, 466 F.2d 343 (D.C. Cir. 1974), cert. denied, 410 U.S. 926 (1973); *United Stanford Employees*, 232 N.L.R.B. 326 (1977), enforced, 601 F.2d 980 (9th Cir. 1979).

46. For the full text of § 7 of the Act, see *supra* note 6.

47. For the full text of § 8(b)(1)(A) of the Act, see *supra* note 9.

48. See *supra* note 6.

49. *Allis-Chalmers*, 388 U.S. 175.

50. See *infra* notes 66-83 and accompanying text.

51. See *Pattern Makers' League of North America, AFL-CIO v. NLRB*, 105 S. Ct. 3064 (1985); *Machinists Local 1327 v. NLRB*, 105 S. Ct. 3517 (1985); *Booster Lodge No. 405, Int'l Ass'n of Machines & Aerospace Workers, AFL-CIO v. NLRB*, 412 U.S. 83 (1973); *NLRB v. Granite State Joint Bd., Textile Workers Union of America, Local 1029, AFL-CIO*, 409 U.S. 213 (1972); *Scofield v. NLRB*, 394 U.S. 423

Less than a year after *Allis-Chalmers* was decided, the Court in *NLRB v. Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO*,⁵² was again called upon to define the scope of section 8(b)(1)(A)⁵³ and its consequent limitations upon union discipline. In *Marine Workers*, the Court addressed the question of whether a union may penalize one of its members for seeking the aid of the NLRB without first exhausting all internal union remedies.⁵⁴ A union member had filed charges with the NLRB initially alleging union inducement of employer discrimination.⁵⁵ The union subsequently tried, convicted, and expelled the member for violating the union's constitution, which required members who had complaints against the union to exhaust union remedies before resorting to outside courts or tribunals.⁵⁶ Thereafter, the employer, on behalf of the employee, filed a second charge with the NLRB in which he alleged unlawful expulsion.⁵⁷

The *Marine Workers* Court unanimously held that the union violated section 8(b)(1)(A)⁵⁸ when it expelled the employee from union membership.⁵⁹ The Court reasoned, in concurrence with the NLRB, that considerations of "public policy" removed the issue from the realm of internal union affairs. Moreover, the Court agreed with the NLRB that the proviso to section 8(b)(1)(A) assures a union freedom of self-regulation only "where legitimate internal affairs are concerned."⁶⁰ Thus, in *Marine Workers*, the union action, expulsion from union membership, was "beyond the legitimate interest of a labor organization."⁶¹

(1969); *NLRB v. Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418 (1968).

52. 391 U.S. 418 (1968).

53. For the full text of § 8(b)(1)(A) of the Act, see *supra* note 9.

54. *Marine Workers*, 391 U.S. at 421. For a thorough discussion of a union's obligation to represent member-grievants, see Waldman, *The Duty of Fair Representation*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-NINTH ANNUAL CONFERENCE ON LABOR 279-95 (R. Adelman ed. 1976).

55. *Marine Workers*, 391 U.S. at 420.

56. *Id.* at 421.

57. *Id.*

58. For the complete text of § 8(b)(1)(A) of the Act, see *supra* note 9.

59. *Marine Workers*, 391 U.S. at 428.

60. *Id.* at 425.

61. *Id.* The Court also emphasized that the policy of keeping access to the NLRB unimpeded was so fundamental to the "functioning of the Act as an organic whole" that it overrode the lesser policy of allowing unions the opportunity to review charges brought against them. *Id.* at 424.

It is interesting to note that the Court did not deem it necessary to decide that filing charges with the Board was a protected activity within the meaning of § 7, even though the prohibitions of § 8(b)(1)(A) are directed only to the exercises of § 7 rights. The Court concluded that was not the issue. In this regard, Justice Douglas stated: "The main issue in the case is whether Holder [the employee] could be expelled for filing the charge with the Board without first having exhausted 'all remedies and appeals within the Union'. . . ." *Id.* at 422.

The decision in *Marine Workers* represents a significant evolution beyond *Allis-Chalmers*. The Court acknowledged that some methods of union discipline, which are wholly "internal" in nature, could be coercive, and the object of that discipline could be scrutinized for consistency with undefined considerations of "public policy."⁶² The implicit conclusion inferrible from the *Marine Workers* decision is that the Court will weigh policy considerations in conjunction with both section 7⁶³ and section 8(b)(1)(A).⁶⁴ Nevertheless, the Court's holding in *Marine Workers* should be considered an anomaly because the case was decided twenty years ago and the Court has since refused to review union disciplinary action within the framework of *Marine Workers*. Instead, the Court has continued to rely on Justice Brennan's *Allis-Chalmers* opinion, which expounded the "contract of union membership" theory.⁶⁵

A year following the *Marine Workers* decision, the Court in *Scofield v. NLRB*⁶⁶ formulated a more comprehensive test to determine the scope of a union's disciplinary power. In *Scofield*, the controversy centered around production employees who were paid on a piecework or incentive basis.⁶⁷ The question raised was whether a union restrains or coerces an employee within the meaning of section 8(b)(1)(A)⁶⁸ when the union fines an employee because he performed work and earned wages in excess of certain production quotas established and enforced by the union.⁶⁹ The Court held that the union fines were valid under the proviso to section 8(b)(1)(A) of the Act.⁷⁰ The Court found that the union rule, which was designed to limit productivity under a piecework system, reflected a "legitimate union interest" in deterring employer speedups, fostering health and safety, and promoting collective bargaining strength.⁷¹

Following the reasoning Justice Brennan implicitly articulated in *Allis-Chalmers*,⁷² the *Scofield* opinion stressed that union members were free to leave the union and escape the rule.⁷³ The *Scofield*

62. This "public policy" exception to union disciplinary authority, which lacks definition, developed from decisions upholding individual members' access to the NLRB. In two companion cases, the NLRB held that a union could not discipline a member for filing an unfair labor practice charge before he had exhausted his internal union remedies. See H.B. Roberts, 148 N.L.R.B. 674, *enforced*, 350 F.2d 427 (D.C. Cir. 1965); Local 138, IUOE, 148 N.L.R.B. 679 (1964).

63. See *supra* note 6.

64. See *supra* note 9.

65. *Allis-Chalmers*, 388 U.S. 175.

66. 394 U.S. 423 (1969).

67. *Id.* at 424.

68. For the full text of § 8(b)(1)(A) of the Act, see *supra* note 9.

69. *Scofield*, 394 U.S. at 427.

70. *Id.* at 436.

71. *Id.* at 435.

72. *Allis-Chalmers*, 388 U.S. 175.

73. *Id.* at 196.

majority, with whom Justice Brennan joined, also noted that the fines were not unreasonable, nor the "mere fiat" of union leadership.⁷⁴ The Court also emphasized the distinction between internal means of disciplinary enforcement, which include measures that do not jeopardize union members' employment status, and external means of enforcement, which do affect members' employment status and contravene section 8(b)(1)(A).⁷⁵ This distinction, the Court noted, was reinforced through the enactment of the Landrum-Griffin Act, in which Congress deliberately refused to alter this longstanding policy to refrain from interfering with internal union affairs.⁷⁶ Consequently, the *Scofield* Court adopted a three-part test to determine whether a union rule violates section 8(b)(1)(A) of the Act.⁷⁷ Under this test, a union may enforce its own rules with respect to union membership if the rules are properly adopted and reflect a legitimate union interest, if they do not impair an aspect of national labor policy inherent in the labor laws, and if the rules are reasonably enforced against union members who are free to leave the union in order to escape the rule.⁷⁸

The Court's primary inquiry in *Scofield* focused on the "legitimacy of the union interest" indicated by the rule.⁷⁹ The importance of *Scofield* lies in the fact that it expounds a balancing test. This balancing test, which must weight statutory labor policy against the validity of the union's interest, was perhaps implicit in both *Allis-Chalmers*⁸⁰ and *Marine Workers*.⁸¹ Assuming there can be some justification, however, for Justice Brennan's opinion in *Allis-Chalmers*, the *Scofield* decision represents an erroneous reading of the *Allis-Chalmers* decision.

Allis-Chalmers has perpetuated the idea that a union may have a blanket immunity for imposing and enforcing fines. *Scofield* presented an ideal case for clarifying and limiting the scope of the *Allis-Chalmers* decision and preventing unions from improperly construing that decision as an endorsement of union fines. A sharply

74. *Scofield*, 394 U.S. at 430.

75. *Id.* at 428; *Allis-Chalmers*, 388 U.S. at 195.

The internal-external dichotomy originated in *Minneapolis Star & Tribune Co.*, 109 N.L.R.B. 724 (1954). In *Minneapolis Star*, the NLRB upheld the imposition of a union levied fine upon a member who refused to perform picket duty. *Id.* at 727. The NLRB held that Congress had specifically intended to distinguish internal enforcement of union discipline from external enforcement which is subject to the prohibitions of § 8(b)(1)(A). *Id.* at 728-29. If a union deprives a member of his right to work, this will be considered external because it affects his employment status and is thus a violation of § 8(b)(1)(A). *Id.*

76. *Scofield*, 394 U.S. at 429.

77. For the full text of § 8(b)(1)(A) of the Act, see *supra* note 9.

78. *Scofield*, 394 U.S. at 430.

79. *Id.*

80. *Allis-Chalmers*, 388 U.S. at 175.

81. *Marine Workers*, 391 U.S. at 418.

divided Court rendered the *Allis-Chalmers* decision, and therefore, its continued viability is doubtful. The holding can be justified, if at all, only with reference to the special solidarity considerations involved in the strike situation. Justice Brennan's opinion in *Allis-Chalmers* emphasized the importance of maintaining the union's strike power and expressed concern that by impairing the usefulness of "labor's cherished strike weapon" there would be limitations on the power of a union to act as the exclusive collective bargaining agent.⁸² That same policy favoring collective bargaining, however, required a different result in *Scofield*.

Two critical distinctions are apparent in comparing *Scofield* and *Allis-Chalmers*. First, in *Allis-Chalmers*, the goal of the union disciplinary activity was the preservation of an effective strike power.⁸³ On the other hand, in *Scofield* the union rule regarding production ceilings reduced and slowed down production.⁸⁴ Although the Act stopped short of prohibiting union production limitations as illegal in themselves, neither are such activities given any protection under the Act.⁸⁵ Second, in *Allis-Chalmers* the union

82. Section 9(a) of the Act provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided that the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (1982) (emphasis added).

Once selected by a majority of the workers, a labor union has sole authority to represent employees in a bargaining unit to negotiate wages, hours, and terms and conditions of employment. See, e.g., *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) (unionized employees who sought to bargain separately with their employer were not protected by § 7 of the Act and could be discharged by employer). For a detailed discussion of the majority principle, see Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusively Be Abolished?*, 123 U. PA. L. REV. 897 (1975); Schreiber, *The Origin of the Majority Rule and the Simultaneous Development of Institutions to Protect the Minority: A Chapter in Early American Labor Law*, 25 RUTGERS L. REV. 237 (1971).

83. *Allis-Chalmers*, 388 U.S. at 175. This was undoubtedly the central rationale for the *Allis-Chalmers* decision. The decision was described as being such in *Marine Workers*, 391 U.S. at 423. Further, Justice Black noted in his dissent in *Allis-Chalmers*, "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." *Allis-Chalmers*, 388 U.S. at 201.

84. *Scofield*, 394 U.S. at 423.

85. Numerous cases have established that the Act does not protect union attempts at slowing down or interfering with production. See, e.g., *Automobile Workers, Local 232 v. WERB*, 336 U.S. 245 (1949); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); *Celotex Corp.*, 146 N.L.R.B. 48 (1964); *Raleigh Water*

could be considered to have had no practical legal alternative for the attainment of its goal. By contrast, the union in *Scofield* could have achieved the imposition of production limitations through the usual collective bargaining process.⁸⁶ The union's enforcement of its production ceiling rule was nothing more than a unilateral attempt to regulate wages in contravention of its mandatory duty to bargain.⁸⁷

It is an essential foundation of national labor policy that the subjects of wages, working hours, and productive output are to be resolved through the collective bargaining process.⁸⁸ Yet, through a broad application of Justice Brennan's opinion in *Allis-Chalmers*, the union in *Scofield* effectively bypassed the collective bargaining process and enforced a production and wage limitation which it was unable to obtain in negotiations with the employer. The only way one might justify the extension of *Allis-Chalmers* to *Scofield* is to hold that an employee who joins a labor union waives the protection of the Act and submits himself to any and all discipline which a union may choose to impose. Such a waiver theory cannot be sustained, however, because it would be inconsistent with the decision of the Court in *Marine Workers*, which held that union fines or expulsion imposed upon a member for exercising rights guaranteed under section 7 constitutes restraint and coercion in violation of section 8(b)(1)(A) of the Act.⁸⁹

Heater Mfg. Co., 136 N.L.R.B. 76 (1960); Elk Lumber Co., 91 N.L.R.B. 333 (1950). In addition, the Board has specifically recognized that an employee has the protected right under the Act to refrain from union production restrictions. Printz Leather Co., Inc., 94 N.L.R.B. 1312 (1951).

86. See *supra* note 82.

87. By virtue of the exclusive representation concept of § 9 of the Act, a union is required, through negotiations with the employer, to negotiate pay systems and work standards. 29 U.S.C. § 159(a) (1982). This section is bolstered by § 8(d) of the Act, which requires employers and unions to bargain collectively over "wages, hours and other terms and conditions of employment, or the negotiations of an agreement, or any question arising thereunder." 29 U.S.C. § 158(d) (1982). Such "mandatory" subjects for bargaining include pay rates, fringe benefits, plant rules, work loads, and seniority. R. RICHARDSON, *COLLECTIVE BARGAINING BY OBJECTIVES: A POSITIVE APPROACH* 114-15 (1977).

The product of the negotiation process is the collective bargaining agreement. Common provisions found in a collective bargaining agreement include identification of the parties and employee "bargaining units" covered by the agreement, compensation provisions, rules for the utilization of labor, seniority rights, rights of the union and management, and methods for enforcing, interpreting, and administering the agreement's terms. Barbash, *Collective Bargaining: Contemporary American Experience: A Commentary*, in *COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE* 553-54 (G. Somers ed. 1980). For statistical data on over 100 different collective bargaining provisions found in agreements pertaining to over six million workers, see *U.S. Dep't of Labor, Bureau of Labor Statistics, Characteristics of Major Collective Bargaining Agreements*, July 1, 1976, Bulletin 2013 (Washington D.C.: U.S. Government Printing Office, 1980).

88. See *supra* note 87.

89. For a criticism of this "waiver" theory, see Recent Cases, *National Labor Relations Act — Union Fine Against Member Who Refuses to Strike Is Unfair La-*

As each of the Court's three opinions make disturbingly clear, disciplinary fines, enforced through either judicial or internal union means, are not in themselves necessarily coercive under its interpretation of section 8(b)(1)(A) of the Act.⁹⁰ Thus, it appears that an employee's section 7 rights⁹¹ must give way if the union's interest in preserving the integrity of its bargaining position overrides the right of the employee to refrain from activity aimed at maintaining that integrity.

The impact of this "trilogy" of cases⁹² and the test proposed in *Scofield*⁹³ was considered in *NLRB v. Granite State*,⁹⁴ and expanded upon in *Booster Lodge No. 405, International Association of Machinists v. NLRB*.⁹⁵ In *Granite State*, the Court squarely addressed the issue of whether the ability to resign from union membership was a precondition for valid union discipline.⁹⁶ The Granite State union had no rules specifying when a member could resign.⁹⁷ Shortly after a lawful strike was called, several union members resigned from the union and returned to work.⁹⁸ Subsequently, the union placed all of the strikebreakers on trial and imposed individual fines equivalent to the wages each employee had earned while a strikebreaker.⁹⁹

In holding that a union suit to enforce fines for post-resignation activity constitutes an unfair labor practice under section 8(b)(1)(A),¹⁰⁰ the *Granite State* Court correctly limited Justice Brennan's *Allis-Chalmers*¹⁰¹ opinion to cases involving sanctions imposed upon employees who are full union members¹⁰² at the time of

bor Practice Under Section 8(b)(1)(A), 80 HARV. L. REV. 683, 685-87 (1967); Comment, *8(b)(1)(A) Limitations Upon the Right of a Union to Fine Its Members*, 115 U. PA. L. REV. 47, 62-63 (1966).

90. See *supra* note 9 (text of § 8(b)(1)(A) of the Act).

91. See *supra* note 6 (text of § 7 of the Act).

92. *Scofield*, 394 U.S. 423; *Marine Workers*, 391 U.S. 418; *Allis-Chalmers*, 388 U.S. 175.

93. *Scofield*, 394 U.S. at 430.

94. 409 U.S. 213 (1972).

95. 412 U.S. 84 (1973).

96. *Granite State*, 409 U.S. at 215.

97. *Id.*

98. *Id.* at 214.

99. *Id.*

100. For the full text of § 8(b)(1)(A) of the Act, see *supra* note 9.

101. *Allis-Chalmers*, 388 U.S. 175 (1967).

102. Unions rely primarily on two forms of security arrangements to retain membership. Under a union shop provision, an employee is required to join the union within a specified period of time after obtaining employment. 29 U.S.C. § 158(a)(3) (1982). After becoming a union member under this type of security arrangement, the employee is required to not only pay dues and initiation fees, but also to abide by the union's rules. Under the agency shop provision, however, an employee is required only to pay union dues and initiation fees and can only be disciplined for nonpayment of dues. See, e.g., *United Automobile Workers Local 1756*, 240 N.L.R.B. 13 (1979) (union cannot assess readmission fee and threaten employee with dismissal

the offense.¹⁰³ The *Granite State* majority, in which Justice Brennan joined, stated that "when a member lawfully resigns from the union, its power over him ends."¹⁰⁴ The Court also noted that because there "was no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union," the rule which allows a member to resign at will from a voluntary association should be applied.¹⁰⁵

Finally, the *Granite State* Court rejected the union's argument that the union members were properly disciplined because they had participated in the strike vote.¹⁰⁶ The Court concluded that post-resignation freedom to cross the picket line was not relinquished when the members participated in the vote to strike. This is because the economic hardship and likelihood of permanent replacement¹⁰⁷

after employee resigned from union but continued paying equivalent of union dues); *Bricklayers' Union No. 11*, 221 N.L.R.B. 133 (1975) (nonunion employees who tender dues and initiation fees not required to pay new initiation fees after union negotiates new security clause).

103. *Granite State*, 409 U.S. at 215.

104. *Id.*

105. *Id.* at 216. In a concurring opinion, Chief Justice Burger made the following pertinent observations:

The balance is close and difficult; unions have need for solidarity and at no time is that need more pressing than under the stress of economic conflict. Yet we have given special protection to the associational rights of individuals in a variety of contexts; through § 7 of the Labor Act, Congress has manifested its concern with those rights in the specific context of our national scheme of collective bargaining. *Where the individual employee has freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership.*

Granite State, 409 U.S. at 218 (Burger, C.J., concurring) (emphasis added). See also *Local 621, Rubber Workers*, 167 N.L.R.B. 610, 611 (1967) (where union constitution was silent on the right to resign, union member could resign at will); *New Jersey Bell Tel. Co.*, 106 N.L.R.B. 1322, 1324 (1953) (where union constitution did not specify procedures for resignation, employee joining for an indefinite period could resign at will).

106. *Granite State*, 409 U.S. at 217. It is usually standard practice for a union to provide in its constitution for a membership vote on continuing or terminating a strike. See, e.g., *ALUMINUM WORKERS INT'L UNION CONST.* art. IX, § 2 (1975) (although local union membership may terminate strike by majority vote, local's executive board may override decision to terminate); *COMMUNICATIONS WORKERS OF AMERICA UNION CONST.* art. XVIII, § 8(a)-(b) (1979) (either local union in accordance with local bylaws or Executive Board or Convention may terminate strike); *INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION CONST.* art. XII, § 1(b) (1976) (majority vote of local members may terminate strike). In this regard, the Court has also held that an employee does not surrender the right to refrain from concerted activities when he joins a union. *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954). Under § 7, the individual may be a "good, bad or indifferent member." *Id.* at 40.

107. Although workers engaged in a strike are still considered employees for purposes of the Act, those giving up their jobs to strike for increased benefits or other non-unfair labor practice issues receive little protection with respect to reinstatement. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (economic strikers are entitled only to nondiscriminatory review and disposition of their job applications for rehiring). If the employer has hired a replacement or has abolished the striker's job, an economic striker will not be entitled to reinstatement. See *NLRB v. R.C. Can Co.*,

in a lengthy strike might cause a member to reconsider his initial vote to strike.¹⁰⁸

Six months after the *Granite State* decision, the Court was again required to determine whether a union member could lawfully resign his membership during a strike and thereby escape union discipline. In *Booster Lodge No. 405, International Association of Machinists v. NLRB*,¹⁰⁹ 143 employees crossed the picket line and returned to work during an eighteen day strike.¹¹⁰ A majority of these employees had resigned their union membership prior to or subsequent to resuming work.¹¹¹ The union's constitution expressly forbade strikebreaking, but contained no provisions regarding resignations.¹¹² In a per curiam opinion, the *Booster Lodge* Court held that the union violated section 8(b)(1)(A)¹¹³ in seeking judicial enforcement of fines that arose from post-resignation activities.¹¹⁴ As in *Granite State*, the Court appeared to establish the individual's right to insulate himself from union discipline by withdrawing from union membership.

Throughout this line of cases, Justice Brennan has been consistent in upholding union disciplinary measures except when the union attempted to discipline employees who were no longer members of the union.¹¹⁵ In contrast, this line of cases must be distinguished from cases in which a union has placed restrictions on the ability of union members to resign, wherein Justice Brennan has endorsed the view that these members may be fined, expelled, or both depending on the severity of the union members' transgression. This view is most evident in *Pattern Makers' League of North America*,

328 F.2d 974 (5th Cir. 1964). *But see* *Laidlaw Corp. v. NLRB*, 414 F.2d 99 (7th Cir. 1969) (failure to consider existing job applications by strikers when vacancies do occur is discriminatory and an unfair labor practice).

108. *Granite State*, 409 U.S. at 217.

109. 412 U.S. 84 (1973).

110. *Id.* at 85.

111. *Id.* The remainder of the strikebreakers did not resign. *Id.* at 85-86.

112. *Id.* at 86.

113. For the full text of § 8(b)(1)(A) of the Act, see *supra* note 9.

114. *Booster Lodge*, 412 U.S. at 88. Under § 8(b)(1)(A) of the Act, a union which persists in attempting to impose fines on one of its members commits an unfair labor practice. 29 U.S.C. § 158(b)(1)(A) (1982). *See, e.g.*, *Local 143, Chemical Workers*, 188 N.L.R.B. 100 (1971); *Local 69, Newspaper Guild*, 186 N.L.R.B. 548 (1970).

In a companion case to *Booster Lodge*, the Court held that the NLRB is not empowered under § 8(b)(1)(A) to inquire into the reasonableness of a disciplinary fine imposed upon a member when the NLRB exercises authority under that section to determine whether the fine constitutes an unfair labor practice. *NLRB v. Boeing Co.*, 412 U.S. 67 (1973). The Court has based this denial of NLRB jurisdiction over the reasonableness of a fine on its belief that state courts possess greater expertise in this area. *Id.* at 75-77.

115. *Compare* *Pattern Makers' League of North America, AFL-CIO v. NLRB*, 105 S. Ct. 3064 (1985), *Scofield*, 394 U.S. 423, and *Allis-Chalmers*, 388 U.S. 175, with *Booster Lodge*, 412 U.S. 84, and *Granite State*, 409 U.S. 213.

AFL-CIO v. NLRB,¹¹⁶ in which the Court recently struck down a union rule that prohibited strike-time resignations¹¹⁷ because it violated section 8(b)(1)(A).¹¹⁸ The rule at issue in *Pattern Makers' League Law 13*, which provided that "no resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent."¹¹⁹ All members of the union were required to take an oath of membership, obligating them to adhere to the union's "Constitution, Laws, Rules and Decisions."¹²⁰

The *Pattern Makers'* dissenters, with whom Justice Brennan joined, relied heavily on a contract theory in attempting to justify the imposition of fines, which were levied on union members who had resigned during a strike despite the union rule prohibiting strike-time resignation.¹²¹ It appears that Justice Brennan would carry the contract of union membership theory relied on in *Allis-Chalmers*¹²² to the limits of unconscionability, in light of the fact that union membership in most instances may be compulsory, making the contract one of adhesion. Such a contract, the basis of the fines imposed in *Allis-Chalmers*, must also place limits on a union's power over its members so as not to preclude the individual rights guaranteed under the Act.¹²³ While Justice Brennan's reliance on

116. 105 S. Ct. 3064 (1985).

117. *Id.* at 3072. Unions often employ a variety of methods to prevent employees from tendering effective resignations. These procedural hurdles, however, have usually been invalidated by the NLRB. *See, e.g.*, Sheet Metal Workers Local 170, 225 N.L.R.B. 1178 (1976) (union cannot prohibit oral resignations that are clear and unequivocal expression of intent to resign); Bookbinders' Local 60, 203 N.L.R.B. 732 (1973) (resignations submitted orally or by registered mail valid); Electrical Workers Local 1522, 180 N.L.R.B. 131 (1969) (resignation effective when worker sent dues check-off de-authorization form to company and union demonstrating intent to resign); Oil Workers Union, 148 N.L.R.B. 629 (1964) (resignation effective in face of silent constitution when made either orally or by telegram prior to effective date of contract).

118. *See supra* note 9.

119. *Pattern Makers'*, 105 S. Ct. at 3066.

120. Brief for Petitioners at 3, *Pattern Makers' League of North America, AFL-CIO v. NLRB*, 105 S. Ct. 3064 (1985).

121. *Id.* at 3077-85 (Blackmun, J., dissenting).

122. Justice Brennan argued in *Allis-Chalmers* that, "Congress was operating within the context of the 'contract theory' of the union-member relationship which widely prevailed at that time." *Allis-Chalmers*, 388 U.S. at 192. Justice Brennan provided very little case authority for this proposition. *See, e.g.*, *IAM v. Gonzales*, 356 U.S. 617 (1958); *Masters Stevedors Ass'n v. Walsh*, 2 Daly 1 (N.Y. 1867).

123. Congress clearly expressed its policy to protect individual employees in its declaration of purpose and policy of the Act, as amended. 29 U.S.C. §§ 141-187 (1982). Section 1(b) of the Act provides, in part, that:

[i]t is the purpose and policy of this Chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . . to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce . . . and are inimical to the general welfare

29 U.S.C. § 141(b) (1982) (emphasis added).

the contract theory of union constitutions¹²⁴ may have some validity, it is the "right to refrain" protected under section 7 which is appropriately paramount, not the union-employee contract.¹²⁵

Just as Justice Brennan has endorsed the imposition of union discipline as it relates to the rank and file worker, so too has he endorsed it as it relates to disciplining supervisor-union members. For example, in *Florida Power & Light Co. v. IBEW, Local 641*,¹²⁶ Justice Brennan joined a bare majority of the Court, which held that a union does not violate section 8(b)(1)(B) of the Act¹²⁷ when it imposes a fine upon a supervisor-member who performs rank and file work for the employer during a strike.¹²⁸ In *American Broadcasting Co. v. Writers Guild*,¹²⁹ the Court held that the union committed an unfair labor practice when it fined a supervisor-member who crossed the union picket line to perform his regular supervisory duties.¹³⁰ Justice Brennan, however, dissented, apparently desiring to expand the *Florida Power* decision to every situation in which a supervisor-member crosses the picket line.¹³¹

In attempting to expand the Court's limited holding in *Florida Power* to the dissimilar facts of *American Broadcasting*, Justice Brennan overlooked the distinction that the Court drew in *Florida Power*. This distinction was between the performance of normal supervisory duties and the performance of rank-and-file struck

124. The attempt to classify the union-member relationship as contractual has often met with opposition by those who argue that it is nothing more than a legal fiction. See e.g., Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951).

125. A collective bargaining agreement may be conceptualized as a contract of "adhesion" because "[t]he member has no choice as to terms but is compelled to adhere to the inflexible ones presented." See *id.* at 1055. See also Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 642 (1943) (the decision of whether to enforce contracts of adhesion will depend not only on the "social importance of the type of contract" but also on "the degree of monopoly enjoyed by the author"). For a thorough analysis of the differences between a collective bargaining agreement and a traditional contract, see Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 5-25 (1958).

126. 417 U.S. 790 (1974).

127. 29 U.S.C. § 158(b)(1)(B) (1982). This section makes the restraint or coercion of "an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances," a union unfair practice. *Id.*

Early § 8(b)(1)(B) cases involved union restraint and coercion applied directly to an employer to pressure it to dismiss labor relations personnel who were hostile to unions or to appoint personnel favorable to organized labor. See *Orange Belt Dist. Council of Painters No. 48*, 152 N.L.R.B. 1136 (1965); *Warehousemen, Drivers and Helpers Local 986*, 145 N.L.R.B. 1511 (1964); *Los Angeles Cloak Joint Bd., ILGWU (Helen Rose Co.)*, 127 N.L.R.B. 1543 (1960).

128. *Florida Power*, 417 U.S. at 803.

129. 437 U.S. 411 (1977).

130. *Id.* at 437.

131. *Id.* at 438. The dissent viewed the Court's opinion as a "radical alteration of the natural balance of power between labor and management." *Id.* at 438-39 (Stewart, J., dissenting).

work.¹³² The distinction was drawn because the performance of rank and file work during a strike will inhibit the effectiveness of the strike, whereas the performance of supervisory duties during a strike will not similarly inhibit the effectiveness of the strike. Thus, the distinction protects the Union's need for solidarity during the strike. Nevertheless, the *Florida Power* distinction deprives employers of what may be their only effective means of ensuring their statutory right to treat supervisors as supervisors and to select and retain loyal and effective employees.¹³³

Florida Power has blurred the distinction that Congress established between management and labor.¹³⁴ Nevertheless, Justice Brennan would go further, as proposed in *American Broadcasting*,¹³⁵ and ignore the distinction altogether. Compliance with the union's strike rules by supervisory and executive union members in *American Broadcasting* would have required them to quit their jobs as management. This would have been in direct violation of section 8(b)(1)(B),¹³⁶ because it would have restrained and coerced the employer in the selection of these supervisory and executive employees for the purpose of collective bargaining or the adjustment of grievances. Justice Brennan, however, would construe section 8(b)(1)(B) as totally inapplicable during a strike, making the exception, carved

132. In *Florida Power*, the Court made it clear that there is a definite distinction between supervisory work and "rank-and-file" work. *Florida Power*, 417 U.S. at 792 ("unions did not violate 8(b)(1)(B) of the Act when they disciplined their members for performing rank-and-file struck work") (emphasis added).

133. The four dissenters in *Florida Power* appeared to agree with this author's proposition. In their opinion, § 8(b)(1)(B) must be considered a vital part of the solution to the problem that concerned Congress and that section is violated when a union disciplines a supervisor who works for his employer during a strike, regardless of the nature of the work performed. *Florida Power*, 417 U.S. at 814. In this regard, Justice White, quoting the lower court, stated:

Nothing in the language or legislative history of the statute contradicts the conclusion that '[w]hen a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline equally interferes with the employer's control over his representative and equally deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the way the supervisor interpreted the collective bargaining agreement or performed his "normal" supervisory duties.'

Id. at 815 (quoting 487 F.2d at 1176).

134. As Senator Ball, a leading sponsor of § 8(b)(1)(B), observed in voicing his concern that previous interpretations of the Act by the NLRB and courts had blurred the line between management and employees:

The committee took the position that foremen are an essential and integral part of management, and that to compel management to bargain with itself, so to speak, by dividing the loyalties of foremen between the union and the employer, simply did not make sense, and inevitably would prove harmful to the free enterprise system.

93 CONG. REC. 5014, reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1496 (1948) (emphasis added).

135. *American Broadcasting*, 437 U.S. at 438 (Stewart, J., dissenting).

136. See *supra* note 127.

out in *Florida Power*,¹³⁷ the rule.

The Court's narrow holding in *Florida Power* was based entirely on the distinction drawn between a supervisor-member's performance of normal supervisory duties¹³⁸ versus the performance of rank-and-file struck work.¹³⁹ Justice Brennan argues that this distinction is meaningless because if the absence of the supervisor-members is what restrains and coerces the employer in its selection of its representatives, this occurs no matter what work the supervisor-members perform. Thus, in Justice Brennan's view, *Florida Power*'s rank-and-file struck work exception to section 8(b)(1)(B)¹⁴⁰ would be expanded into a much broader crossing-the-picket-line exception.

Justice Brennan has not only misconstrued the plain meaning of the Act in cases such as *Allis-Chalmers*¹⁴¹ and *Scofield*,¹⁴² but he has also failed to recognize or acknowledge the statutory provisions within the Act that establish a clear division between management and labor, between supervisors and rank-and-file employees, and between management representatives and labor representatives.¹⁴³

137. *Florida Power*, 417 U.S. 790. The Court in *Florida Power* reached an extremely narrow holding: "[W]e hold that the respondent unions did not violate § 8(b)(1)(B) of the Act when they disciplined their supervisor-members of performing rank-and-file struck work." *Id.* at 813 (emphasis added).

Subsequent to the Court's decision in *Florida Power*, both the Seventh and District of Columbia Circuits reviewed and enforced NLRB orders which found violations of § 8(b)(1)(B) where unions disciplined supervisor-members who performed their normal supervisory duties against their unions' wishes. See *Chicago Typographical Union, No. 16 v. NLRB*, 531 F.2d 612 (D.C. Cir. 1976); *Wisconsin River Valley Dist. Council of Carpenters v. NLRB*, 532 F.2d 47 (7th Cir. 1976). Both courts regarded the nature of the work performed by the supervisor-members as being the key legal issue in § 8(b)(1)(B) adjudications.

138. See *supra* note 143.

139. *Id.*

140. See *supra* note 137.

141. *Allis-Chalmers*, 388 U.S. 175. Much of the criticism of Justice Brennan's opinion in *Allis-Chalmers* is based upon the premise that § 7 confers individual rights. See Atleson, *Union Fines and Picket Lines: The NLRA and Union Disciplinary Power*, 17 UCLA L. Rev. 681 (1970); Cramer, *The Boeing Decision: A Blow to Federalism, Individual Rights and Stare Decisis*, 122 U. Pa. L. Rev. 556 (1974).

142. *Scofield*, 394 U.S. 423.

143. Section 11 of the Act defines the term "supervisor" as: any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1982).

In contrast, § 2 of the Act defines the term "employee" as follows:

(3) the term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of an unfair labor practice . . . but shall not include . . . any individual employed as a supervisor. . . .

Section 14(a) of the Act provides in relevant part that “[n]o employer . . . shall be compelled to deem . . . supervisors as employees for the purposes of any law, either national or local, relating to collective bargaining.”¹⁴⁴ In enacting section 14(a), Congress undertook to guarantee that supervisors would not be subject to conflicting pressures on their loyalty.¹⁴⁵ Moreover, Congress did not contemplate that section 8(b)(1)(B) would be interpreted in a manner that ignores the fundamental distinction between management and labor and thereby makes more severe the conflict of loyalties problems.¹⁴⁶ Yet, that is precisely the result of Justice Brennan’s construction of section 8(b)(1)(B). The union discipline that Justice Brennan found permissible in both *Florida Power* and *American Broadcasting* converts supervisor-members into ordinary employees for purposes of union fines. In sanctioning this discipline, Justice Brennan would effectively deprive the employer of the loyalty of its chosen section 8(b)(1)(B) representative during the strike, the very time when such loyalty may be most essential.

CONCLUSION

There is good reason to believe that the Court will continue to limit the *Allis-Chalmers* holding or to overrule it completely, despite Justice Brennan’s emphasis on the contract theory of union membership. Justice Brennan’s theory is misplaced because the individual joins the union under a statute which protects his right to refrain from any or all concerted activities. The principle of *Allis-Chalmers* should not be extended to permit fines in furtherance of union goals that do not further the purposes of the Act, and do not even command the protection of the Act.

29 U.S.C. § 152(2) (1982) (emphasis added).

144. 29 U.S.C. § 114(a) (1982).

145. In this regard, Representative Meade noted:

[T]his section of the bill [114(a)] is an example of the old adage, “One cannot serve two masters.” It would be an utterly impossible position in which to place a man — he would be paid by his employer but he [would be] expected to go along with the union of which he was a member.

93 CONG. REC. 1910, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 868-69 (1948).

146. The Senate Report noted that “[i]t is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank and file.” S. REP. NO. 105, 80th Cong., 1st Sess., reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 411 (1948). See also 93 CONG. REC. 4136, reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1064 (1948) (supervisors are “not to be considered as employees having bargaining rights under the Wagner Act”) (remarks of Senator Ellender); 93 CONG. REC. 3443, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 647 (1948) (foremen “are supposed to represent management” and “to be loyal to the management’s point of view”) (remarks of Representative Gwinn).

Although a union must be allowed some power to discipline its members, there is no inconsistency in concluding that Congress intended to permit this power while restricting the union's power to fine or otherwise coerce employees. A fine is coercion in its purest form, designed not to protect the union but to control the employee. Although Justice Brennan's goal is laudable, to increase the strength and solidarity of unions, it unfortunately and unnecessarily limits the scope of the individual employees' rights guaranteed under section 7 of the Act.

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