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Pattern Makers' League of North America, AFL-CIO v. NLRB: Supreme Court Upholds Federal Limitation on Union Power to Compel Strike Activity, 19 J. Marshall L. Rev. 789 (1986)

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*PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO v. NLRB:** SUPREME COURT UPHOLDS FEDERAL LIMITATION ON UNION POWER TO COMPEL STRIKE ACTIVITY

The National Labor Relations Act (the "Act"),[1] as amended,

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* 105 S. Ct. 3064 (1985).

1. 29 U.S.C. §§ 141-187 (1982). The National Labor Relations Act (or Wagner Act) of 1935 declares that the public policy of the United States is to encourage and facilitate collective bargaining through unions in which employees select representatives to further their interests. *Id.* § 151. The Act announced substantive rules of labor law and established the National Labor Relations Board with power to interpret and administer the law. *Id.* § 156. *See infra* note 18.

The Act immediately came under constitutional attack when its opponents argued that the Act, as applied to manufacturing, went beyond the Commerce Clause and violated the States' tenth amendment rights. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). This argument was rejected, however, and the constitutionality of the Act upheld in *Jones & Laughlin Steel Corp.*, where the Supreme Court held that Congress may control activities which may be intrastate in character when separately considered, if these activities have such a "close and substantial" relationship to interstate commerce that their control is essential or appropriate to protect that commerce from burdens or obstructions. *Id.* at 3.

Under the Wagner Act of 1935, unions and employers were permitted to enter into collective bargaining agreements requiring that employees become union members as a condition precedent to employment. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-166 (1982)). These "closed shop" agreements became the primary means by which unions acquired and exercised power over unwilling members. *See* Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 291-99 (1948) (closed shop may prevent employer from obtaining competent workers, since he must select employees from ranks of the union).

The Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C §§ 141-187 (1982)) reenacted and amended the Act of 1935 to prohibit the closed shop, but permitted agreements under which employees were required to become and remain members of the union within 30 days after employment (the "union shop"). 29 U.S.C. § 158(a)(3) (1982). Such an agreement, however, required membership only to the extent of paying dues and initiation fees. *See* NLRB v. General Motors Corp., 373 U.S. 734, 743 (1963) (involuntary membership is restricted to the "financial core" of the payment of fees and dues). *See also* United Stanford Employees, 232 N.L.R.B. 326 (1977) (union must notify new employees that they are not required to become full members or will be committing an unfair labor practice). In 1959, the Act was amended further with the passage of the Labor-Management Reporting and Disclosure Act of 1959 (also known as the Landrum-Griffin Act). Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 153, 158-160, 401-531 (1982)). This amendment to the Act was intended to regulate unions' internal affairs and recognized a union's right to discipline by fining, suspension, expulsion, "or otherwise," but restricts such discipline to union members. 29 U.S.C. § 411(a)(5). In addition, the Landrum-Griffin Act recognized the right of unions to prescribe reasonable rules which would require disciplinary action if violated, but expressly restricted such rules to those relating to the

prohibits a union from restraining or coercing[2] employees in the exercise of their rights to engage in or refrain from concerted activities.[3] In *Pattern Makers' League of North America, AFL-CIO v. NLRB*,[4] the United States Supreme Court addressed the issue of whether a union rule[5] that restricts members from resigning from the union during a strike[6] or at a time when a strike appears imminent, violates the statutory rights of employees to refrain from engaging in union activities, in violation of section 8(b)(1)(A) of the Act.[7] The Court resolved this issue in favor of the employee, justifia-

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responsibility of union members. *Id.* § 411(a)(2).

2. 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 Act; *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. . . .

29 U.S.C § 158(b)(1)(A) (1982).

3. 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 for 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 Act.

29 U.S.C. § 157 (1982).

4. 105 S. Ct. 3064 (1985).

5. The rule at issue in *Pattern Makers'* was League Law 13, which provided that "[n]o 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." *Id.* at 3066. 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." Brief for Petitioners at 3, Pattern Makers' League of North America, AFL-CIO v. NLRB, 105 S. Ct. 3064 (1985).

The union contended that the proviso to § 8(b)(1)(A), which provides for the right of a union to prescribe its own rules with respect to the "acquisition or retention of membership," encompasses League Law 13 and gave them an absolute right to restrict resignations during the strike. *Pattern Makers'*, 105 S. Ct. at 3071-72. 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 who exceeded specified ceilings under a piecework production system); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) (unions could assess and collect fines against members who crossed picket lines and worked during a strike called by the union).

6. The Supreme Court has never determined whether there is an absolute constitutional right to strike. Dorchy v. Kansas, 272 U.S. 306 (1926) (strike in question did not involve a controversy over "wages, hours or conditions of labor, discipline or discharge of an employee, or the employment of non-union labor" and was, therefore, not afforded protection under the common law or any rights under the fourteenth amendment).

Federal regulation of strikes is based principally upon the Act, as amended. 29 U.S.C. §§ 151-169 (1982). Section 7 grants employees the right to "engage in concerted activity," and this language is read to guarantee the right to strike and picket. 29 U.S.C. § 157 (1982).

7. For the full text of § 8(b)(1)(A), see *supra* note 2.

bly holding that such a union rule impermissibly abridges the statutory right of employees to refrain from engaging in union activities.[8] In so holding, the Court resolved the inherent conflict between an employee's section 7 right to refrain from collective activity and a union's authority to regulate its internal affairs.[9]

On May 5, 1977, forty-three members of the Rockford, Illinois, and Beloit, Wisconsin, locals of the Pattern Makers' Union went on strike against several manufacturing companies.[10] During the next seven months of the strike,[11] eleven union members submitted resignations to the union and returned to work, thereby violating the union's League Law 13[12] which prohibited strike-time resignations.[13] Thereafter, the union levied fines[14] against ten[15] of the strikebreakers and informed them that their resignations could not be accepted because they had violated League Law 13.[16]

The Rockford-Beloit Pattern Jobbers' Association[17] filed charges with the National Labor Relations Board (NLRB)[18] against

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8. *Pattern Makers'*, 105 S. Ct. at 3064.

9. *Id.* at 3076 (White, J., concurring) ("The Board has adopted a sensible construction of the imprecise language of §§ 7 and 8 that is not negated by the legislative history of the Act"). For the text of § 7, see *supra* note 3. For the text of § 8(b)(1)(A), see *supra* note 2.

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

11. The strike began on May 5, 1977, and ended on December 19, 1977, after the membership accepted the employers' contract offer and the parties signed a new collective bargaining agreement. *Id.*

12. For the complete text of League Law 13, see *supra* note 5.

13. *Pattern Makers'*, 105 S. Ct. at 3066. It is well established that a union may not impose a fine upon an employee who is not a member of the organization, including an employee who has resigned from the union to escape disciplinary action for violating an internal union rule. *See, e.g.*, Booster Lodge No. 405, IAM v. NLRB, 412 U.S. 84, 88 (1973) (the Court recognized the § 7 right to resign from union membership and avoid union fines, but left open the question of the extent to which contractual restrictions on a member's right to resign may be limited by the Act); NLRB v. Granite State Joint Board, Textile Workers Local 1029, 409 U.S. 213, 217 (1972) (same).

14. Each member was fined the equivalent of his earnings during the strike. *Pattern Makers'*, 105 S. Ct. at 3066. The monetary fine is but one of many penalties that a union may impose on its members as a disciplinary measure. Other measures of union discipline include suspension, expulsion, reprimands, and removal from office. Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1032 (1976).

15. One employee who returned back to work during the strike was denied readmission to the union because he refused to pay $4,200 in "damages" for abandoning the strike and returning to work. *Pattern Makers'*, 105 S. Ct. at 3066 n.2.

16. *See supra* note 5.

17. This Association had represented the employers throughout the collective bargaining process. *Pattern Makers'*, 105 S. Ct. at 3066.

18. The National Labor Relations Board (NLRB) was created to administer the law created by the National Labor Relations Act. 29 U.S.C. § 156 (1982). 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 primary functions of the Board are to determine 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.

the union and its two locals, alleging that the union had committed an unfair labor practice[19] when it levied fines against those employees who had returned to work.[20] An Administrative Law Judge ruled that the union had violated section 8(b)(1)(A) of the Act[21] when it fined the employees for returning to work after they had tendered their resignations.[22] The NLRB agreed with this ruling, relying on its earlier decision in *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO v. NLRB*[23] which held that fining employees for returning to work after they had resigned from the union violated section 8(b)(1)(A) of the Act.[24] The United States Court of Appeals for the Seventh Circuit enforced the NLRB's order,[25] holding that League Law 13[26] was invalid because it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities.[27]

The United States Supreme Court granted certiorari in order to review the decision of the Seventh Circuit.[28] The Court wanted to resolve the conflict between the circuit courts[29] over the validity of restrictions on union members' right to resign.[30] The Court addressed the issue of whether a union is precluded from fining employees who have attempted to resign[31] when a union's constitution prohibits resignation during a strike or at a time when a strike appears imminent.[32] The Court construed section 8(b)(1)(A) of the Act[33] as prohibiting the fining of such employees under these circumstances.[34] Accordingly, the Court deferred to the NLRB's interpretation of the Act[35] and affirmed the judgment of the Seventh Cir-

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19. *See supra* note 2 (text of § 8(b)(1)(A) of the Act).

20. Pattern Makers' League of North America, AFL-CIO, 265 N.L.R.B. 1332 (1982), *enforced*, 724 F.2d 57 (7th Cir. 1983), *aff'd*, 105 S. Ct. 3064 (1985).

21. *See supra* note 2.

22. *Pattern Makers'*, 265 N.L.R.B. at 1331.

23. 263 N.L.R.B. 984 (1982), *enf. denied*, 725 F.2d 1212 (9th Cir. 1984), *vacated and remanded*, 105 S. Ct. 3517 (1985).

24. *See supra* note 2 (text of § 8(b)(1)(A) of the Act).

25. *Pattern Makers'*, 724 F.2d at 57.

26. *See supra* note 5.

27. *Pattern Makers'*, 724 F.2d at 60.

28. *Pattern Makers'*, 105 S. Ct. at 3064.

29. Unlike the Seventh Circuit's decision in *Pattern Makers'*, the Ninth Circuit endorsed a union's contractual restraint on strike-time resignations. *Machinists Local 1327*, 725 F.2d 1212 (9th Cir. 1984), *vacated and remanded*, 105 S. Ct. 3517 (1985).

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

31. The union had notified 10 of the 11 employees who had returned to work that their resignations had been rejected under League Law 13. *Id.*

32. *See supra* note 5.

33. *See supra* note 2.

34. *Pattern Makers'*, 105 S. Ct. at 3064.

35. Congress has given the NLRB broad power to devise remedies to implement the policies of the Act. 29 U.S.C. § 160(c) (1982). The NLRB is authorized to require the perpetrator of an unfair labor practice "to take such affirmative action . . . as will effectuate the policies of th[e] Act . . . . " *Id.*

cuit enforcing the NLRB's order.[36]

The Court began its analysis citing *NLRB v. Allis-Chalmers Manufacturing Co.*,[37] in which it held that the language of section 8(b)(1)(A) of the Act[38] may be construed to allow union imposition of disciplinary fines upon members who crossed picket lines to return to work during a strike.[39] In *Allis-Chalmers*,[40] the Court substantially relied on the legislative history of section 8(b)(1)(A) of the Act[41] when it ruled that the imposition of fines on union members does not "restrain or coerce" them in the exercise of their rights guaranteed under section 7 to engage in or refrain from engaging in concerted activity.[42] The Court in *Allis-Chalmers*[43] differentiated between the internal affairs of a union,[44] through which it might discipline its members with fines and expulsion, and external activities,[45] through which the union urges the employer to take action in an effort to discipline its member.[46] In following this precedent,[47]

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36. *Pattern Makers'*, 105 S. Ct. at 3076.

37. 388 U.S. 175 (1967).

38. *See supra* note 2 (text of § 8(b)(1)(A) of the Act).

39. *Pattern Makers'*, 105 S. Ct. at 3068 (citing NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967)). In *Allis-Chalmers*, 175 members of a 7,400-member bargaining unit returned to work during a strike when the union's constitution prohibited strikebreaking. *Allis-Chalmers*, 388 U.S. at 176. A number of these strikebreakers were fined, and the union argued that these 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.* at 179.

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

41. *See supra* note 2.

42. *Allis-Chalmers*, the Court quoted extensively from legislative materials addressing § 8(b)(1)(A). *Allis-Chalmers*, 388 U.S. at 185-92. The Court stressed that § 8(b)(1)(A) was enacted to prohibit restraint and coercion by unions in organizational campaigns and observed in this regard that:

> [T]he 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 making threats or false promises or false statements, the unions also shall be guilty of unfair labor practices.

Id. at 186 (quoting 93 CONG. REC. 4271 (1947)).

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

44. Internal affairs of the union include disciplinary measures which do not jeopardize a member's employment status and are, therefore, permissible under § 8(b)(1)(A). *See* Wellington, *supra* note 14, at 1022.

45. External activities affect a union member's job status and contravene § 8(b)(1)(A). *See Scofield*, 394 U.S. at 428; *Allis-Chalmers*, 388 U.S. at 195.

The internal-external dichotomy originated in Minneapolis Star & Tribune Co., 109 N.L.R.B. 727 (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.*

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

47. *Id.*

however, the *Pattern Makers'* Court[48] emphasized that while a union may have the power to control its own "internal affairs,"[49] it does not have the same power to place restrictions on a union member's right to resign from the union.[50]

The Court made two findings in order to support its conclusion that a limit must be placed on a union's ability to prohibit strike-time resignations.[51] It found that both prior case law[52] and legislative history[53] supported the NLRB's interpretation[54] of section 8(b)(1)(A) of the Act,[55] and that this construction was reasonable.[56] Specifically, the Court relied on its decision in *Scofield v. NLRB*,[57] where it had further delineated the extent to which a union may control its members within the constraints of section 8(b)(1)(A).[58] The *Pattern Makers'* Court, citing *Scofield*, adopted the proposition that a labor organization may impose disciplinary fines against one of its members only if the members are free to leave the union and escape the union rules.[59]

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48. Justices Burger, Rehnquist, and O'Connor joined in the plurality opinion, with Justice White concurring. Justice Blackmun filed a dissenting opinion in which Justices Brennan and Marshall joined. *Pattern Makers'*, 105 S. Ct. at 3064.

49. *Id.* at 3069. *See also supra* note 44 for discussion of "internal" union affairs.

50. *Pattern Makers'*, 105 S. Ct. at 3069. The Court cited several cases to demonstrate how case law has supported the willingness of the courts to allow a union member to resign without being penalized. *Id. See, e.g.*, Bayer v. Brotherhood of Painters, Decorators and Paperhangers of America, Local 301, 308 N.J. Eq. 257, 262, 154 A. 759, 761 (1931) ("association is a voluntary one, and the workmen may decline to become members or withdraw from membership, if dissatisfied with the conduct of its affairs"); Longshore Printing Co. v. Howell, 26 Ore. 527, 540, 38 P. 547, 551 (1894) ("No resort can be had to compulsory methods of any kind either to increase, keep up, or retain such membership").

51. *Pattern Makers'*, 105 S. Ct. at 3069.

52. *See Granite State*, 409 U.S. 213; *Scofield*, 394 U.S. 423.

53. *See infra* notes 96-99 and accompanying text.

54. The Board ruled that a union may not restrict a member's right to resign and may not extend its disciplinary authority under the proviso to § 8(b)(1)(A) to fine an employee who is no longer a union member. *Pattern Makers'*, 265 N.L.R.B. at 1336.

55. *See supra* note 2.

56. *Pattern Makers'*, 105 S. Ct. at 3076.

57. 394 U.S. 423 (1969).

58. *Id.* at 428. *See also supra* note 2 (text of § 8(b)(1)(A)).

59. *Pattern Makers'*, 105 S. Ct. at 3067 (citing *Scofield*, 394 U.S. at 430). In *Scofield*, the Supreme Court reiterated the internal-external dichotomy (for a discussion of this dichotomy, *see supra* notes 44 and 45 and accompanying text) and upheld fines imposed upon union members who had violated a union rule regarding production ceilings. *Scofield*, 394 U.S. at 423. In doing so, the *Scofield* Court rejected the employee's argument that union enforcement of the rule through court collection of fines was an unfair labor practice under section 8(b)(1)(A). The Court in *Scofield* thus adopted a three part test to be used in considering those situations which involve conflicts between section 8(b)(1)(A) and section 7 of the Act. *Scofield*, 394 U.S. at 430. Under this approach, a union may enforce its own rules with respect to union membership if: the rules are properly adopted; if they 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

In addition to citing precedent[60] in order to stress the importance of a union member's freedom to exercise his section 7 rights,[61] the *Pattern Makers'* Court acknowledged that prior NLRB decisions[62] had found union resignation restrictions inconsistent with the policy of voluntary unionism implicit in section 8(a)(3) of the Act.[63] The Court emphasized that pursuant to the Taft-Hartley Act's prohibition against compulsory union membership,[64] "full" union membership can no longer be a condition precedent to obtaining employment.[65] The Court concluded that the union's League Law 13[66] frustrated an employee's freedom to resign from full union membership.[67] In making this conclusion, the Court rejected the

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the union in order to escape the rule. *Id.*

The *Scofield* Court did admit that the union's rule had and intended to have an impact beyond the internal affairs of the union organization but concluded that the rule did not necessarily violate § 8(b)(1)(A), "unless . . . impairment of a statutory labor policy [is] shown." *Id.* at 432. For a more detailed analysis of the Court's decisions in both *Allis-Chalmers* and *Scofield*, see Coleman, *Union Discipline Under 8(b)(1)(A) of the National Labor Relations Act: The Emergence of a New Trilogy*, 45 ST. JOHN'S L. REV. 219 (1970); Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067.

60. The test set forth in *Scofield* was applied by the Court in *Granite State*, where the Court employed a contract analysis to justify its "free to leave the union" mandate of *Scofield*. *Granite State*, 409 U.S. at 217. The Court held that absent a contractual provision in the union's constitution or bylaws restricting a member's right to resign, the union fines violated § 8(b)(1)(A) of the Act. *Id.* at 215.

61. *See supra* note 3.

62. The NLRB has consistently adopted the position that the Act permits no restriction on the right of union members to resign. *See* International Association of Machinists, Local Lodge 1414, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) 1257, 1260 (June 22, 1984); Engineers Union Local 444, 235 N.L.R.B. 98 (1978); Sheet Metal Workers' International Association, Local Union No. 170, 225 N.L.R.B 1178 (1976).

63. 29 U.S.C. § 158(a)(3) (1982). This section provides:

> [N]o employer shall justify any discrimination against an employee for nonmembership 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.

Id.

64. 29 U.S.C. §§ 141-187 (1982). The closed shop was a major target of the Taft-Hartley Act. *See supra* note 1. The Senate Committee on Labor and Public Welfare opposed compulsory union membership, stating:

> It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. . . . Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons.

SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, LABOR-MANAGEMENT RELATIONS ACT OF 1947, S. REP. No. 105, 80th Cong., 1st Sess., *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 412 (1948).

65. *Pattern Makers'*, 105 S. Ct. at 3071.

66. *See supra* note 5.

67. *Pattern Makers'*, 105 S. Ct. at 3071.

union's argument that League Law 13[68] does not interfere with an employee's section 7 rights.[69]

In concluding that League Law 13[70] unlawfully restrains union members in the exercise of their right to refrain from participating in concerted activity,[71] the Court examined the legislative history of the Act, and rejected the union's three arguments.[72] The union first argued that the proviso to section 8(b)(1)(A) of the Act[73] validates a union rule restricting the right to resign.[74] The Court, however, stated that neither it nor the NLRB had ever interpreted this proviso as allowing unions to restrict resignation through its rules.[75] Instead, the Court concluded that rules pertaining to the retention of membership are those that provide for the expulsion of union members, not the indefinite retention of members who no longer want to remain union members.[76] The Court found that the legislative history of both the Taft-Hartley and Landrum-Griffin Acts supported this conclusion.[77]

The Court also rejected the union's second contention that the legislative history of the Taft-Hartley Act[78] indicates that Congress did not intend to protect a union member's right to resign.[79] The union argued that Congress' failure to adopt congressional legislation[80] protecting a union member's right to resign, demonstrated

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68. *See supra* note 5.

69. *Pattern Makers'*, 105 S. Ct. at 3071. *See also supra* note 3 (text of § 7 of the Act).

70. *See supra* note 5.

71. *See supra* note 3 (text of federal statutory right to refrain from engaging in concerted activity).

72. *Pattern Makers'*, 105 S. Ct. at 3071-75.

73. *See infra* note 125.

74. *Pattern Makers'*, 105 S. Ct. at 3072. The League had contended that a rule providing that a union member is required to continue membership during a strike is a rule "with respect to the retention of membership" and is, therefore, within the protection of § 8(b)(1)(A) and its proviso. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* The Court suggested that the legislative history of the Act confirms the conclusion that the proviso to § 8(b)(1)(A) allows unions to enforce only internal rules that establish who may and may not become a union member and what conduct will result in expulsion from the union. *Id.* The Court noted that the proviso's sponsor, Senator Holland, specifically stated that § 8(b)(1)(A) should not prohibit union rules "which [have] to do with the admission or the expulsion of members." *Id.* (quoting 93 CONG. REC. 4271 (1947)).

78. *See supra* note 1 (Taft-Hartley Act amendments to the National Labor Relations Act).

79. *Pattern Makers'*, 105 S. Ct. at 3073.

80. H.R. 3020, 80th Cong., 1st Sess. § 8(c)(4) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 180 (1948). Section 8(c) of the House bill created ten unfair labor practices regulating the relationship between unions and their members. *Id.* § 8(c). Section 8(c)(4) made it a union unfair labor practice to deny any member the right to resign. *Id.* § 8(c)(4). Unlike the House bill, the Senate bill was passed, but did not include specific employee rights to resign.

that Congress did not intend to protect this right.[81] The Court, however, stated that the legislative history of the Taft-Hartley Act does not support this contention.[82] The Court reasoned that the language regarding the "right to resign" was only included in the original House bill[83] to protect workers who had been victimized by the closed shop provision[84] and were unable to resign without losing their jobs.[85] The Court concluded that the passage of the Taft-Hartley amendments to the Act, which prohibit the closed shop,[86] revealed Congress' belief that it was unnecessary to explicitly preserve the right to resign.[87]

Finally, the union argued that because the common law does not prohibit restrictions such as those contained in League Law 13,[88] this provision does not violate section 8(b)(1)(A) of the Act.[89] The Court found that this argument was without merit. To support this conclusion, the Court cited *NLRB v. Marine & Shipbuilding Workers*,[90] which held that although a union rule may be valid under the common law of associations,[91] it may still conflict with and therefore violate section 8(b)(1)(A) of the Act[92] as an unfair labor practice.[93]

The Court in *Pattern Makers'* justifiably concluded that League Law 13 impermissibly abridged the section 7 right of employees to refrain from engaging in union activities. This decision was correct for three reasons. First, federal labor policy and the legislative history of the Act establish that Congress intended to protect the freedom of employees to resign from a union and escape union disci-

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See supra note 2 (text of § 8(b)(1)(A) of the Act).

81. *Pattern Makers'*, 105 S. Ct. at 3073.

82. *Id.* at 3073-74.

83. *See supra* note 80.

84. *See supra* note 1 (Taft-Hartley amendments banned closed shop).

85. *Pattern Makers'*, 105 S. Ct. at 3073.

86. *See supra* note 1.

87. *Pattern Makers'*, 105 S. Ct. at 3073.

88. *See supra* note 5.

89. *Pattern Makers'*, 105 S. Ct. at 3074. The union had argued that it had a common law right to adopt and enforce League Law 13 under the common law of associations. Brief for Petitioner at 36-38, Pattern Makers' League of North America, AFL-CIO v. NLRB, 105 S. Ct. 3064 (1985).

90. 391 U.S. 418 (1968) (held that a union rule requiring members to exhaust union remedies before filing an unfair labor practice charge with the Board was unenforceable because the rule was contrary to the policy of the Act in favor of unfettered access to the NLRB).

91. "Association" has been defined as "[t]he act of a number of persons in uniting together for some special purpose of business." BLACK'S LAW DICTIONARY 111 (5th ed. 1979). Under the common law of associations, an association may place restrictions on its member's right to resign where such restrictions are designed to further a basic purpose for which the association was formed. 7 C.J.S. *Associations* §§ 6, 19, 22 (1980).

92. *See supra* note 2.

93. *Pattern Makers'*, 105 S. Ct. at 3074-75 (*citing* NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 424 (1968)).

pline as a fundamental policy of the Act. Second, a union's prohibition against member resignation should be unenforceable because union membership under the Act is not wholly voluntary. Finally, League Law 13 is invalid under the *Scofield* test.

First, the Supreme Court's approach to the conflict between section 7 and section 8(b)(1)(A) of the Act[94] is based on the impact of federal labor policy and the legislative history of the Act.[95] The entire range and tone of the legislative history confirms the intent of Congress to eliminate repressive union tactics against employees exercising their section 7 right[96] to refrain from concerted activities.[97] An analysis of the Act and the Taft-Hartley amendments of the Act[98] reveals Congress' intent to balance the national labor policy by

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94. *See supra* notes 2 (text of § 8(b)(1)(A) of the Act) and 3 (text of § 7 of the Act).

95. *See supra* note 77 and accompanying text.

96. For the complete text of § 7, see *supra* note 3. The protected right of an employee to cross a picket line during a strike without union threat or coercion is firmly imbedded in the Act. 29 U.S.C. §§ 141-187 (1982). As Senator Taft, a leading sponsor of the legislation, observed in his analysis of the conference agreement on the Act: "[T]he House conferees insisted that there be express language in section 7 which would make the prohibition contained in section 8(b)(1)(A) 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.*" 93 CONG. REC. 7000-01, *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1622-23 (1948) (emphasis added).

The protection of the right to refrain from engaging in a strike, however, does not in any way interfere with the right to strike which is guaranteed by the Act. Senator Taft expressly covered this point during the debates on § 8(b)(1)(A) of the Act. In response to the charge that § 8(b)(1)(A) would prevent unions from engaging in strike activity, Senator Taft stated:

> It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. 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.*

93 CONG. REC. 4436, *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1207 (1948) (emphasis added).

97. Section 7 of the Act grants employees the right to engage in or refrain from engaging in "concerted activities for the purpose of collective bargaining and for other mutual aid or protection." 29 U.S.C. § 157 (1982). For the full text of § 7, see *supra* note 3. For a particular activity to be protected under § 7, there must be some element of "concert" pertaining to more than one employee. *See, e.g.*, NLRB v. Office Towel Supply Co., 201 F.2d 838 (2d Cir. 1953) (individual complaints regarding working conditions are not protected as "concerted activity" under § 7 of the Act). *Cf.* NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971) (activity by an individual employee will be protected if it is "looking toward group action").

As the language of § 7 makes clear, it is not necessary to have a union sponsored concerted activity in order that the activity be protected as "concerted" for "mutual aid or protection." 29 U.S.C. § 157 (1982). *See* NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (Court held that non-union employees who had staged a walkout because they believed it was too cold to continue work had engaged in protected concerted activity).

98. 29 U.S.C. §§ 141-187 (1982). *See supra* note 1 (Taft-Hartley amendments outlawed the closed shop which made union membership a condition precedent to obtaining employment, while allowing the union shop which makes union member-

placing a limitation on coercive union compacts.[99]

Moreover, the enactment of sections 8(b)(1)(A),[100] 8(a)(3),[101] and 8(b)(2)[102] of the Act demonstrates that Congress intended to protect employees in the exercise of their section 7 rights[103] without coercive union interference. When Congress debated the advisability of the Taft-Hartley amendments,[104] Congress indicated that its policy was "to insulate employee's jobs from their organizational rights."[105] Although Congress has never specifically addressed the problem of a union fining members who resign and refuse to strike, section 7 of the Act[106] provides that employees have a "right to refrain" from concerted activity.[107] Congress, therefore, insured that all employees are protected against a union's attempt to restrain or coerce them in making a decision to refrain from engaging in any concerted activity, even a strike.

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ship a condition subsequent to employment).

99. Senator Taft's discussion regarding the purpose of enacting § 8(b)(1)(A) of the Act included references to an employee's right to be free of coercion from a union which may force the employee to engage in undesired union activities. Senator Taft stated:

> If there is anything clear in the development of labor union history in the past ten 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 of protest against arbitrary powers which have been exercised by some of the labor union leaders.

93 CONG. REC. 4023, *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1028 (1948).

100. For the full text of § 8(b)(1)(A) of the Act, see *supra* note 2.

101. For the full text of § 8(a)(3) of the Act, see *supra* note 67.

102. Section 8(b)(2) of the Act provides:

> It shall be an unfair labor practice for a labor organization or its agents — (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground *other than his failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.*

29 U.S.C. § 158(b)(2) (1982) (emphasis added).

In light of § 8(b)(2) and its prohibition on causing employer discrimination based on union membership, it is interesting to note that the union in *Pattern Makers'* had requested that the employer discharge one of the employees who had returned to work because he was no longer a member of the union as required by the union security provision in the collective bargaining agreement. Brief for Respondents, at 4, Pattern Makers' League of North America, AFL-CIO v. NLRB, 105 S. Ct. 3064 (1985). The union had refused to allow the employee to reacquire his membership until he paid $4,200 in fines, $211 in back dues, and a $500 fee in order to be readmitted to the union. *Id.*

103. *See supra* note 3.

104. *See supra* note 1.

105. Radio Officers' Union of the Commercial Tel. Union v. NLRB, 347 U.S. 17, 40 (1954) (Court held that sections 8(a)(3) and 8(b)(2) of the Act were designed to allow employees to freely exercise their right to either join or abstain from joining a union).

106. For the full text of § 7 of the Act, see *supra* note 3.

107. *See supra* note 97 (protected concerted activity).

This legislative history demonstrates that unless a union member is free to resign from his union in order to avoid a union rule prohibiting him from returning to work, the section 7 right to refrain from engaging in concerted activities is rendered null and void. This interpretation of the legislative history finds support in Supreme Court decisions acknowledging that Congress intended to balance the national labor policy in favor of the employee's right to refrain from engaging in concerted activities.[108] Moreover, the thrust of the decision in *Pattern Makers* and its resultant effect on *Machinists Local 1327 v. NLRB*[109] affirms that this is the correct inter-

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108. In both *Granite State*, 409 U.S. 213, and *Booster Lodge*, 412 U.S. 84, the Supreme Court held that a union violates § 8(b)(1)(A) of the Act when it fines employees who resign from the union and return to work during a strike.

In *Granite State*, 409 U.S. 213, the union membership voted to strike if a new collective bargaining agreement was not reached before expiration of the previous one. *Id.* at 214. After the strike began, the union members agreed that any strike breaker would be subject to a $2,000 fine. *Id.* Subsequently, several employees resigned from the union, returned to work, and were fined the equivalent of a day's wages for each day worked during the strike. *Id.* In refusing to enforce the fines that the union imposed on the employees, the Court distinguished the situation in *Granite State* from that in *Allis-Chalmers*. *Id.* at 215. In *Allis-Chalmers*, the union had imposed fines on full union members, whereas in *Granite State*, the union had attempted to fine employees who were no longer members of the union. *Id.*

Similarly, in *Booster Lodge*, 412 U.S. 84, a group of employees who had crossed picket lines during a strike were fined by the union under a constitutional provision that prohibited "members" from strikebreaking. *Id.* at 86. Those employees who returned to work sent letters of resignation to the union either before returning to work or shortly after doing so. *Id.* at 85. The Court held that fining employees for their post-resignation activities constituted an unfair labor practice. *Id.* at 88. The Court rejected the union's argument that the fines could be imposed against a former member under a breach of contract theory, stating:

> [I]n order to sustain the Union's position, we would first have to find . . . that the Union constitution by implication extended its sanctions to nonmembers, and then further conclude that such sanctions were consistent with the Act. But we are no more disposed to find an implied post-resignation commitment from the strikebreaking proscription in the Union's constitution here than we were to find it from the employee's participation in the strike vote and ratification of penalties in *Textile Workers* [NLRB v. Granite State Joint Board, Textile Workers Union, Local 1029, 409 U.S. 213 (1972)].

Id. at 89-90.

More importantly, the Court has recently reiterated its policy to prohibit union coercion and restraint on strike-time resignations in *Machinists Local 1327, International Association of Machinists and Aerospace Workers v. NLRB*, 725 F.2d 1212 (9th Cir. 1984), *vacated and remanded*, 105 S. Ct. 3517 (1985). *See infra* note 109.

109. 105 S. Ct. 3517 (1985), *vacating and remanding*, 725 F.2d 1212 (9th Cir. 1984). In *Machinists Local 1327*, the NLRB invalidated fines imposed upon former union members pursuant to a similar constitutional provision as that found in *Pattern Makers'*. *Machinists Local 1327*, 263 N.L.R.B. 984 (1982), *enf. denied*, 725 F.2d 1212 (9th Cir. 1984), *vacated and remanded*, 105 S. Ct. 3517 (1985). The NLRB held that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign." *Machinists Local 1327*, 163 N.L.R.B. at 986. The Ninth Circuit refused to enforce the NLRB's order, maintaining that, under the proviso to § 8(b)(1)(A), the member's obligation was no less than the obligation the union constitution and bylaws establish:

> [T]he terms of the contract before us condition the member's right to resign on

pretation of the legislative history.[110]

The second reason why the decision in *Pattern Makers'* is justified follows from the fact that the Act[111] permits a form of compulsory union membership under the union shop provision.[112] Thus employees may not always join unions freely and voluntarily. Unlike Illinois and Wisconsin,[113] several states have enacted "right-to-work" laws,[114] which forbid union shop provisions in collective bargaining agreements.[115] The purpose of these laws is to protect employees from compulsory union membership under the union shop provision.[116] In light of the fact that the union shop provision re-

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his promise not to break the strike. If the member can escape his obligations by pleading, when the union attempts to collect the fine, that he is no longer part of the union, then the terms of his contract mean little.

Machinists Local 1327, 725 F.2d at 1218.

The Supreme Court, in light of *Pattern Makers'*, vacated the judgment of the Ninth Circuit and has remanded the case to comply with its decision in *Pattern Makers'*. *Machinists Local 1327*, 105 S. Ct. at 3517. Thus, the Court has further established a statutory "right to resign" grounded in § 7 of the Act.

110. *See supra* notes 74 and 77 and accompanying text (*Pattern Makers'* Court interpretation of applicable legislative history).

111. 29 U.S.C. §§ 141-87 (1982).

112. *See supra* note 63 (text of § 8(a)(3) which permits union shop). A collective bargaining agreement that contains a union shop provision 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." Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1055 (1951). *See also* Keesler, *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").

In this regard, it is significant to note that the dissent in *Pattern Makers'* relied heavily on a contract theory to justify the imposition of fines pursuant to League Law 13. *Pattern Makers'*, 105 S. Ct. at 3077-85 (Blackmun, J., dissenting). 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). 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).

113. These are the states in which the two local unions were located in *Pattern Makers'*. *Pattern Makers'*, 105 S. Ct. at 3066.

114. The states that have enacted right-to-work statutes are Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Toner, *Right-to-Work Laws and Union Security Contracts*, 28 LAB. L.J. 240, 240-43 (1977).

115. Section 14(b) of the Act, added by the Taft-Hartley amendments in 1947, authorizes states to enact right-to-work laws that prohibit collective bargaining agreements from "requiring membership in a labor organization as a condition of employment in any state." 29 U.S.C. § 164(b) (1982). *See also* Grodin & Beeson, *State Right-to-Work Laws and Federal Labor Policy*, 52 CALIF. L. REV. 95 (1964) (discussion on states that have adopted right-to-work laws); Henderson, *The Confrontation of Federal Preemption and State Right to Work Laws*, 1967 DUKE L.J. 1079 (1967) (federal courts' attitude toward right-to-work laws).

116. *See* Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963) (upheld

quires compulsory membership, at least to the extent of paying dues and initiation fees,[117] it is not appropriate to consider membership in any union as completely voluntary.

In *Pattern Makers'*, the union contended that the employees who had returned to work had violated League Law 13[118] and were subject to the union's discipline rules.[119] This contention was premised on the fiction that the members had "voluntarily" joined the union, therefore binding themselves to its rules.[120] The practical effect of League Law 13[121] was to prevent any opportunity for an employee to leave the union. If Congress intended to give a union the authority to require its members to remain members indefinitely, section 7 of the Act does not reflect this intention.[122] Further, no fair reading of the legislative history of both section 7[123] and section 8(b)(1)(A)[124] supports the contention that the proviso to section 8(b)(1)(A) of the Act[125] authorizes a union to establish a rule that forces a member to remain so indefinitely.[126]

Another argument that the union advanced in *Pattern Mak-*

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state court's interpretation that its right-to-work law outlawed not only the union shop but also the agency shop, which required employees to give the union financial support).

According to a survey conducted by the Bureau of National Affairs, 73 percent of the existing collective bargaining agreements in the United States contain union shop provisions which require employees to become and remain members of a union as a condition of employment. *Collective Bargaining Negotiations and Contracts* (BNA) No. 2, at 87:1-87:4 (1983). Such "membership," however, is limited to the payment of dues and initiation fees. NLRB v. General Motors Corp, 373 U.S. 734 (1963). In *General Motors*, the Supreme Court enunciated the "financial membership" test, stating: "It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights may in turn be conditioned only upon payment of fees and dues." *Id.*

117. *See Allis-Chalmers*, 388 U.S. at 196. *See also* 29 U.S.C. § 158(a)(3) (1982).

118. *See supra* note 5.

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

120. *Id.*

121. For the full text of League Law 13, see *supra* note 5.

122. For the full text of § 7 of the Act, see *supra* note 3.

123. *Id.*

124. *See supra* note 2.

125. The proviso to § 8(b)(1)(A) states: "*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 . . . . " 29 U.S.C. § 158(b)(1)(A) (1982).

126. The proviso by its terms relates only to "acquisition or retention of membership." *Id.* From the language of this section, it is fair to conclude that had Congress intended to allow unions to impose discipline to former members, that desire would have surfaced at some point during the congressional debates. The discipline to which the debates referred was limited exclusively to expulsion from membership. In addressing arguments that § 8(b)(1)(A) would interfere with a union's internal affairs, Senator Taft explained: "They still will be able to *fire* any *members* they wish to *fire*, and they still will be able to try any of their *members*." 93 CONG. REC. 4193, *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1097 (1948) (emphasis added).

ers'[127] with regard to voluntary membership was that under the common law of associations,[128] a union member may be restricted from resigning during a strike.[129] This argument is flawed for two reasons. First, as the *Pattern Makers'* court noted, where the common law conflicts with statutory labor policy, the latter will prevail.[130] Thus, even if we assume, *arguendo*, that the common law of associations allows a union to restrict member resignation during a strike, such a restriction is still invalid. This is because the Act[131] prohibits such restrictions,[132] and therefore supersedes the common law upon which the union bases its argument.

The union's argument fails for another reason. The purpose of the Act[133] and its section 7 right[134] to refrain from concerted activities, is to protect the employee's freedom of association, and not inhibit such freedom.[135] The appropriate doctrine to apply is that of voluntary association.[136] Under this doctrine, a member of an association is free to resign, even though this freedom is subject to any financial obligations owed the association.[137]

Finally, application of the Supreme Court's *Scofield*[138] test to the facts in *Pattern Markers'* also demonstrates that the Court's holding is justified.[139] To pass scrutiny under the three-part test enunciated in *Scofield*,[140] a union must first demonstrate that it has

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127. *Pattern Makers'*, 105 S. Ct. at 3074.

128. *See supra* note 91.

129. *Id.*

130. *Pattern Makers'*, 105 S. Ct. at 3075.

131. *See supra* note 1.

132. *See supra* note 2 (unions may not coerce employees in the exercise of their § 7 rights), and note 3 (employees have a "right to refrain" from engaging in concerted activities).

133. *See supra* note 1.

134. *See supra* note 3.

135. Section 1 of the Act establishes the protection of employee freedom of association as a fundamental purpose of the statute. 29 U.S.C. § 151 (1982). This section provides:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of *full freedom of association*, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id. (emphasis added).

136. 7 C.J.S. *Associations* § 24 (1980).

137. *Id.*

138. For a description of this test, see *supra* note 59 and accompanying text.

139. Although the Court in *Pattern Makers'* did not specifically apply the *Scofield* test to invalidate League Law 13, it did note that "[s]ection 8(b)(1)(A) allows unions to enforce only those rules that 'impai[r] no policy Congress has imbedded in the labor laws . . . . " *Pattern Makers'*, 105 S. Ct. at 3070 (citing *Scofield*, 394 U.S. at 430).

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

a legitimate interest in limiting its members' right to resign.[141] Although a union has a legitimate interest in maintaining group solidarity during a strike, neither the advancement nor protection of this interest requires granting to the union the right to fine ex-members for ending their participation in a strike and resigning from the union. While a member may be sympathetic to a strike when it is first called, unanticipated events may lead the member to return to work.[142] When the cost of returning to work is approximately equal to what an employee earns,[143] the interest in maintaining group solidarity does not outweigh the individual's section 7 rights.[144] The substantial disciplinary measures which a union may already possess are more than adequate to encourage solidarity and obedience to the will of the majority without infringing on the right to refrain from concerted activity.[145]

Under the second part of the *Scofield* test, a union rule must not "invade or frustrate" an overriding policy of the labor laws.[146] As the *Pattern Makers'* Court noted, restricting resignation interferes with an individual's section 7 right[147] to refrain from concerted activity.[148] To permit a union to extend to prospective ex-members the coercion of judicially enforceable fines would result in a judicial repeal of section 7 of the Act.[149] Therefore, a union rule such as League Law 13,[150] which prevents a union member from resigning

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141. *Id.* at 430. In a recent decision regarding restrictions on the right to resign, the NLRB has held that restrictions on resignations impair the policy distinction between internal and external union action. International Ass'n of Machinists, Local Lodge 1414 (Neufeld-Porsche-Audi), 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) 1257, 1260 (June 22, 1984) (a rule restricting resignations "constitutes a unilateral reordering of the basic employee-union relationship that directly and fundamentally redraws the line between internal and external actions").

142. In *Granite State*, the Court observed in this regard that:

> [e]vents occuring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. *The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.*

Granite State, 409 U.S. at 217 (emphasis added).

143. The employees who submitted resignations and returned to work in *Pattern Makers'* were fined the equivalent of their wages earned during the duration of the strike. *Pattern Makers'*, 105 S. Ct. at 3066.

144. One court has observed that to equate union fines with total wages earned by a non-striking employee is "the greatest form of economic coercion . . . calculated in design and effect to force an employee to act in concert with the union in future labor-management strife." Leeds & Northrup Co. v. NLRB, 357 F.2d 527, 536 (3d Cir. 1966). *See also* NLRB v. Boeing Co., 412 U.S. 67, 73 (1973) ("all fines are coercive to a greater or lesser degree").

145. *See* Wellington, *supra* note 14, at 1032.

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

147. *See supra* note 3.

148. *Pattern Makers'*, 105 S. Ct. at 3065.

149. For the full text of § 7 of the Act, see *supra* note 3.

150. *See supra* note 5.

during a strike, contradicts, and thus frustrates the policy of labor law, because the rule restrains an employee from exercising his rights under section 7 of the Act.[151]

The third and most critical element in the analysis of League Law 13[152] under the *Scofield* test is the concept that union members be "free to leave the union and escape the rule."[153] Under this part of the test, League Law 13[154] is prima facie invalid. A union rule that requires an employee to relinquish his section 7 right[155] to refrain from concerted activities during a strike is no more permissible than forcing an individual to surrender any other statutory right. The Court's emphasis in *Pattern Makers'*[156] on the union member's freedom to leave the union and escape its rule indicates that the employees' section 7 rights are paramount to the union's interest in maintaining solidarity.

In sum, League Law 13[157] does not pass scrutiny under any part of the *Scofield* test. It does not advance any legitimate union interest and it impairs a fundamental policy underlying the Act.[158] The rule also denies members the freedom to resign from the union to escape the union rule.[159] Given the failure of League Law 13 to pass scrutiny under the *Scofield* test, the Court correctly concluded[160] that League Law 13 impermissibly regulated external union activities[161] in violation of section 8(b)(1)(A) of the Act and was therefore invalid.

In conclusion, the Court has resolved the inherent conflict between section 7 and section 8(b)(1)(A) of the Act. This is reflected in the Court's conclusion that a union rule which prohibits the resigna-

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151. *See supra* note 3.
152. *See supra* note 5.
153. *Scofield*, 394 U.S. at 430.
154. *See supra* note 5.
155. *See supra* note 3. *See also* Local 900, International Union of Electrical Workers v. NLRB, 727 F.2d 1184, 1190 (D.C. Cir. 1984) (court rejected union contention that employees waived the protection of § 7 by ratifying a contract clause affording superseniority to certain union officers because the § 7 right is not waivable).
156. *Pattern Makers'*, 105 S. Ct. at 3070.
157. *See supra* note 5.
158. *See supra* text accompanying notes 138-51.
159. *See supra* text accompanying notes 152-56.
160. *Pattern Makers'*, 105 S. Ct. at 3075.
161. For a discussion of the internal-external dichotomy, see *supra* notes 44 and 45 and accompanying text. As the NLRB emphasized in *Neufeld-Porsche-Audi*:

> [T]he fundamental policy . . . imbedded in the very fabric of the labor laws . . . distinguishes between internal and external union actions. A consistent and enduring basis for distinguishing between internal and external actions is whether the union's action applies only to union members. By unilaterally extending an employee's membership obligation through restrictions on resignation a union artifically expands the definition of internal action and can thus continue to regulate conduct which it would otherwise have no control . . . .

Neufeld-Porsche-Audi, 270 N.L.R.B. 209 (1984).

tion of a member during a strike, or when a strike appears imminent, is invalid because it is contrary to the express language and interpretation of section 7 of the Act. With this conflict resolved, the Court has chosen not to abandon the individual and his section 7 right to refrain from engaging in concerted activities. The precedential value of this holding is evidenced in the Court's subsequent decision in *Machinists Local 1327*,[162] which expressly directed the Ninth Circuit to follow *Pattern Makers'*. Given the involuntary nature of the union shop provision, the Court has correctly balanced the employees' right to refrain from engaging in concerted activity and a union's limited power to compel strike activity.

Colette M. Foissotte

162. *Machinists Local 1327*, 105 S. Ct. 3517. For a discussion of this case, see *supra* note 109.