National Labor Relations Board Control of Union Discipline and the Myth of Nonintervention

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Roger C. Hartley*

INTRODUCTION

No brighter star shines in the firmament of national labor policy rhetoric than the promise to American workers of their right to designate union "representatives of their own choosing." The National Labor Relations Board (NLRB), recognizing this much heralded autonomy, professes a fierce commitment not to obstruct union members' right to choose their own leaders and otherwise oversee internal governance. Although the NLRB has publicly em-

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2. See General Elec. Co. v. NLRB, 412 F.2d 512 (2d Cir. 1969) (employees enjoy a fundamental right to choose their representatives for bargaining, absent a clear and present danger to the collective bargaining process); accord Kudla v. NLRB, 821 F.2d 95 (2d Cir. 1987); Louisiana Council 17, AFSCME, 250 N.L.R.B. 880, 882 n.17 (1980). See also Teamsters Local 703, 284 N.L.R.B. 1125 (1987) (union will not be decertified or ordered not to designate two persons as bargaining representatives due to their previously violent behavior). But cf. Fitzsimons Mfg. Co., 251 N.L.R.B. 375 (1980), enforced sub nom. UAW v. NLRB, 670 F.2d 663 (6th Cir. 1982) (employer not required to bargain with two union representatives who previously had acted violently at bargaining sessions).
3. Litigation under the National Labor Relations (Wagner) Act made it plain that Congress did not authorize the NLRB to regulate union enforcement of membership obligations. Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949). See infra notes 24-26 and accompanying text.

The legislative history of the Taft-Hartley amendments to the Wagner Act made it plain that Congress did not authorize the NLRB to regulate union enforcement of membership obligations. Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949). See infra notes 24-26 and accompanying text.

The United States Supreme Court repeatedly voices the proscriptions against NLRB involvement in internal union affairs. See infra notes 63-64 and accompanying text. The NLRB, from its earliest cases, readily concedes that Congress requires that it abstain from regulating union internal affairs. See Sheet Metal Workers' Local 22, 296 N.L.R.B. No. 150, 6, 132 L.R.R.M. (BNA) 1354, 1356 (Oct. 5, 1989) ("[t]he Board and [the] courts have long recognized that Congress in enacting [s]ection 8(b)(1) did not intend to regulate the internal
braced a policy of nonintervention, an examination of its activities demonstrates that it has become a major regulator of internal union government. For example, the NLRB limits the membership majority's autonomy to determine eligibility to vote in internal union elections and hold union office, it monitors the union officer election campaign, and it constricts members' ability to compel union leaders to conform to the will of their constituencies.

This article explains how the NLRB, contrary to its protestations of noninterference with internal union affairs, has perfected its grip on union self-governance through control of the union disciplinary processes. The disparity between the Board's policies and its actions discredits the Board's proclaimed abstention.

Second, this article examines whether the NLRB overreaches its regulatory authority through its intervention in the officer selection and discipline processes. NLRB regulation of union discipline rests primarily on section 8(b)(1)(A) of the Labor Management Re-


The Labor-Management Reporting and Disclosure Act of 1959 (§§ 401-531 (1988)) authorizes limited federal regulation of internal union government. The NLRB, however, has no explicit enforcement role in this scheme. But see infra notes 178-283 and accompanying text.

4. See infra notes 91-177 and accompanying text.
5. See infra notes 178-283 and accompanying text.
6. See infra notes 139-177 and accompanying text.
7. Although the NLRB involves itself in union activity in many ways, the focus of this article is NLRB intervention through its control of union discipline. The Board controls union membership resignation procedures. See, e.g., Sheet Metal Workers' Local 18, 298 N.L.R.B. No. 11, 134 L.R.R.M. (BNA) 1043 (Mar. 30, 1990). The Board determines the portion of dues a union may charge to union dues objectors and oversees procedures for providing dues objectors advanced dues reductions. See Communications Workers v. Beck, 487 U.S. 735 (1988). The Board monitors union decisions regarding merger and affiliation. See NLRB v. Financial Inst. Employees Local 1182, 475 U.S. 192 (1986); May Dept. Stores, 289 N.L.R.B. No. 88, 128 L.R.R.M. (BNA) 1299 (June 30, 1988), enforced, 133 L.R.R.M. (BNA) 2745 (Feb. 28, 1990). The Board can influence a member's willingness to serve as a union leader by permitting selective employer discipline of union officers, see, e.g., Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), and by approving or disapproving some of the perquisites of union office such as superseniornity, see, e.g., NLRB v. Local 1131, UAW, 777 F.2d 1131 (6th Cir. 1985), or negotiated leaves of absence from regular employment while holding union office, see, e.g., IBEW Local 1212, 288 N.L.R.B. No. 49, 128 L.R.R.M. (BNA) 1219 (Apr. 1, 1988). The Board even determines who may hold union office by allocating rights of supervisors to participate in the internal union political process. Compare ESI, Inc., 296 N.L.R.B. No. 148, 132 L.R.R.M. (BNA) 1323 (Oct. 16, 1989) (unlawful to appoint supervisor to the joint apprenticeship and training committee) and Hoyt, Brumm & Link, Inc., 292 N.L.R.B. No. 111, 130 L.R.R.M. (BNA) 1225 (Feb. 14, 1989) (lawful to permit general foreman to be delegate to union convention and member of union finance committee).
lations (Taft-Hartley) Act. The Board’s early decisions under this section, as well as judicial precedent, defined a narrower role for NLRB intervention than the role presently claimed by the Board. Courts increasingly are rejecting the NLRB’s assertion of broad regulatory authority. The Supreme Court’s union discipline cases, decided over a decade ago, initiated these judicial misgivings. Moreover, the Supreme Court’s more recent decisions in Pattern Makers’ League v. NLRB and Communication Workers v. Beck require a reappraisal of expansive NLRB monitoring of internal union life. Pattern Makers’ and Beck ring in a new era of voluntary unionism that demands acknowledgement.

Finally, this article addresses the various conflicting interests that underlie and oppose NLRB intervention in internal union affairs. The Board’s decisions rarely discuss their practical impact on unions or their contribution to the national policy aspirations that unions be governed democratically and independently. The desirability of Board intervention, however, should be assessed by considering all of the legitimate conflicting interests raised: the individual rights at risk, the union majority’s collective associational interests, and the wider public interest in union democratic self-government with minimal governmental interference. As recently as 1973, the Chief Justice of the United States Supreme Court stated, “It is odd, to say the least, to find a union urging on us severe limitations on NLRB authority [because the

8. Section 8(b)(1)(A), as codified, provides:
   (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .
9. See infra notes 22, 27-46, 63-75 and accompanying text.
11. Pattern Makers’ League v. NLRB, 473 U.S. 95, 105 (1985) (union prohibition on a member’s right to resign violative of section 8(b)(1)(A) and contrary to congressional “policy of voluntary unionism”).
13. See infra notes 158-177 and accompanying text.
14. See id.
NLRB lacks the requisite expertise)." However, in light of increasing NLRB control over the union disciplinary process, requests to limit NLRB authority seem less odd today. The NLRB has exceeded its authority by intervening in internal union affairs and it is time to reevaluate the appropriate limits on NLRB authority.

I. The Transformation of Section 8(b)(1)(A)

The United States has many laws regulating the selection of union officers. Title IV of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA) explicitly regulates union officer elections. In addition, union members may initiate litigation directly under Title I of the LMRDA to challenge abuses of the officer selection process. Title I also regulates the discipline of union members, including union officers, with regard to their intra-union political activities. The NLRB has become an additional regulator of the internal union political process through its supervision of union discipline.

A union employs discipline to achieve various objectives. A monetary fine may be intended to punish or deter future breaches of obligations of union membership. A fine, however, carries no statement from the group that the individual recipient lacks continued worthiness to participate in union governance. When, however, a member is expelled or suspended from membership, barred from eligibility to be a candidate for union office, or precluded from attending union meetings for a set period, the union collective sends a different message. The union may deter and punish, but it also excludes the disciplined member from participation in the internal union political process.

Appreciation of the NLRB's role as intervenor in internal union political processes begins with an understanding that the Board's control over union member expulsion shifts the locus of

17. See, e.g., Local No. 82, Furniture Moving Drivers v. Crowley, 467 U.S. 526 (1984) (Title I of LMRDA available to protect member participation in union election process if the election has not been conducted already and the relief sought does not require invalidation of election). See generally M. MALIN, supra note 16 at 50-81.
18. See infra notes 178-211 and accompanying text.
authority outside the union because the NLRB determines leadership eligibility within the union.\textsuperscript{19} NLRB authority to regulate union discipline derives from section 8(b)(1)(A) of the Taft-Hartley Act. Section 8(b)(1)(A) prohibits union restraint or coercion of an employee’s right to engage in or refrain from concerted activity for the purpose of collective bargaining or other mutual aid or protection. Section 8(b)(1)(A) provides, however, that the section shall not be interpreted to “impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership [in the union].”\textsuperscript{20} Section 8(b)(1)(A) seems to state unequivocally that the Board may not proscribe union member expulsion. Moreover, the Board may not bar the imposition of lesser forms of discipline that only affect one’s “retention of membership,” such as temporary suspension or ineligibility to be a candidate for office or to attend union meetings. Nevertheless, the NLRB now routinely bans union discipline that affects only membership rights.\textsuperscript{21}

A. The Original Interpretation

The NLRB’s expansionist tendencies began prior to the 1947 enactment of section 8(b)(1)(A). In 1942, without section 8(b)(1)(A) to regulate internal affairs of unions, the NLRB developed the Rutland Court doctrine.\textsuperscript{22} This doctrine provided that an employer may not lawfully discharge employees pursuant to a closed shop contract when the employer knows that the discharge is requested by the union for the purpose of preventing employees from seeking to change their bargaining representative.\textsuperscript{23}

\textsuperscript{19} Political autonomy is largely defined by the locus of effective authority to set eligibility standards for the acquisition and retention of the right to participate in the process of democratic self-government. This is well-recognized in American political life where, for example, autonomy from the federal government includes the right of each state to “establish its own form of government and limit the right to govern to those who are full-fledged members of the political community.” Bernal v. Fainter, 467 U.S. 216, 221 (1984) (describing the State’s right to exclude aliens from positions intimately related to the process of democratic self-government).

\textsuperscript{20} See supra note 8.

\textsuperscript{21} Cannery Workers Union, 159 N.L.R.B. 843, 846-47 (1966) (“We are unable to conclude that a reasonable reading of the proviso to section 8(b)(1)(A) permits a valid distinction to be drawn between fines and expulsions. . . . [F]ines and expulsions are to receive equal treatment under the [Act].”), enforced, 396 F.2d 955 (9th Cir. 1968). See infra notes 103-119 and accompanying text. But cf. infra notes 91-95 and accompanying text.

\textsuperscript{22} Rutland Court Owners, Inc., 44 N.L.R.B. 587 (1942).

\textsuperscript{23} In a closed shop agreement the continued employment of an employee is conditional on the employee maintaining membership in good standing in the union. H. Roberts,
The Rutland Court doctrine was rejected by the Supreme Court in Colgate-Palmolive-Peet Co. v. NLRB. In that case, the union expelled dissidents for dual unionism and obtained their discharge under a closed shop agreement with the employer. Applying the Rutland Court doctrine, the Board found that the employer had violated the National Labor Relations (Wagner) Act and required that the discharged employees be restored to their former jobs with no loss of pay or seniority. The Supreme Court reversed. At the time of the union's conduct, the Court reasoned, congressional policy permitted the closed shop. The NLRB's Rutland Court doctrine was viewed as an NLRB attempt to defeat that policy by

ignor[ing] the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. Shorn of embellishment, the Board's policy makes interference and discrimination by fellow employees an unfair labor practice of the employer.

Enforcing union membership obligations by adversely affecting union members' employment rights is poor labor policy. Colgate-Palmolive-Peet Co. made the point in 1946 that "[t]o sustain the Board's contention would be to permit the Board under the guise of administration to . . . [practice] administrative amendment of the statute." The appropriate present inquiry is whether the Board has heeded the Court's admonition by finding a wide-ranging license in section 8(b)(1)(A) to restrict the union's internal enforcement of membership obligations.

The present interpretation of section 8(b)(1)(A) began to

Roberts' Dictionary of Industrial Relations, 105 (1986).
26. Id. at 363. Congress expressly rejected such an expansionist vision of government regulation prior to 1947. See id. at 363 n.16, 364.
27. The Taft-Hartley Act remedied this abuse, as the Supreme Court made clear in Radio Officers' Union v. NLRB: "The policy of the Act is to insulate employees' jobs from their organizational rights. [The Act was] designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954); accord NLRB v. General Motors Corp., 373 U.S. 734 (1963). The only limitation on the policy discussed in Radio Officers' is the union's right to require the payment of union dues and fees pursuant to a lawful union security agreement. Id. at 742.
evolve in 1948 when the NLRB decided *National Maritime Union.* The issue raised was whether a union's attempt, through collective bargaining, to obtain an unlawful closed shop agreement violated section 8(b)(1)(A). In another case discussing *National Maritime*, the Board examined the section's legislative history and decided that, although Congress used the term "restraint and coercion" in section 8(b)(1)(A), the legislative scheme envisaged a narrow construction "limited to situations involving actual or threatened economic reprisals and physical violence by unions... to compel [individuals] to join a union or cooperate in a union's strike activities." The NLRB applied this vision of limited section 8(b)(1)(A) regulatory authority in *International Typographical Union (American Newspaper Publishers).* In that case, an international union allegedly threatened local unions and members with summary expulsion if they failed to engage in conduct inconsistent with their duty to bargain in good faith. Citing its decision in *National Maritime*, the Board dismissed all section 8(b)(1)(A) allegations. The Board held that "Congress unmistakenly intended to, and did, remove the application of a union's membership rules to its members from the proscriptions of Section 8(b)(1)(A), irrespective of any ulterior reasons motivating the union's application of such rules or the direct effect thereof on particular employees."

A lower federal court agreed with the Board's position in *American Newspaper Publishers v. NLRB.* The court explained that the proviso to section 8(b)(1)(A) enables labor organizations to restrain or coerce employees in the exercise of their rights under section 7 of the Act "so long as such restraint or coercion consist[s] only of the exercise by the labor organization of its rights over the

30. International Typographical Union (American Newspaper Publishers), 86 N.L.R.B. 951, 956 (1949) (describing the NLRB's holding the previous year in *National Maritime*), enforced, 193 F.2d 782 (7th Cir. 1951), aff'd on other grounds, 345 U.S. 100 (1953); but see District 50 UMW Local 12419 (National Grinding Wheel Co.), 176 N.L.R.B. 628 (1969) (discussing the rejection of this view of section 8(b)(1)(A)).
32. Id. at 957.
33. American Newspaper Publishers v. NLRB, 193 F.2d 782 (7th Cir. 1951), aff'd on other grounds, 345 U.S. 100 (1953).
acquisition or retention of membership in such organization." However, this allocation of section 8(b)(1)(A) liability was misleadingly straight-forward. Left unresolved were a number of questions. Is a court enforceable union fine an internal sanction beyond the proscriptions of section 8(b)(1)(A)? Is it the type of economic coercion Congress intended to outlaw through section 8(b)(1)(A)? Further, what if union discipline contravenes the policies that form our labor laws?

The Board answered some of these questions in Minneapolis Star & Tribune Co. In that case, a union fined a member $500 because he failed to perform picket duty during a strike. The Board rejected the argument that section 8(b)(1)(A) prohibits a union from enforcing obligations of membership through court enforceable fines. "[T]he proviso to Section 8(b)(1)(A) precludes any such interference with the internal affairs of a labor organization."

34. Id. at 797. This case consolidated three NLRB decisions, one of which involved union threats to expel members for violation of a rule forbidding them to work in a shop with nonunion members. Id. As the court additionally stated,

Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as [section] 8(b)(1)(A) is concerned. This interpretation has support in the legislative history of the Act... It is not within the power of the courts to write into this section of the Act, by interpretation, language which would broaden its scope. ...

36. Id. at 729.
37. Id. The Supreme Court had not yet registered its vote. Two Supreme Court decisions, neither involving union discipline, decided in the early 1960s dispatched contradictory signals. In 1961 the Court held that an employer violates sections 8(a)(1) and 8(a)(2) of the Act by recognizing a minority union as the exclusive bargaining representative of its employees. ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961). The Court also held that the minority union's accepting recognition violates section 8(b)(1)(A) because "Congress [intended] to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights." Id. at 738.

This was a curious holding for a Court that, just the prior term, in NLRB v. Drivers Local 639 (Curtis Brothers), had adopted a far narrower view of the reach of section 8(b)(1)(A). NLRB v. Drivers Local 639 (Curtis Brothers), 362 U.S. 274 (1960). There, the Court noted that section 8(b)(1)(A) is not a catchall section authorizing the Board to condemn economic weapons not explicitly proscribed by the Taft-Hartley Act. Rather, the tenor of the congressional debates was that the section was intended to make unlawful the use of force, violence, physical obstructions, or threats thereof associated with organizational activities and strikes. Id. at 286. As the Court concluded, section 8(b)(1)(A) "is a grant of power to the Board limited to authority to proceed against union tactics involving violence,
B. The Board's 1964 Internal Union Affairs Trilogy

In 1964, the Board decided three pivotal cases. Two of these cases reached the Supreme Court. The third, while not reaching the Supreme Court, considered an issue that the Court resolved soon thereafter. These three cases highlight the Board's expansionist tendencies. Although the Board originally was committed to noninterference with internal union affairs, it reversed itself in the span of less than one year by accepting various limitations and exceptions that eventually blossomed into a rich source of authority to regulate internal union government.

The Board's landmark decision, Local 283, UAW (Scofield), held that, pursuant to section 8(b)(1)(A), it was lawful for a union to fine members for violating the union's production ceilings. The majority reasoned that section 8(b)(1)(A) prohibits only "unlawful ... use of force, violence, physical obstruction or threats thereof to accomplish certain purposes associated with organizational activity and strikes." Even if section 8(b)(1)(A) has a broader reach, as the Supreme Court's decision in ILGWU v. NLRB (Bernhard-Altmann Texas Corp.) suggests, "internal union disciplines were not among the restraints intended to be encompassed by the sec-

intimidation, and reprisals or threats thereof — conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes." Id. at 290.

38. Local 283, UAW (Wisconsin Motor Corp.), 145 N.L.R.B. 1097 (1964) (lawful for union to fine and suspend union member for exceeding union imposed production quota), enforced sub nom. Scofield v. NLRB, 393 F.2d 49 (7th Cir. 1968), aff'd, 394 U.S. 423 (1969); Local 248, UAW (Allis-Chalmers), 149 N.L.R.B. 67 (1964) (union fine for crossing lawful picket line lawful), enforcement denied, 358 F.2d 656 (7th Cir. 1966), rev'd, 388 U.S. 175 (1967).

39. Operating Eng'rs Local 138 (Charles S. Skura), 148 N.L.R.B. 679 (1964) (unlawful for union to fine member for filing an unfair labor practice charge with Board without exhausting internal union remedies).


42. Id. at 1100 (decision by Members McCulloch, Fanning, and Brown). For a discussion of the Supreme Court's adoption of this view, see supra note 37. But see Helton v. NLRB, 656 F.2d 883, 888-89 (D.C. Cir. 1981) (review of legislative history shows that regulating union conduct involving threats of violence and economic reprisal the primary, but not the sole purpose of section 8(b)(1)(A)).

43. See supra note 37.
The majority explained that even before the proviso was added to section 8(b)(1)(A), Senator Taft assured his colleagues that "the sponsors had no intention to interfere with a union's internal affairs." As the Board majority concluded,

[T]he Board has not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee. . . . [Otherwise] the Board . . . [must] sit in judgment on union standards of conduct for its members even though such standards are not enforced by threats affecting the member's job tenure or job opportunities.

Dissenting, Member Leedom sounded an alarm that has dominated the section 8(b)(1)(A) debate ever since. "Under my colleagues' reading of the proviso, it would appear that the Union can turn any employment matter or Section 7 right into an internal union affair simply by adopting a union rule or bylaw dealing with the subject and disciplining employees thereunder." Member Leedom cited a parade of horribles that he posited would be beyond the reach of section 8(b)(1)(A) under the majority's reasoning.

Concurring, Member Jenkins considered it appropriate for the NLRB to monitor the type of discipline imposed as well as the reason for its imposition. He concurred with the majority's conclu-

44. Local 283, UAW (Wisconsin Motor Corp.), 145 N.L.R.B. 1097, 1100 (1964).
45. Id. at 1101. See also id. at 1100 (discussing additional pre-proviso legislative history of section 8(b)(1)(A)).

At the time the proviso was added, Senator Ball, a key sponsor of section 8(b)(1)(A), assured the Senate that the sponsors had no objection to the proviso because "[t]he was never [their] intent . . . to interfere with the internal affairs or organization of unions. The [proviso] . . . makes that perfectly clear." Id. at 1101. Accord Carpenters Local 720 v. NLRB, 798 F.2d 781, 785 n.5 (5th Cir. 1986); NLRB v. Local 18, Operating Eng'rs, 503 F.2d 780, 782 (6th Cir. 1974).
46. Local 283, UAW (Wisconsin Motor Corp.), 145 N.L.R.B. 1097, 1104. In any event, the majority concluded, "[t]here is nothing in the legislative history [of the section 8(b)(1)(A) proviso which] suggests that Congress intended to permit a union to . . . enforce the fine by expulsion but not by suing for its collection." Id. at 1101.
47. Id. at 1112 (Member Leedom dissenting).
48. These included union fines imposed for filing unfair labor practice charges against the union, testifying at an NLRB hearing, filing a decertification petition, refusing to give the union a copy of a statement made to a Board agent, giving a statement to a Board agent without the union's approval, refusing to participate in unlawful union activity, working with nonunion or black employees, and filing a grievance not approved by the union. Id. at 1112 n.37.
sion, however, finding nothing in the Act regulating a union’s authority to impose production ceilings. Hence, the union rule “cannot be said . . . to offend the Act even if it were . . . unreasonable . . .”

Seven months later, in *Operating Engineers Local 138 (Charles S. Skura)*, the NLRB considered union discipline imposed for reasons offensive to the Act — filing unfair labor practice charges with the NLRB without first exhausting internal union remedies. Abandoning the view that section 8(b)(1)(A) is limited to violence or physical obstruction, or threats thereof, used to accomplish ends involving organizational activity and strikes, the Board unanimously held that union discipline may not “run counter to other recognized public policies . . . .” The Board then reasoned that there exists an “overriding public interest” that no private organization should be permitted to prevent or regulate access to the Board.

The Board’s reasoning in *Skura*, that no private organization may impede Board processes, seems to encompass union attempts to regulate access to the Board through purely internal means, such as expulsion. This is so notwithstanding the Board’s previous assurances that unions may expel members for any reason without violating section 8(b)(1)(A). Indeed, within a week of its *Skura* decision, the Board applied this reasoning to cases involving only expulsion from union membership.

*Skura* arguably is the most significant of all NLRB union discipline cases because it positions the Board as the dominant union discipline regulator. By claiming the power to invalidate any union discipline that contravenes “other recognized public policies,” the Board controls the union disciplinary process because of its authority to define “public policies” and to adjudicate the issue of contravention. No union discipline can escape this net.

Two months after its decision in *Skura*, the Board decided the

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49. *Id.* at 1104 (Member Jenkins concurring). Member Jenkins also noted that the fines were enforced against members who had joined the union freely and who were free to escape the rule by resigning. *Id.*
51. *Id.* at 682.
52. *Id.*
53. See supra notes 29-46 and accompanying text.
54. See Cannery Workers Union, 159 N.L.R.B. 843 (1966). See also infra notes 63-66 and accompanying text.
third of its 1964 trilogy: *Local 248, UAW (Allis-Chalmers).* Allis-Chalmers raised the issue of whether section 8(b)(1)(A) proscribes the imposition of union fines on members for crossing lawful picket lines. Three members of the Board held that fining members who cross a lawful picket line "is a far cry from... Skura." The fine was within the "competence of the union to enforce" because it sought to promote a legitimate union interest — the preservation of the union's integrity during a strike, a "time of crisis for the union." Moreover, the fine did not interfere with the enforcement of the Act, as was the case in Skura, and the strike and picket lines were lawful.

The Allis-Chalmers majority should have stated that its reasoning was a "far cry" from Scofield, not from Skura. In Scofield, this same majority recognized a congressional intent mandating NLRB abstention from the regulation of internal union discipline when a member's employment status is not affected. Skura modified that approach in an exceptional context, when a union fined a member to deter access to the Board's unfair labor practice processes. Although the majority in Allis-Chalmers did not measure the union's actions by whether they override public policies, it, nevertheless, did note the legitimacy of the union's interest, the effect on the Act's administration, and the lawfulness of the strike and picketing. In addition, Member Jenkins, concurring, urged that the Board inquire into the procedural regularity of the discipline. Armed with the power to act as arbiter of legitimate motivations and procedures and to determine their effect on other pub-

56. Members McColloch, Fanning, and Brown.
58. Id.
59. Id. Member Jenkins, concurring, argued for even greater NLRB jurisdiction to limit autonomous union governance. He adopted the Skura limitation that the permissibility of the union's discipline of its members must be measured by its offense to the Act itself and to any other policies "which the [Taft-Hartley Act] is designed to implement." Id. at 71 (Member Jenkins concurring). In addition, he would require that the union publish the membership obligation it seeks to enforce. He emphasized that the union should be able to enforce its rules if at the time the employee chooses to become a union member, the employee is on notice, through published union rules, of which the member has been charged. Id. Finally, he twice emphasized that the union was limited to imposing "specified disciplinary action" for violation of previously published obligations of membership. Id.
60. See supra notes 41-46 and accompanying text.
61. See supra notes 58-59 and accompanying text.
62. See supra note 59 and accompanying text.
lic policies, the NLRB became the internal union discipline regulatory czar. Ultimately, the Supreme Court considered whether Congress intended to vest such power in the NLRB.

C. The Supreme Court’s Union Discipline Cases

The first case to reach the Supreme Court was *NLRB v. Allis-Chalmers Manufacturing Co.* Six members of the Court agreed with the majority of the Board in *Local 283, UAW (Scofield)* that section 8(b)(1)(A) was not intended to regulate internal union affairs. By enacting section 8(b)(1)(A), “Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union’s internal regulations to affect a member’s employment status.”

The next year the Court decided *NLRB v. Marine & Shipbuilding Workers.* This case raised the issue, confronted in *Operating Engineers Local 138 (Charles S. Skura)*, of whether a union may discipline a member for filing an unfair labor practice charge against the union without first exhausting internal union remedies. However, the case differed significantly from *Skura* in that the Marine and Shipbuilding Workers Union expelled, but did not fine, the member.

The NLRB urged the Court to apply *Skura*, a union fine case, to *Marine & Shipbuilding Workers*, a union expulsion case. As the

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64. *Id.* at 195. For a discussion of the legislative history relied on by the Court in reaching this conclusion, see *supra* notes 29-46 and accompanying text.


Justice White, writing a swing-vote concurring opinion, was troubled by the breadth of the plurality’s reasoning. He said, “There may well be some internal union rules which on their face are wholly invalid and unenforceable.” *Id.* at 198 (White, J., concurring).

The four dissenters parted with the majority because “the Court fails to distinguish between court-enforced fines and fines enforced by the traditional method of expulsion.” The proviso to section 8(b)(1)(A) protects only the latter. *Id.* at 214 (Black, J., dissenting).

In short, at least eight of the nine justices agreed that whatever regulatory authority the NLRB may possess with respect to court enforceable fines, it has none with respect to purely internal union discipline such as expulsion.

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Board explained in Cannery Workers Union, decided the same week as Marine & Shipbuilding Workers, "We are unable to conclude that a reasonable reading of the proviso to section 8(b)(1)(A), permits a valid distinction to be drawn between fines and expulsions. ... [F]ines and expulsions are to receive equal treatment under the proviso..." 66

The Supreme Court agreed with the NLRB that the expulsion violated section 8(b)(1)(A), but on grounds considerably more limited than those advanced by the Board. 67 The Court reasoned that section 8(b)(1)(A) assures unions the freedom of self-regulation only "where its legitimate internal affairs are concerned." 68 The Court rejected as overly broad the position of the Board in Skura that "[a]ny coercion used to discourage, retard, or defeat ... access [to the Board] is beyond the legitimate interests of a labor organization." 69 The Court agreed that unions have a legitimate interest in encouraging exhaustion of expeditious internal union remedies. 70

At the same time, however, the Court held that expulsion for failure to exhaust such remedies prior to filing a charge with the NLRB was impermissible under the particular facts of Marine & Shipbuilding Workers. The public interest in expeditious resolution of unfair labor practices overrode this union interest because the grievance brought to the Board involved not only the union but also the employer. "The employer might also have been made a party and comprehensive and coordinated remedies provided.... [Accordingly, the] internal [union] procedures plainly [are] inadequate to deal with all phases of the complex problem concerning employer, union, and employee member." 71 As the Court summarized, "the overriding public interest makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved." 72 In Marine & Shipbuilding Workers, given the employer's interests and the need for remedies beyond those available through internal appeal mecha-

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68. Id. at 424.
69. Id.
70. Id. at 425-26.
72. Id. (emphasis added).
isms, the nature of the grievance brought to the Board raised "a matter that is in the public domain and beyond the internal affairs of the union." 73

Marine & Shipbuilding Workers departed from Allis-Chalmers by focusing on the legitimacy of the union’s interest in disciplining members and by evaluating whether the discipline impeded access to the Board. For the first time, the Court disregarded the plain language of section 8(b)(1)(A) and proscribed expulsion from union membership when the reason for the expulsion does not involve “plainly internal affairs of the union.” 74 It is unclear whether this approach applies only to Board access cases. It also is unclear whether a union may require exhaustion of internal remedies if the unfair labor practice can be redressed adequately through the union’s internal appeal procedures. 75

The last of the Board’s three 1964 internal union affairs cases to reach the Supreme Court was Scofield. 76 In Scofield v. NLRB, Court dicta transformed the simple logic of the Board’s opinion into a formidable six part test. Justice White, writing for a seven member majority, acknowledged the holding of Allis-Chalmers, which was that Congress did not propose any limitations with respect to union enforcement of internal affairs aside from “‘barring enforcement of a union’s internal regulations to affect a member’s employment status.’” 77 Yet, the Court added that “if the rule invades or frustrates an overriding policy of the labor laws[,] the rule may not be enforced, even by fine or expulsion, without violating [section] 8(b)(1)(A)].” 78 To these two limitations, the Scofield ma-
majority added four more: 1) the rule must be a "properly adopted rule," 2) it must "reflect a legitimate union interest," 3) it must be "reasonably enforced against union members who are free to leave the union and escape the rule," and 4) the amount of the union fine must not be "unreasonable."  

It has been argued that *Scofield* turned *Allis-Chalmers* on its head and invited conflict:

social conflict as to the bounds of legitimate union interests, judicial and political-administrative conflict (in and over the Board) as to what Congress had or had not imbedded in the law, and internecine conflicts among workers, some of them tempted to leave the unions and escape the rules at opportune times.  

After *Scofield*, much of the litigation revolved around the determination of which of the several limitations *Scofield* expressed would find a permanent home in section 8(b)(1)(A).

In *NLRB v. Boeing Co.*, the Court began to retreat from *Scofield*’s expansive interpretation of the scope of NLRB regulatory authority under section 8(b)(1)(A). Holding that the reasonableness of union fines is a state court issue, not a section 8(b)(1)(A) concern, the Court stated, "[W]e recede from the implications of the dicta in [the] earlier cases [of *Allis-Chalmers* and *Scofield*]."  

The retreat in *Boeing* had two additional components. First, the Court explained that union discipline is beyond the scope of section 8(b)(1)(A) unless it affects the employer-employee relationship or violates a policy of, or is otherwise prohibited by, the Wagner Act. There was no suggestion that NLRB scrutiny should extend to congressional policies beyond those found in the Act. Second, the Court reaffirmed the national commitment to NLRB  

(1964) and NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418 (1968)) (emphasis added).

79. Id. at 430.


82. Id. at 72. Cf. Pattern Makers’ League v. NLRB, 473 U.S. 95 (1985) (adopting the *Scofield* dicta that members who are disciplined must be free to leave the union and escape the rule).

nonintervention in internal union affairs. "While the line may not always be clear between those matters that are internal and those that are external,"84 one critical consideration is the degree of NLRB involvement in "strictly internal union affairs" that would be required should the NLRB attempt to regulate a particular aspect of union governance.85 For example, "[t]o the extent that the Board [would be] required to examine into such questions as a union's motivation for imposing a fine it would be delving into internal union affairs in a manner which we have previously held Congress did not intend."86

Pattern Makers' League v. NLRB signals a further retreat from Scofield.87 By holding that it was unlawful for a union to restrict members who wanted to resign from the union, the Court defined the sweep of the section 8(b)(1)(A) proviso. The Court reasoned that Congress intended that "a union should be free to 'refuse [a] man admission to the union, or expel him from the union.'"88 The Court did not suggest that the autonomy to expel members was dependent on whether the reason for the expulsion frustrated any policy in the Taft-Hartley Act or any other labor law.89

The Supreme Court's retreat from Scofield is significant but,

84. Id. at 74.
85. Id.
86. Id. The Court also explained that its Allis-Chalmers decision was based on the conclusion "that Congress had not intended by enacting [section 8(b)(1)(A)] to regulate the internal affairs of unions to the extent that would be required in order to base unfair labor practice charges on the levying of . . . fines [for crossing a lawful picket line]" (emphasis added). Id. at 73.
88. Id. at 109 (quoting Senator Taft's discussion of the section 8(b)(1)(A) proviso) (emphasis in original).
89. This view of the proviso, albeit dicta in Pattern Makers', conforms with the Board's pre-Cannery Workers view. See supra notes 29-46 and accompanying text. But, this view departs from the dicta in Scofield that "if the [union] rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating [section 8(b)(1)(A)]" (emphasis added). Scofield v. NLRB, 394 U.S. 423, 429 (1969) (citing Operating Eng'rs Local 138 (Charles S. Skura), 148 N.L.R.B. 679 (1964) and NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418 (1968)). The Court did not satisfactorily explain how its decision in Marine & Shipbuilding Workers conforms with the section 8(b)(1)(A) legislative history because the Court erroneously described Marine & Shipbuilding Workers as involving a "rule [that] was enforced by the imposition of fines . . . ." Pattern Makers' League v. NLRB, 473 U.S. 95, 109 n.20 (1985). For a discussion of post-Scofield judicial recognition that expulsion and other forms of union discipline should be treated differently, see NLRB v. Local 18, Operating Engineers, 503 F.2d 780 (6th Cir. 1974), and infra notes 155-157 and accompanying text.
as yet, uncertain. The legitimacy of the Board's role as a dominant internal union affairs regulator depends on the *Scofield* dicta stating that the union majority may not enforce an obligation of union membership, by either fine or expulsion, if the union either has no legitimate interest for invoking the discipline, or the discipline frustrates overriding labor law policies.\(^9\) The Court has not abandoned these exceptions; after all, *Marine & Shipbuilding Workers* has not been overruled. However, the post-*Scofield* union discipline cases counsel moderation in applying the exceptions. There is little evidence that the NLRB has heeded this counsel, or even acknowledged it.

II. **NLRB Intervention When Union Discipline Is Seen to Frustrate Labor Policies in the Taft-Hartley Act**

A. **The NLRB's Frustration of Congressional Intent**

Since the Supreme Court's decision in *Scofield v. NLRB*, the NLRB has invalidated additional categories of union discipline because they frustrate overriding labor policies. Although the Board is tolerant of certain union disciplinary action, it prohibits other such action. For example, while the NLRB has held that a union does not violate the Act by expelling or suspending a member for filing a decertification petition with the Board,\(^9\) it also has held

90. The "properly adopted rule" limitation of *Scofield* has generated little litigation but is potentially another significant source of NLRB power over union governance. See supra note 79 and accompanying text. Compare NLRB v. Retail Clerks Local 1179, 526 F.2d 142 (9th Cir. 1975) (lawful union discipline must meet requirements of procedural regularity—means of enforcement must not exceed contractual authority of union); Machinist Local 707 (Pratt & Whitney), 278 N.L.R.B. 39 (1986) (cancellation of union membership unlawful in part because union did not follow its constitution and bylaws), enforced, 817 F.2d 142 (2d Cir. 1987) and Carpenters Local 720 v. NLRB, 798 F.2d 781, 786 (5th Cir. 1986) (NLRB lacks authority to inquire into procedural regularity of union discipline); Helton v. NLRB, 576 F.2d 883, 894 n.56 (D.C. Cir. 1981) (requirement of "properly adopted rule" may not be applicable when union discipline not arbitrary or discriminatory). See also Boilermakers v. Hardeman, 401 U.S. 233 (1971), reh'g denied, 402 U.S. 967 (1971) (LMRDA requirement of procedural regularity in union discipline does not require discipline limited to offenses listed in union's constitution and bylaws).

91. Steelworkers Local 4028, 154 N.L.R.B. 692 (1965), enforced sub nom. Price v. NLRB, 373 F.2d 443 (9th Cir. 1967) (suspension); Tawas Tube Products, Inc., 151 N.L.R.B. 46 (1965) (expulsion). When a union expels a member who files a decertification petition, the union is advancing a "legitimate union concern." The filing of the petition constitutes an attack upon "the very existence of the union as an institution," and the union, acting in a "defensive" manner, may expel the member for filing the petition. In a contest for support, the union requires unity and it need not tolerate an active opponent within its ranks. Tawas Tube Products, Inc., 151 N.L.R.B. 46, 48 (1965). Accord Price v. NLRB, 373 F.2d 443, 447 (9th Cir. 1967) (unless union can expel member seeking its destruction during pre-election
that a union may not impose a court enforceable fine for filing such a petition. Discipline for filing union security deauthorization petitions is similarly evaluated. The Board also bars a union from fining a member for supporting a rival union in order to oust the incumbent union; but the Board permits the union to expel such a member or bar the member from holding office. Still, the Board does not permit any discipline of members who file unit clarification petitions, reasoning that these are more akin to unfair labor practice charges than decertification petitions.

92. Molders' Union, Local 125, 178 N.L.R.B. 208 (1969). The Board explained: when a union only fines a member because he has filed a decertification petition, the effect is not defensive and can only be punitive . . . ; the union is not one whit better able to defend itself against decertification as a result of the fine. The dissident member could still campaign against the union while remaining a member and therefore be privy to its strategy and tactics. 

Id. at 209. See also Transport Workers Local 514, 249 N.L.R.B. 1171 (1980). Therein a fine for filing a decertification petition was found unlawful. The Board disavowed the administrative law judge's "gratuitous comments regarding his personal views of Board precedent" that it is difficult to understand how a fine against a disloyal member was not defensive when the decertification petition was filed in the midst of an economic strike. Id. at 1171 n.2.


For a collection of older cases concerning various aspects of discipline impeding Board access, see Machinist Lodge 113, 207 N.L.R.B. 795 (1973).

95. Buffalo Newspaper Guild, Local 26, 265 N.L.R.B. 382 (1982) (unit clarification petition seeking to exclude supervisors from unit — some of whom were union officers — calls for Board to make objective appraisal of fixed events rather than invoke election process among employees; only in latter context do union members have legitimate interest in ensuring solidarity).
Permitting a union to expel for defensive purposes protects the union’s interest in excluding disloyal members from its political community, and deprives dissident members access to the strategy and tactics of the union. Yet, by prohibiting fines, the Board becomes ensnared in the complex process of determining the motivation underlying the fine. In \textit{NLRB v. Boeing Co.}, the Supreme Court was quite definite: a critical consideration for determining whether the NLRB engaged in unauthorized regulation of internal union affairs is the degree of NLRB involvement required for the NLRB to regulate a particular aspect of union governance. For example, “[t]o the extent that the Board [would be] required to examine into such questions as a union’s motivation for imposing a fine it would be delving into internal union affairs in a manner which we have previously held Congress did not intend.”

The NLRB ignores this admonition.

Beyond the Board access cases, the NLRB controls union discipline to preserve the integrity of the Taft-Hartley Act labor policies in many additional ways. By failing to distinguish between fines and expulsion, the Board positions itself to influence eligibility to participate in the selection of union leaders. Moreover, by reserving to itself the decision of whether union discipline frustrates labor policy, the NLRB adds a new layer of restriction on a union’s choice of economic weapons.

For example, nothing in the Act explicitly prohibits a union from inducing employees to strike in breach of a no-strike clause.

96. See supra note 91 and accompanying text.

97. See, e.g., \textit{NLRB v. American Bakery Workers’ Local 300}, 411 F.2d 1122 (7th Cir. 1969) (upholding NLRB finding that fine was imposed for filing unfair labor practice charge, not for strikebreaking); \textit{Automotive Salesmen’s Ass’n}, 184 N.L.R.B. 608 (1970) (strikebreaking motivation rejected in favor of finding motivation, in part, was member’s supporting decertification petition).


99. \textit{Id.} See also supra notes 83-86 and accompanying text. The Supreme Court's decision in \textit{NLRB v. Marine & Shipbuilding Workers} does not require a contrary result. There, the Board was not required to delve into motivation, as the union acknowledged that its motivation was to impose discipline because the member filed a charge with the NLRB without first exhausting internal union remedies. \textit{NLRB v. Marine & Shipbuilding Workers}, 391 U.S. 418 (1968).

100. See, e.g., \textit{Iron Workers}, 285 N.L.R.B. 739 (1987) (union discipline invoked for filing unfair labor practice charge with Board, not for union’s asserted lawful motivation), enforced, 864 F.2d 1225 (5th Cir. 1989); \textit{APTRA, Washington-Baltimore Local}, 269 N.L.R.B. 787, 790 (1984) (NLRB accepted union’s explanation that fine was for union officer crossing lawful picket line, not for filing decertification petition with NLRB).
Such inducement may subject the union to damages\textsuperscript{101} or to an injunction,\textsuperscript{102} but Congress has specifically chosen not to make a breach of a no-strike clause an unfair labor practice.\textsuperscript{103} Nevertheless, the Board views union inducement to breach a no-strike clause as an unfair labor practice when the inducement is effected through union discipline. The Board reasons that it is seeking to protect the sanctity of the collective bargaining agreement by disallowing such union discipline.\textsuperscript{104}

Most union discipline cases involving the breach of a no-strike clause arise in sympathy strike contexts. Whether the strike breaches the contract is usually a close question. Sometimes the Board cannot agree with its administrative law judge\textsuperscript{106} or even agree with its own prior ruling on the question in a given case.\textsuperscript{108} Yet the Board, superimposing its understanding of the contract, prohibits a union's expulsion in these circumstances. Consequently, the NLRB, and not the union members, determines who shall be eligible to nominate union officers, vote for such officers, and run for elective office. The NLRB thereby removes an economic weapon from the union's arsenal.

Related to these cases are those involving discipline of members who cooperate with an employer at an arbitration proceeding

\textsuperscript{103} Indeed, Congress has rejected proposals to make the breach of a collective bargaining agreement an unfair labor practice. See Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 207 (1962) (Senate approved proposal in 1947 "declaring the breach of a collective [bargaining] agreement to be an unfair labor practice, was dropped and never became law."). Instead, Congress "agreed that suits for breach of [collective bargaining agreements] should remain wholly private and 'be left to the usual processes of the law,' and . . . would be at the instance of private parties rather than at the instance of the Labor Board. . . ." Id.
\textsuperscript{104} See Carpenters Local 1780, 296 N.L.R.B. No. 53, 132 L.R.R.M. (BNA) 1328 (Aug. 31, 1989) (unlawful to fine and otherwise discipline member who refused to participate in sympathy strike found by NLRB to violate no-strike clause); District 50 UMW Local 12419 (National Grinding Wheel Co.), 176 N.L.R.B. 628 (1969) (union's interest must be considered in balance, but union has no legitimate interest in discipline for refusing to breach no-strike clause).
\textsuperscript{105} See, e.g., Teamsters Local 600, 294 N.L.R.B. No. 81, 131 L.R.R.M. (BNA) 1653, 1654 (June 14, 1989) (contrary to finding of administrative law judge, Board finds collective bargaining contract specifically prohibits sympathy strike, notwithstanding explicit protection of employee's right to choose whether "to enter upon any property involved in a lawful, primary labor dispute. . . .")
by giving testimony adverse to other union members. For many years, the Board has held that a union has a legitimate interest in disciplining members who inform the employer of alleged job misconduct by other members.\(^{107}\) Also well established, however, is the rule that a union may not discipline a member for giving testimony adverse to another member at an arbitration hearing. Such discipline is unlawful, not because of any duty the employee owes to the employer, but because the discipline is seen to obstruct and impair the contractual arbitration process.\(^{108}\)

Between these two extremes are cases where a union disciplines a member who consented to an employer request to sign a witness statement. Employees sign such statements knowing that the employees named therein will be discharged and the statements may be used in any subsequent arbitration. The Board finds this discipline unlawful because, by giving the statement, the member is cooperating with the grievance-arbitration process.\(^{109}\)

By outlawing discipline of one union member who harms another through arbitration testimony or by filing witness statements, the Board frustrates the union's attempt to maintain harmony among the diverse groups within the union.\(^{110}\) Undermining group harmony curtails the union's effectiveness as a bargaining representative. These union discipline cases, which do not involve the mere exercise of self-evident deduction, present policy choices which limit the union's use of economic weapons in labor-management disputes.\(^{111}\) The Board has not acknowledged the limiting ef-

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\(^{107}\) See Local 5795, Communication Workers, 192 N.L.R.B. 556 (1971) (employee reported co-employee's infractions of company work rules properly fined because employee's job duties do not include such action and union rule bars injury to fellow union members). Accord Transit Union, Local 1225, 285 N.L.R.B. 1051 (1987).


\(^{109}\) Oil, Chemical & Atomic Workers, 269 N.L.R.B. 129 (1984). Accord Cement Workers' D-357, 288 N.L.R.B. 1156 (1988) (unlawful to reprimand member signing witness statement even though no fine, expulsion, or other punishment; union action constitutes coercive expression disapproving member's conduct, and violates section 8(b)(1)(A)).

\(^{110}\) See Local 5795, Communication Workers, 192 N.L.R.B. 556 (1971) (union rule prohibiting reporting infractions by fellow members designed to promote harmony).

\(^{111}\) The Board rationally could conclude that the union has no legitimate interest in disciplining members for reporting other member's rule infractions, whether or not their job...
fect resulting from these union discipline cases.\textsuperscript{112}

The Board also uses section 8(b)(1)(A) to enforce the secondary boycott laws. NLRB cases hold that a union may not discipline a member for working behind a picket line that violates section 8(b)(4) of the Act.\textsuperscript{113} The Board does not differentiate between crossing a picket line to work for an employer with whom the union has a primary dispute and crossing to work for a neutral employer. However, some courts recognize the difference. For example, in \textit{NLRB v. Local 18, Operating Engineers}, the union fined and expelled three members who crossed an unlawful secondary picket line to work for a nonunion employer with whom the union had a primary dispute.\textsuperscript{114} The Board found the discipline unlawful because it frustrated the secondary boycott laws. The court disagreed, noting that the union has a legitimate interest in prohibiting members from working for nonunion employers and that the secondary boycott laws privilege union inducement not to work for the primary employer even in the context of a union unlawfully picketing in an attempt to embroil neutrals.\textsuperscript{115} Making such discipline unlawful expands regulation of union economic conduct beyond the boundaries of section 8(b)(4) of the Act.\textsuperscript{116}

descriptions so require. Indeed, Board members continue to make that argument. \textit{See Transit Union}, 285 N.L.R.B. 1051 (1987) (Member Dotson dissenting); \textit{Oil, Chemical \& Atomic Workers}, 269 N.L.R.B. 129 (1984) (Member Dennis concurring). Similarly, it would be rational for the Board to conclude that the union's legitimate interest in promoting harmony justifies disciplining members who harm other members through arbitration testimony.

\textsuperscript{112} \textit{See infra} notes 124-134 and accompanying text.

\textsuperscript{113} \textit{See Plumbers Local 388}, 280 N.L.R.B. 1260 (1986); NLRB v. Glaziers Local 1621, 632 F.2d 89 (9th Cir. 1980) (unlawful for union to discipline member entering neutral gate at construction site to work for neutral subcontractor); Operating Eng'rs, Local 77, 298 N.L.R.B. No. 2, 134 L.R.R.M. (BNA) 1046 (Mar. 30, 1990) (employees disciplined for failure to honor picket line). \textit{See also Sheet Metal Workers, Local 104}, 297 N.L.R.B. No. 179, 134 L.R.R.M. (BNA) 1016 (Mar. 28, 1990) (unlawful for union to discipline construction employee working on equipment manufactured by nonunion employer with whom union had primary dispute).

\textsuperscript{114} NLRB v. Local 18, Operating Eng'rs, 503 F.2d 780 (6th Cir. 1974).

\textsuperscript{115} \textit{Id.} at 782-83.

\textsuperscript{116} Union fines invoked against members who cross an unlawful picket line to work for neutrals present a different situation. Such discipline violates explicit prohibitions in the secondary boycott laws. \textit{See Bricklayers Local 2}, 166 N.L.R.B. 117 (1967) (fining members working for neutral employer behind unlawful secondary picket line violative of section 8(b)(4) of the Act; remedy includes refund of fines). Accordingly, prohibiting union discipline imposed because a member works for a neutral employer conforms with congressional policies in the Act. \textit{But see NLRB v. Local 18, Operating Eng'rs}, 503 F.2d 780, 783-84 (6th Cir. 1974) (refusal to "enforce the Board's invasion of int[ra]-union discipline" imposed on employee who crossed a picket line prohibited by section 8(b)(4) of the Act, in part because
In addition, the NLRB uses section 8(b)(1)(A) to enforce section 8(b)(7) of the Act, which regulates recognition picketing. Unlike section 8(b)(4), which prohibits inducing or coercing employees to accomplish objectives proscribed within that section, section 8(b)(7) does not prohibit such inducement or coercion. It prohibits only picketing and threats to picket with the objective of organizing employees or securing recognition. Accordingly, by outlawing union discipline for crossing a picket line proscribed by section 8(b)(7), the Board makes inducement to engage in section 8(b)(7) an unfair labor practice. In this manner, the Board again expands its regulation of union economic weapons beyond that specifically provided by Congress.

The NLRB's use of control over union discipline to regulate union economic weapons during labor disputes is more pronounced in situations involving partial strikes. The Board has argued successfully to the lower courts that a union may not discipline a member for performing mandatory overtime in defiance of a partial strike. Such discipline is seen to frustrate the policy behind the national labor laws that "[a]n employer is entitled to receive from a person who opts for continued employment the full and undiluted performance of the duties for which he is hired and paid." Union discipline interfering with the employer's interest

"Congress has provided measures to eliminate the threat of secondary boycotts other than banning a union's discipline of its own membership" — citing injunctive relief and district court suits for damages. Even when a picket line is lawful, union discipline for crossing the line to work for a neutral employer violates the secondary boycott laws. For example, in NLRB v. Plumbers a union fined members who crossed a lawful picket line established by another union in order to work for a neutral employer. The Board, with court approval, found this discipline unlawful. NLRB v. Plumbers, 827 F.2d 579 (9th Cir. 1987).

117. See, e.g., International Union of Operating Eng'rs, Local 520, 298 N.L.R.B. No. 109, 134 L.R.R.M. (BNA) 1182 (June 11, 1990) (members disciplined for crossing picket line established by members' union; fines contravene policy of Taft-Hartley Act, section 8(b)(7)(C)); NLRB v. Retail Clerks' Local 1179, 526 F.2d 142 (9th Cir. 1975) (member disciplined for crossing picket line established by another union violates section 8(b)(7)(C)). See also Operating Eng'rs Local 101, 297 N.L.R.B. No. 70, 133 L.R.R.M. (BNA) 1049 (Dec. 29, 1989) (union discipline unlawful because it frustrates secondary boycott and recognition picketing laws).

118. See supra note 115.


in receiving full service for the wages paid is prohibited even when the refusal to perform assigned work is designed to put economic pressure on the employer during a labor dispute.\textsuperscript{123} The NLRB makes the use of union discipline to induce a partial strike an unfair labor practice. The Board's rationale is that such practices contravene a basic policy of the Act: that workers may not work, receive their pay, and strike at the same time.\textsuperscript{124} Such a prohibition provides another example of the NLRB restricting the union's choice of economic weapons beyond that intended by Congress.

The Board's use of section 8(b)(1)(A) to convert union economic weapons that Congress chose not to prohibit into conduct violative of section 8(b)(1)(A) is not what the Supreme Court intended in \textit{Scofield}. In \textit{NLRB v. Insurance Agents' Union}, decided prior to \textit{Scofield}, the Court chastised the Board for attempting to use section 8(b)(3) of the Act to enlarge its regulatory power to restrict the parties' choice of economic weapons beyond those powers expressly provided by Congress.\textsuperscript{124} In \textit{Insurance Agents'}, the Board attempted to prohibit a partial strike, used as leverage against the employer during bargaining, by making the union's inducement of the partial strike a violation of the duty to bargain in good faith.\textsuperscript{125} The Court condemned the NLRB's attempt to add to its arsenal of regulatory authority by using section 8(b)(3) of the Act to outlaw a union's inducement of partial strikes. Noting that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions [and that] . . . the activities here involved have never been specifically outlawed by Congress,"\textsuperscript{126} the Court found that the NLRB has no license to determine the permissibility of partial strikes as economic weapons. The NLRB's attempt to amend the statute administratively frustrates a policy of the Act that some activities, left unregulated by Congress, are to be controlled by the parties themselves.\textsuperscript{127}

\begin{itemize}
\item \textsuperscript{122} Id. at 306 (no-overtime policy adopted to advance union position with its employer in bargaining); Paperworkers Local 5, 294 N.L.R.B. No. 84, 131 L.R.R.M. (BNA) 1545 (June 15, 1989) (no non-unit work policy adopted to assist local of same international that was locked out prevented employer from being able to transfer personnel to locked out plant to maintain production).
\item \textsuperscript{123} See Elk Lumber Co., 91 N.L.R.B. 333 (1950).
\item \textsuperscript{124} NLRB v. Insurance Agents' Union, 361 U.S. 477, 487-500 (1960).
\item \textsuperscript{125} Id. at 481.
\item \textsuperscript{126} Id. at 498.
\item \textsuperscript{127} Id. at 499-500 (not the role of the NLRB to determine for itself permissible economic sanctions in an "ideal" or "balanced" state of collective bargaining). Accord Garner v. Teamsters, 346 U.S. 485 (1953).
\end{itemize}
The principles spelled out in *Insurance Agents’* are violated by the Board’s cases making it unlawful for a union to discipline a member for refusing to engage in a partial strike (i.e., for performing overtime). The Board created unfair labor practices from the same union economic weapons that the Court concluded Congress chose to leave unregulated by any governmental authority. The Court could not have intended in *Scofield* to permit the Board to accomplish through section 8(b)(1)(A) what it had denied the Board power to accomplish through section 8(b)(3) in *Insurance Agents’*.

Likewise, the Board’s no-strike clause and recognition picketing union discipline cases make unfair labor practices out of union economic inducements that Congress did not choose to proscribe. Honoring a picket line that breaches a collective bargaining agreement is unprotected activity subjecting those who engage in this conduct to employer discipline. The same is true of honoring a picket line that violates section 8(b)(7) of the Act. Reserving to the employer the business judgment of whether to discipline those engaging in this conduct protects national labor policy unless, given the free play of economic forces, the employer’s relative strength is insufficient to use its right to discipline effectively. It is not the Board’s appropriate role to balance relative bargaining power.

The Court’s decision in *Machinists Lodge 76 v. Wisconsin Employment Relations Commission* buttresses the conclusion that *Scofield* was not meant to enhance the NLRB’s power to limit union economic weapons. In *Machinists Lodge 76*, state law prohibited union inducement of employees to refuse to perform overtime work. The Court concluded that “the Act’s processes would be frustrated . . . were the State’s ruling permitted to stand.”

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128. See Machinists Lodge 76 v. Wisconsin Employment Relations Comm’n, 427 U.S. 132 (1976) (Congress did not intend to outlaw the partial strike); NLRB v. Insurance Agents’ Union, 361 U.S. 477 (1960) (Congress did not intend to limit economic weapons such as harassing tactics).


130. See, e.g., Claremont Polychemical Corp., 196 N.L.R.B. 613 (1972). In this respect, the secondary boycott laws present a very different analysis. See supra note 115 and accompanying text.


133. Id. at 148.
Congress intended that such union self-help be left unregulated by the states and the NLRB.\textsuperscript{134}

The Board, in its union discipline cases, should not embrace only those labor policies that enhance its regulatory authority. The policies enunciated in \textit{Insurance Agents’} and \textit{Machinists Lodge 76} must be acknowledged. They demonstrate, contrary to the Board’s assumption, that union discipline of members who refuse to engage in conduct neither prohibited nor protected by the Act, does not frustrate any overriding labor law policy. It is the Board’s converting this discipline into unfair labor practice conduct, and determining for itself the permissible use of economic weapons, that frustrates the Act’s processes.

The Board, of course, is authorized to limit economic weapons that involve threats affecting employment status.\textsuperscript{135} The Board also may prohibit, through section 8(b)(1)(A), union conduct that parallels employer conduct specifically made unlawful under section 8(a) of the Act.\textsuperscript{136} Finally, through section 8(a)(1), the Board may discipline employers who use promises of economic benefit to influence NLRB elections and, through section 8(b)(1)(A), may discipline unions for the same conduct.\textsuperscript{137} None of these cases, however, grants the NLRB a general license to identify the employee conduct it deems unprotected by the Act, and to convert into an unfair labor practice union discipline that induces such conduct. Otherwise, NLRB power to regulate union economic conduct is limited only by the NLRB’s creativity in defining unprotected employee conduct.

A fair question arises whether the dissident union member is presented with a dilemma: discipline by the union for not engaging

\textsuperscript{134} \textit{Id.} at 149.

\textsuperscript{135} The Board prohibits employer coercion affecting employment status. See, e.g., \textit{NLRB v. Gissel Packing Co., Inc.}, 395 U.S. 575 (1969) (employer threats of economic reprisal); \textit{Republic Aviation Corp. v. NLRB}, 324 U.S. 793 (1945) (employer work rule making union solicitation during working hours at the work place conduct punishable by discharge). The Board also prohibits union coercion. See \textit{supra} note 27 and accompanying text.

\textsuperscript{136} \textit{NLRB v. Marine & Shipbuilding Workers}, 391 U.S. 418 (1968), is perhaps the best example. Section 8(a)(4) of the Act prohibits coercion for filing charges with the Board or giving testimony in a Board proceeding; section 8(b)(1)(A) bars union discipline for filing Board charges. See \textit{supra} notes 65-75 and accompanying text. See also \textit{ILGWU v. NLRB} (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961) (section 8(a)(2) prohibits employer’s grant of recognition to minority union and section 8(b)(1)(A) makes it unlawful for the union to accept such recognition).

\textsuperscript{137} See \textit{NLRB v. Exchange Parts Co.}, 375 U.S. 405 (1964).

in unprotected concerted activity or discipline by the employer for engaging in such activity.\textsuperscript{139} The new voluntary unionism, guaranteeing union members the right to resign from the union and avoid union discipline,\textsuperscript{140} demonstrates that this dilemma is illusory.

\textit{NLRB v. Graphic Arts Local 13-B} presented the argument that the union should be permitted to discipline members performing overtime work because the membership voted to discontinue overtime work, and each member could avoid the rule by leaving the union.\textsuperscript{141} The court rejected this reasoning by stating that "[a] rule which is inconsistent with our national labor policy must give way."\textsuperscript{142} The court's reasoning begs the question of whether a rule prohibiting overtime work, designed to place economic pressure on an employer during bargaining is inconsistent with national labor policy if members are free to avoid the rule by resigning.

The discussion above suggests that such a rule should not be viewed by the NLRB as contrary to national labor policy for several reasons. The NLRB should withdraw from regulating union discipline that frustrates the policies of the Taft-Hartley Act unless the inducement inherent in the discipline has been addressed and prohibited by Congress.\textsuperscript{143} The Board would then free itself from evaluating the motive for union discipline.\textsuperscript{144} Such a withdrawal would be consistent with the Court's mandate not to create unfair labor practice prohibitions from the parties' choice of economic weapons when Congress has not specifically outlawed the weapon.\textsuperscript{145} Moreover, such a withdrawal would not abandon helpless members to a dilemma of facing either union or employer discipline.\textsuperscript{146}

\textsuperscript{139} Concern that a union member cannot escape the unhappy choice of either union or employer discipline is an underlying consideration in union discipline cases. See, e.g., NLRB v. Graphic Arts Local 13-B, 682 F.2d 304, 308 (2d Cir. 1982) (union discipline forcing members to engage in unprotected activity impermissible "since it jeopardizes the members' employment relationships [and] imperils their livelihood . . . ").

\textsuperscript{140} See Pattern Makers' League v. NLRB, 473 U.S. 95 (1985).

\textsuperscript{141} NLRB v. Graphic Arts Local 13-B, 682 F.2d 304 (2d Cir. 1982).

\textsuperscript{142} Id. at 309.

\textsuperscript{143} Examples of union discipline addressed and prohibited by Congress are found in the secondary boycott laws, see supra note 116 and accompanying text, and in section 8(a)(4) of the Act, see supra note 136 and accompanying text.

\textsuperscript{144} In Boeing the Court held that the NLRB had no authority to inquire into the motive for union discipline. See infra notes 84-86 and accompanying text.

\textsuperscript{145} See supra notes 117-138 and accompanying text.

\textsuperscript{146} See supra notes 139-147 and accompanying text.
B. The NLRB's Failure to Consider Union Interests Adequately When Balancing Union Interests Against Overriding Labor Policies

The court's reasoning in *NLRB v. Graphic Arts Local 13-B* illustrates the failure, found throughout these cases, to balance the union's legitimate interest in being permitted to discipline with the danger that union discipline will frustrate an "overriding" policy in the labor laws. This need to balance is inherent in the Court's use of the term "overriding" policy in *Scofield v. NLRB,*147 seen in the decertification cases,148 recognized as a necessary analytical ingredient in the breach of the no-strike clause cases,149 and is a mainstay throughout the Board's union discipline cases.150

The new voluntary unionism guaranteed by *Pattern Makers' League v. NLRB* must now be factored into that balance. More than any other recent development in the field of union discipline, *Pattern Makers' League v. NLRB* protects the individual from the effects of majoritarian rule.151 The Supreme Court has required a reevaluation of union discipline cases which involve a member being able to escape the consequences of having joined the union.152

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148. See supra notes 91-95 and accompanying text.
149. See District 50 UMW Local 12419 (National Grinding Wheel Co.), 176 N.L.R.B. 628 (1969) (NLRB balances frustration of labor policies with union's interest when determining whether union discipline is lawful).
150. See, e.g., Meat Cutters Local 593 (S & M Grocers), 237 N.L.R.B. 1159, 1161 (1978) (after balancing union's legitimate interest in maintaining bargaining effectiveness with policy of employee free choice, NLRB concluded that a union may fine a member for refusing to support organizing drive). But see infra note 264 and accompanying text (recent NLRB decisions suggest there is no need to balance union interests and an employee's section 7 interests).
151. See, e.g., Winery Workers Local 186, 296 N.L.R.B. No. 72, 132 L.R.R.M. (BNA) 1129, 1130 (Sept. 13, 1989) (Member Stevens concurring) (member's freedom to resign from union and "[give] up the benefits and obligations of union membership" was properly considered in a case involving a fine for announcing a fixed intent to not honor a union's lawful picket line); Meat Cutters Local 593 (S & M Grocers), 237 N.L.R.B. 1159 (Aug. 25, 1978) (a fine for refusing to assist the union in organizing a campaign interferes with member's free speech rights, but member free to avoid rule through resignation).
152. See, e.g., NLRB v. IBEW Local 340, 481 U.S. 573 (1987) (member-supervisors' right to resign from the union at any time and avoid imposition of union discipline considered in determining whether union violates section 8(b)(1)(B) by disciplining member-supervisors because they worked for employers not having collective bargaining contracts with the union). Compare Machinists Local 702 v. Loudermilk, 444 F.2d 719 (5th Cir. 1971) (fining a member for dual unionism when membership in union is compelled under union shop agreement violates LMRDA free speech guarantees) with Halsell v. Local 5, Bricklayers, 530 F. Supp. 803 (N.D. Tex. 1982) (fine for teaching nonunion apprenticeship bricklaying class
Resignation from the union permits the former member to choose not to engage in unprotected concerted activities and thereby avoid all risk of discipline.\textsuperscript{153} Certainly, the member who resigns forfeits the right to participate in the future governance of the union, but that is the exact choice \textit{NLRB v. Allis-Chalmers Manufacturing Co.} and \textit{Pattern Makers’} anticipate.

When balancing the interests of the individual, the membership majority, and the public, the fact that the membership majority chose to expel, rather than to fine, a member charged with violating a membership obligation is significant. This is required by the explicit guarantee of section 8(b)(1)(A), granting the majority the autonomy to expel. The Supreme Court endorsed this principle in \textit{Allis-Chalmers}.\textsuperscript{154} In \textit{Pattern Makers’}, the Court restated the principle that a union’s choice of expulsion as a remedy for violating an obligation of membership should have a significant impact on the Board’s decision.\textsuperscript{155} In \textit{Meat Cutters Local 81 (MacDonald Meat Co.)}, the Board recognized that the logical corollary of the individual member’s right to non-association with the union, the right to resign, is the membership majority’s right to non-association with the individual, the right to expel.\textsuperscript{156} This principle has also been affirmed in the decertification petition union discipline cases, which distinguish between expulsion and fines.\textsuperscript{157}

In short, \textit{Scofield}, at a minimum, requires the Board to find that union discipline contravenes an “overriding” policy in our labor laws. Such a determination requires a balancing that must weigh the right to resign guaranteed by \textit{Pattern Makers’}. However, the right to resign has its concomitant: the union’s right to expel. Hence, in most cases, the unions choice of expulsion to enforce membership obligations should not be viewed as contrary to any overriding policy.

\textsuperscript{153} See \textit{Scofield v. NLRB}, 394 U.S. 423, 435 (1969) (“If members are prevented from taking advantage of their contractual rights bargained for all employees it is because they have chosen to become and remain union members.”).

\textsuperscript{154} See supra note 64.

\textsuperscript{155} See supra notes 87-88 and accompanying text. See also \textit{NLRB v. Local 18, Operating Eng’rs}, 503 F.2d 780, 784 (6th Cir. 1974) (proviso permits the Board to “restrain threats or physical violence or secondary boycotts against union members who cross a picket line but cannot keep the union from expelling them”).

\textsuperscript{156} \textit{Meat Cutters Union 81 (MacDonald Meat Co.)}, 284 N.L.R.B. 1084 (1987).

\textsuperscript{157} See infra notes 91-95 and accompanying text.
C. The Societal Need for Union Self-Governance

The NLRB’s control of the unions’ right to expel undermines an important national labor policy favoring democratically governed independent unions. Only the most substantial countervailing public interests may outweigh the membership majority’s right to an independent democratic union, and the inherent power to decide who shall govern the union.\textsuperscript{158} This national commitment to democratic unions governed independently from the state is well established.\textsuperscript{159} Union democracy is necessary if unions are to perform their assigned societal functions. National labor policy is rooted in the conviction that workers have a right to a voice at the work place. The best way to secure that voice and give it effect is through a union that is responsive to membership’s concerns.\textsuperscript{160}

Unions have at least two democratic functions. The first is to provide employees with the dignity gained from participating in industrial government. The second is to provide employees with an effective voice in the workplace by replacing the employer’s arbitrary power with clearly established union rules and procedures contained in a collective agreement.\textsuperscript{161} To perform these functions effectively, unions must operate as democratic organizations.\textsuperscript{162} Outside the work place, unions stabilize workers’ political power by representing them in the political arena. In order for this political

\textsuperscript{158} Marine & Shipbuilding Workers does not require a contrary conclusion. It is the quintessential case of a compelling public interest overriding the union’s legitimate interest. The public interest in access to the NLRB is compelling as evidenced by section 8(a)(4) of the Act, which protects employees’ unimpeded access to the NLRB. The union’s interest in requiring exhaustion of internal union remedies was marginal since the member’s unfair labor practice was rooted in statutory policies involving both the employer and the union and could not be remedied fully through the union’s internal union appeal process. See supra notes 74-75 and accompanying text. The public interest in expeditious resolution of labor disputes by the NLRB simply overrode the union’s interest in requiring exhaustion of an appeal process inadequate to resolve the grievance. See Clayton v. UAW, 451 U.S. 679, 688 (1981) (union has a right to require exhaustion of internal union remedies unless the issues raised by a member’s grievance are “rooted in statutory policies extending far beyond internal union interests”). But see Meat Cutters Local 81 (MacDonald Meat Co.), 284 N.L.R.B. 1084, 1085 (1987) (Marine & Shipbuilding Workers based on conclusion that Board access is a “polic[y] of the labor laws . . . of such significance that [it] may not be overridden even by the union's congressionally recognized interest in determining who may and who may not be its members . . . .”).


\textsuperscript{160} Id. at 39-44.

\textsuperscript{161} Id. at 54-56.

\textsuperscript{162} Id. at 102.
voice to be truly representative, workers must control the direction and operation of their unions.\textsuperscript{163} "An effective internal political process provides such control and checks the misrepresentation of members' views. In this sense societal democracy depends on union democracy.\textsuperscript{164}

Unions also perform economic functions. They influence the amount of compensation a worker receives and its form. They provide job security and protect against capriciousness and error in personnel decisions. They also make the work environment healthier, both physically and psychologically.\textsuperscript{165} Moreover, unions' collective bargaining power decentralizes economic decisions.

\begin{quote}
[A]llocation of power and control to the union . . . creates centres of power and instruments of control apart from the State, which then does not become unmanageable or dangerously large. Collective bargaining shortens the reach of central legal control by establishing a separate structure of industrial government as an alternative to suffocating statism.\textsuperscript{166}
\end{quote}

Unlike businesses, unions lack the "universal quantifier" of profit margin to gauge the efficiency of the leadership's bargaining goals.\textsuperscript{167} A union's internal political process replaces the market's influence by ensuring that union leadership is responsive to membership's needs. It also assures that a labor contract's benefits and burdens are distributed fairly.\textsuperscript{168}

The importance of union democratic governance should limit governmental intervention in internal union affairs. Unions cannot serve as "centres of power and instruments of control apart from the State," and collective bargaining cannot "shorten[] the reach of central legal control by establishing a separate structure of industrial government as an alternative to suffocating statism,"\textsuperscript{169} unless unions remain independent, self-governing institutions. It is "because unions are among the important 'competing units of so-

\begin{itemize}
\item \textsuperscript{163} See Hartley, Framework, supra note 159, at 58-61, 103.
\item \textsuperscript{164} Id. at 103.
\item \textsuperscript{165} Id. at 50-53.
\item \textsuperscript{166} Summers, Internal Relations Between Trade Unions and Their Members, 91 INTL. L. REV. 175, 177 (1965) [hereinafter International Relations]. See, Hartley, Framework, supra note 159 at 56-58.
\item \textsuperscript{167} Munson, The Trade Union as an Organization, 88 MONTHLY LAB. REV. 497, 500 (1965).
\item \textsuperscript{168} Id. at 102.
\item \textsuperscript{169} Summers, International Relations, supra note 166, at 177.
\end{itemize}
cial and economic aggregation' that their independence from state control is so vital." The Senate Committee on Labor and Public Welfare summarized the underlying labor policy by stating that governmental interference should be avoided if it would "undermine union self-government[,] . . . weaken unions in their role as collective bargaining agents[,] or] cross over into the area of trade union licensing and destroy union independence."171

When the NLRB prohibits expulsion in circumstances other than where necessary to protect an overriding public interest, it undermines union self-governance, reduces their effectiveness as collective bargaining agents, and destroys union independence. Self-governance is undermined because NLRB intervention encourages dissident members to look to the Board, rather than to the internal union political process, as the final arbiter of appropriate union policy. For example, if the NLRB permitted the union to discipline those who perform overtime work against the will of the membership majority, the dissident wishing to remain a union member would be forced to participate in the internal union political process and persuade the majority to amend the rules and allow overtime. When, however, the NLRB superimposes its will over that of the union majority, the dissident procures a political victory without expending any political effort. The interests of those members who worked diligently to persuade the majority to approve a no-overtime rule are overlooked. In short, when the NLRB substitutes its own processes for a union's internal political process, it enhances the importance of the former and undermines the latter.

The NLRB's union discipline cases have also weakened unions' collective bargaining ability. The NLRB has repeatedly prohibited the use of expulsion to discipline a member who refuses to participate in a concerted effort to counter employer power during a labor dispute.172 By limiting the unions' ability to discipline their members,173 these prohibitions weaken the unions' effectiveness as collective bargaining agents.

The NLRB's regulatory authority, which enables it to discipline unions when they act "irresponsibly," compromises the un-

172. See supra notes 101-123 and accompanying text.
173. See supra notes 124-138 and accompanying text.
ions’ independence. This is especially true because the NLRB’s definition of “responsible” union behavior is primarily premised upon the Board’s determination of whether the union conduct in question undermines national labor policy. As a result of this power, the NLRB has the ability to control, to a certain degree, who within the union is permitted to nominate officers, vote for such officers, and run for union office. This control puts the Board in a position to influence the outcome of union elections. The state’s commitment to union independence is inconsistent with the Board possessing unbridled discretion to determine permissible and impermissible economic weapons, or to determine eligibility to participate in the selection of union leaders. Union independence is imperiled when an executive agency of government, and not Congress, is given the authority to define the scope of responsible union conduct.

Additionally, when the NLRB limits the ability of unions to expel members it breaches a social compact encompassed in the LMRDA. Labor law is committed to “permit[ting] the individual to share in the formation of union policy.” That accomplished, “the case for external regulation of union structure and substantive policy largely collapses.” The social compact has been summarized as follows: “By protecting and fostering democratic processes within unions, the law can rely on the self-corrective ability of those processes. The necessity for intervention is reduced by insuring that unions speak with the voice of those whom they represent.” The NLRB unjustifiably undermines union independence and breaches the social compact when it superimposes its will to outlaw the union majority’s expulsion decision, unless necessary to accomplish an overriding policy embedded in the Act. If

174. See supra notes 111, 124-138 and accompanying text.
176. Hartley, Framework, supra note 159, at 124. Accord Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, 611 (1959) (justification for union independence from the state turns on the union membership possessing the effective tools of self-government); Summers, American Legislation For Union Democracy, 25 Mod. L. Rev. 273, 300 (1962) ("The law, by protecting democratic rights within the union . . . reinforces the union's claim to remain free, for its decisions are validated by the democratic process."); Id. at 279 (a primary motive for the enactment of the LMRDA was to protect union democratic process and thereby eliminate the need for public regulation of union structure and public policy).
the Board’s unarticulated assumption is that union disciplinary processes are not democratic, that should be expressed, documented, and remedied by invoking laws specifically designed to redress the problem, or by amending them if necessary. The answer is not to undermine union self-governance in the name of enhancing it.

III. NLRB Intervention When Union Discipline Is Seen to Frustrate Labor Policies in the LMRDA

A. The Protection of a Member’s Right to Participate in Intra-Union Activities

The NLRB also prohibits union discipline that frustrates policies embedded in the LMRDA. As early as its Wagner Act decisions, the NLRB held that employers may not interfere with, restrain, or coerce employees in the exercise of internal union political activities.\(^\text{178}\) In early Taft-Hartley Act cases, the Board ruled that intra-union political activities fall within the orbit of activities protected by section 7 of the Act.\(^\text{179}\) In so doing it held that an employer violates the Act when it makes employment decisions based on intra-union activities\(^\text{180}\) or otherwise impedes an active political process within the union.\(^\text{181}\) In addition, the Board held

\(^{178}\) See In re Fairfield Eng’g Co., 74 N.L.R.B. 827 (1947) (employer violated section 8(1) of Wagner Act by interfering with outcome of intra-union dispute by assisting in effort to oust incumbent president).

\(^{179}\) See In re Nu-Car Carriers, Inc., 88 N.L.R.B. 75 (1950) (employee criticism of bargaining position adopted by union protected by section 7 from employer threats), enforced, 189 F.2d 756, 760 (3d Cir. 1951) (“Attempts by some members of a union to bring about a change in the union’s attitude about particular collective bargaining contracts is certainly ‘concerted activity’ protected by section 8(a)(1) of the Act.”), cert. denied, 342 U.S. 919 (1952).


\(^{181}\) See Machinists District Lodge 91 v. NLRB, 814 F.2d 876 (2d Cir. 1987) rev’g 279 N.L.R.B. 973 (1986) (employer may not ban employee from parking in company parking lot bearing four-by-six foot sign endorsing candidate for union office); NLRB v. Methodist Hospital of Gary, Inc., 733 F.2d 43 (7th Cir. 1984) (employer may not refuse union use of
that union leadership may not threaten to affect job status because of intra-union activities.  

Carpenters Local 22 (Graziano Construction Co.) represented the Board's first attempt to regulate a union's internal political process directly. The NLRB held that a union may not fine a member for opposing an incumbent in a union election and successfully challenging the election. The NLRB found support for its decision in the Supreme Court's Scofield v. NLRB decision. In Scofield, the Court stated that the "Board is charged with considering the full panoply of congressional labor policies in determining the legality of a union fine," including those supporting independent democratic unions found in the LMRDA.

The primary problem facing the Board since its decision in Graziano has been how to implement LMRDA union democracy policy using its regulatory authority under the Taft-Hartley Act.

cafeterias to conduct election for bargaining committee when no showing that election would be disruptive or interfere with patient care); Honeywell, Inc., 262 N.L.R.B. 1402 (1982) (employer may not permit bulletin board to be used for personal notices but prohibit its use to announce union meetings); Arkansas-Best Freight System, Inc., 257 N.L.R.B. 420 (1981) (employer may not prohibit posting or distribution of intra-union campaign literature in nonworking areas on nonworking time and soliciting votes for intra-union election on nonworking time).

182. See National Maritime Union v. NLRB, 423 F.2d 625 (2d Cir. 1970) (unlawful to deny seaman registration for employment because of opposition to incumbent administration of union); Graphic Communications Local 388, 287 N.L.R.B. 1128 (1988) (threat to refuse to represent fairly employee who challenged intra-union election unlawful); Laborers Local 282, 271 N.L.R.B. 878 (1984) (causing discharge because employee supported incumbent's political opponent unlawful); Hoisting and Portable Eng'rs Local 4, 189 N.L.R.B. 366 (1971), enforced, 456 F.2d 242 (1st Cir. 1972) (violation of section 8(b)(1)(A) in refusing to refer from nonexclusive hiring hall because member opposed re-election of incumbent union officials). See also Laborers Local 806, 295 N.L.R.B. No. 102, 133 L.R.R.M. (BNA) 1125 (July 10, 1989) (assaults and acts of physical violence against members because of dissident union activities unlawful); Teamsters Local 745, 240 N.L.R.B. 537 (1979) (threat by union official of physical harm for dissident activity violates Act). But cf. East Texas Motor Freight, 262 N.L.R.B. 868 (1982) (violation of section 8(b)(1)(A) to condone physical attack on dissident by union steward but no violation of Act not to come to assistance of dissidents attacked by unknown assailants: section 8(b)(1)(A) forbids limitations on intra-union actions that frustrate labor policy but places no affirmative duty on union to take action to further policy of the labor laws).


184. Id. at 2.

185. Id. As the Board explained, "[W]e have been charged by the Supreme Court with the duty of determining the overall legitimacy of union interests, and must therefore take into account all Federal policies and not limit ourselves to those embodied in our own Act." (emphasis in the original). Id. n.5. See also Machinists Lodge 91, 298 N.L.R.B. No. 47, 134 L.R.R.M. (BNA) 1192, 1194 n.6 (Apr. 30, 1990) (unlawful to disqualify candidate for union office because of protected dissident activities).
"It has long been held that Section 7 guarantees to employees the right to question the wisdom of their representative or to take steps to align their union with their position . . . ." However, when the union acts as the collective bargaining representative, it is acting in furtherance of objectives which a majority of the employees have agreed to support, and is entitled to solid support from employee-members in seeking to obtain those objectives.

Accommodating these conflicting, legitimate interests is the challenge. In section 101(a)(2) of the LMRDA, Congress tackled the problem by guaranteeing union members the right to "challenge," that is, the right to "express any views, arguments, or opinions; and to express at meetings of the labor organization . . . views, upon candidates in an election of the labor organization or upon any business properly before the meeting . . . ." Congress also provided that

[n]othing [in the LMRDA] shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Because Graziano rests upon the Board's authority to enforce LMRDA labor policies, these cases must be consistent with LMRDA's policies, especially section 101(a)(2) and its "reasonable rules" proviso.

In Steelworkers v. Sadlowski, the Court explained that the free speech protections afforded union members under section 101(a)(2) is considerably narrower than that provided by the first amendment. The proper order of inquiry requires that courts (and the NLRB) first consider whether enforcement of the union's rule interferes with a free speech interest protected by section 101(a)(2). If it does, adjudicators then must determine whether the union rule is "reasonable," and, thus, protected by the proviso to

187. See Winery Workers Local 186, 296 N.L.R.B. No. 72, 132 L.R.R.M. (BNA) 1129 (Sept. 13, 1989) (union has reasonable expectation of support from members regarding decision to strike).
189. Id.
190. See supra notes 183-187 and accompanying text.
section 101(a)(2). Therefore, unlike the first amendment, section 101(a)(2) of LMRDA permits union rules to restrict a member’s freedom of speech if the rules are reasonable. "By way of the proviso of section 101(a)(2), nothing in the statute is to impair the union’s right to enforce its reasonable rules. The Constitution accords no similar overriding interest in law enforcement that would automatically negate a constitutional right simply because there was a reasonable interest in prosecution."

When members voice opposition to union policies, the NLRB must balance the need for free expression within the union against the union’s need for solidarity. Accordingly, the Board prohibits unions from disciplining a member for internally advocating a dissenting view to a proposed union policy. Teamsters Local 610 is an example of the Board’s attempt to balance these two conflicting policies. Therein, the Board ruled that a union may not discipline a member for seeking to persuade other members to vote to accept a contract offer that the union leadership believes to be unsatisfactory. Section 8(b)(1)(A) offers similar protection to members who appeal to the international union to protest inadequate representation by local union leaders.

Section 8(b)(1)(A) does permit discipline of members who advocate disobeying an existing lawful group decision. For example, in Winery Workers Local 186, the NLRB approved the imposition of a fine on a member for announcing at a union meeting an “absolute intention to defy any union call for lawful strike action” and

192. Id. Accord M. Malin, supra note 16 at 78-79.
194. Massey v. Inland Boatmen’s Union, 886 F.2d 1188, 1191 (9th Cir. 1989) (citing United Steelworkers v. Sadlowski, 457 U.S. 102, 111 (1982)) (emphasis in original). See Malin, supra note 16 at 78 (burden of proving that a union’s restraint on speech is privileged by the proviso “is not as stringent as the burden of establishing a compelling state interest to justify restraints under the First Amendment to the Constitution”).
196. Accord Machinists Local 707 (Pratt & Whitney), 276 N.L.R.B. 985 (1985) (unlawful for union to process internal union charges against member for distributing leaflet accusing local union leadership of serious wrongdoing).
197. See Steelworkers Local 5163, 248 N.L.R.B. 943 (1980) (violation of section 8(b)(1)(A) to threaten to sue dissidents because they filed grievance with international union complaining about inadequate representation by local — failure to appoint steward and police plant safety — and sought recall of local union president); Groves-Granite, 229 N.L.R.B. 56 (1977) (threat of “executive board action” against member who complained to state council regarding representative’s performance of union duties violates section 8(b)(1)(A)).
urging others to do the same.\textsuperscript{198} In \textit{Meat Cutters Local 593 (S & M Grocers)}, the Board held that a union may discipline members who refuse to support an organizing campaign.\textsuperscript{199} The Board reasoned that the union’s rule “restrict[ed] its members’ exercise of free speech during an organizational drive [but] only in a manner consistent with their voluntary membership status in the Union.”\textsuperscript{200} This rule gives a member the choice between participation in the affairs of the union and exercising those rights guaranteed by section 7 of the Act:

\begin{quote}
[a]s members they participate in the election of officers and in the other internal affairs of the Union which lead to the decision to organize particular employees. They are free to resign any time the Union sets out on a course they do not agree with. . . . However, as long as they remain members, the Union has a right to expect their support, including actual participation in the Union’s organizational efforts.\textsuperscript{201}
\end{quote}

The Board’s cases, then, define “reasonable rules” by distinguishing between those rules that restrict a member’s right to advocate a change in union policy through democratic means and those that limit a member’s ability to advocate disobedience of a current policy. The same distinction is made under section 101(a)(2) of LMRDA.\textsuperscript{202}

\textsuperscript{198} Winery Workers Local 186, 296 N.L.R.B. No. 72, 132 L.R.R.M. (BNA) 1129 (Sept. 13, 1989). The Board reasoned that the union has a legitimate interest in promoting membership solidarity in an impending strike situation and the member’s conduct exceeded merely an attempt to advocate a dissenting point of view and advocate an alternative to economic action. \textit{Id.} at 1130. \textit{See also} Teamsters Local 610, 264 N.L.R.B. 886, 905 (1982) (union may discipline members for attempting to persuade others to abandon strike and cross picket line — at least when done in the presence of management).

\textsuperscript{199} Meat Cutters Local 593 (S & M Grocers), 237 N.L.R.B. 1159 (1978).

\textsuperscript{200} \textit{Id.} at 1161.

\textsuperscript{201} \textit{Id.} Closer questions arise when the union majority has reached a decision and a member continues to advocate a contrary position but does not advocate civil disobedience. In \textit{Operating Eng’rs Local 400 (Hilde Construction Co.)}, a Board majority held that a union may not impose a fine on members who held an unofficial meeting to discuss current negotiating positions of the union and employer with a view toward persuading the union leaders to modify strategy or hold a second strike vote. \textit{Operating Eng’rs Local 400 (Hilde Constr. Co.)}, 225 N.L.R.B. 596 (1976). Member Murphy dissented. She noted that the decision to strike had been presented to the membership in a democratic way and the union now had a right to present, publicly at least, a unified front. The dissidents had frustrated that interest in solidarity by publicly voicing their dissent by advertising the unofficial meeting on TV and in the local newspaper. \textit{Id.} at 596 (Member Murphy dissenting).

\textsuperscript{202} \textit{Compare} Kuebler v. Cleveland Lithographers Local 24-P, 473 F.2d 359 (6th Cir. 1973) (violation of section 101(a)(2) of LMRDA to discipline member for meeting with other members to urge that negotiating committee change bargaining strategy) \textit{and} Boilermakers v. Rafferty, 348 F.2d 307 (9th Cir. 1965) (violation of section 101(a)(2) to expel member who
B. The Membership's Right to Form Dissident Factions

An action closely related to the encouragement of opposition to union policy is an attempt to form an intra-union dissident group in an effort to make that opposition effective. The Board and the courts disagree on how extensively section 8(b)(1)(A) regulates this purely internal union activity. There is a limited consensus that efforts to organize internal union opposition in order to effectuate a change in union policy is protected activity under section 7 of the Act and that an employer may not interfere with employee efforts on behalf of intra-union rival factions.\(^{203}\) Disagreement arises when section 8(b)(1)(A) is used to prohibit union leadership interference with a member's efforts to organize a rival political faction within the union.

In Teamsters Local 515, the NLRB held that section 8(b)(1)(A) does not prohibit union leadership from removing a rival faction's literature from a union bulletin board.\(^{204}\) The dispute, the Board reasoned, concerned a purely internal union matter that did not involve threats of violence, economic reprisal, or discipline.\(^{205}\) The court of appeals disagreed, holding that neither the dicta in Scofield v. NLRB nor the Board's own precedent limits the application of section 8(b)(1)(A) to cases involving violence, economic reprisal, or discipline.\(^{206}\)


\(^{203}\) See East Texas Motor Freight, 262 N.L.R.B. 868 (1982) (violation of Act for employer to refuse to permit posting of intra-union political literature on company bulletin board reserved for material related to the collective bargaining agreement when limitation not enforced against others); Transcon Lines, 235 N.L.R.B. 1163 (1978), enforced, 599 F.2d 719 (5th Cir. 1979) (employer violated section 8(a)(1) by prohibiting distribution of rival faction's internal union political literature in the drivers' room and elsewhere when other union political literature permitted to be distributed); Roadway Express, Inc., 239 N.L.R.B. 653 (1978) (employer may not interfere with employees' efforts to organize rival intra-union political group and distribute its literature); Massey-Ferguson, Inc., 211 N.L.R.B. 487 (1974) (employer violated Act by refusing to permit employee to distribute newspaper critical of union bargaining policies to co-workers at their place of employment).


\(^{205}\) Id. at 86.

\(^{206}\) Helton v. NLRB, 656 F.2d 883, 888-89, 891-92 (D.C. Cir. 1981). The Board precedent cited by the court was International Union of Electrical Workers Local 601, 180 N.L.R.B. 1062 (1970) (violation of section 8(b)(1)(A) to refuse to accept personal check and insist on payment of dues through dues deduction), General Motors Corp., 158 N.L.R.B. 1723 (1966) (section 8(b)(1)(A) violation to agree to contract provision banning distribution of rival union's literature during working hours), and General Motors Corp., 147 N.L.R.B. 509 (1964) (same). For a discussion of NLRB regulation of union discipline for dual union-
The Seventh Circuit Court of Appeals held in *NLRB v. Operating Engineers Local 139* that section 8(b)(1)(A) does not give the NLRB any authority to regulate union factionalism that does not affect members' job rights, even in cases involving union discipline.\(^{207}\) The NLRB ruled that the union had violated section 8(b)(1)(A) by fining a member for publishing and distributing a newsletter that questioned the propriety of certain actions taken by the incumbent union leadership.\(^{208}\) The court of appeals agreed that publishing and distributing the newsletter was concerted activity protected by section 7 of the Act and construed the fine as an attempt to quiet the member's opposition.\(^{209}\) Nevertheless, the court held that the NLRB did not have any authority under section 8(b)(1)(A) to prohibit the union discipline. Relying primarily on *NLRB v. Boeing Co.*, the court reasoned that Congress did not intend for section 8(b)(1)(A) to regulate the imposition of fines that are not related to the employer-employee relationship.\(^{210}\) "Because the union’s action in charging and fining [the member] did not touch the employer-employee relationship, the union did not commit an unfair labor practice in violation of section 8(b)(1)(A) by charging and fining [the member].”\(^{211}\)

C. The Conflict Between Operating Engineers Local 139 and Graziano

The court’s reasoning in *NLRB v. Operating Engineers Local 139* would seem to undermine *Carpenters Local 22 (Graziano Construction Co.)*. Graziano dealt with the legitimacy of a fine imposed for opposing an incumbent union officer and challenging an internal union election,\(^{212}\) conduct not “touching the employer-
ployee relationship." Indeed, union discipline cases arising solely out of opposition to union policy would similarly seem to involve only internal union matters. 213 However, the Board has not accepted the Operating Engineers Local 139 court's interpretation of section 8(b)(1)(A) and the conflict remains unresolved. 214

The Supreme Court's union discipline precedent does not offer a sound basis for resolving the conflict between Graziano and Operating Engineers Local 139. The dicta in Scofield implies that union disciplinary measures should not be allowed to frustrate overriding national labor law policies, not just those found in the Taft-Hartley Act. 215 However, the dicta in NLRB v. Boeing Co. speaks only in terms of Taft-Hartley policies. 216 Because these two decisions fuel, rather than resolve, the controversy, we must look beyond Supreme Court union discipline precedent.

For several reasons, advancement of the policies supporting democratic unions found in the LMRDA should not be cabined by LMRDA's enforcement mechanisms. These policies should be considered when regulatory action is taken under section 8(b)(1)(A). Supreme Court precedent does not preclude the NLRB from considering LMRDA policies while exercising its Taft-Hartley regulatory authority in union discipline cases. In Carpenters Local 1976 v. NLRB (Sand Door), 217 the NLRB premised its ruling, in which it found that the union's conduct violated the Taft-Hartley Act's secondary boycott prohibitions, on national labor policy found in the Interstate Commerce Act. 218 The Supreme Court reversed, holding that the Board may not supplement its regulatory authority by using the Taft-Hartley Act to enforce congressional policies found in other statutes "involving significantly different considerations and legislative purposes." 219

1987), must be distinguished. There, the union expelled a member both for factionalism and for filing an unfair labor practice charge with the Board. Id. at 41-48.
213. See supra notes 188-211 and accompanying text.
214. See, e.g., Machinists Lodge 91, 298 N.L.R.B. No. 47, 4, 6 n.6, 134 L.R.R.M. (BNA) 1192, 1194 & n.6 (Apr. 30, 1990) (union violates section 8(b)(1)(A) by suing a member to enjoin him from entering union hall, attending union meetings, and harassing union members because the suit lacked merit and was filed to retaliate for engaging in intra-union activities, and also by refusing to allow dissident to be nominated for union office in retaliation for his intra-union political activities).
215. See supra note 78 and accompanying text.
216. See supra note 83 and accompanying text.
218. Id. at 103.
219. Id. at 110. The issue in Sand Door, and in Graziano, is thus different from that
The LMRDA, which regulates internal union affairs, certainly entails significantly different considerations than the Taft-Hartley Act. The Taft-Hartley Act focuses on labor-management relations and does not encompass the regulation of internal union affairs. Yet, the two statutes share similar legislative purposes. As discussed above, national labor policy is rooted in the conviction that workers have a right to a voice at the work place, and that the best way to ensure the effectiveness of their voice is through an organized group in which the individual has a meaningful voice. Unless the individual is permitted to share in the formation of union policy through a democratic process, the "other provisions of law [guaranteeing the right of self-organization] may be of little benefit ...." If employees become as voiceless within the union as they are as individuals, national labor policy would then have merely substituted the tyranny of the group for the tyranny of an employer, and would have effected no net gain for the individual. In short, the justification for the Board's consideration of LMRDA policies, when enforcing the Taft-Hartley Act, is that the policies underlying the two statutes are inexorably intertwined.

In addition, the LMRDA's statutory scheme anticipates, indeed relies on, NLRB involvement. By incorporating in its decisions the various goals of the LMRDA, the Board participates in "litigating elucidation." By effectuating legislative policies in the labor laws in this fashion, adjudicatory institutions "participate in the growth of law" by filling the interstices of federal labor statutes. Nothing in the LMRDA suggests that its interstices should be presented in Southern Steamship Co. v. NLRB. In Southern Steamship, the NLRB ordered reinstatement of an employee fired for engaging in a strike otherwise protected by the Wagner Act but inconsistent with policies of federal mutiny statutes. Reversing the NLRB, the Supreme Court admonished that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942). The Graziano issue is not whether the Board may single-mindedly effectuate Taft-Hartley policies to the detriment of policies in other statutes, but whether the Board may look to policies in other statutes to find regulatory authority not otherwise available from the Taft-Hartley Act alone.

220. See supra notes 160-161 and accompanying text. See also Hartley, Framework, supra note 159, at 39-44.


222. Id. at 6,472. For a discussion of the role of union democracy in achieving the goals of the Taft-Hartley Act, see supra notes 166-177 and accompanying text.

223. H. WELLINGTON, LABOR AND THE LEGAL PROCESS, 147, 170-71 (1968). See also Hartley, Framework, supra note 159, at 120-23 (outlining the various ways the NLRB acts as "elaborator of congressional policy") (quoting H. WELLINGTON, supra, at 171).
be filled only by the Secretary of Labor or the federal courts. Indeed, the case for advancing labor policy through various adjudicatory institutions is particularly strong with respect to the LMRDA because under that Act, Congress explicitly retained existing rights and remedies under federal and state laws.224

Nor is it incongruous that the Taft-Hartley Act, committed to nonintervention in internal union affairs, should permit NLRB intrusion in Graziano-type cases which involve almost purely internal union affairs and touch the employer-employee relationship the least.225 Coherence is found by understanding that the LMRDA marked a turning point in congressional labor policy. For the first time, Congress clearly joined the values of industrial democracy and union democracy.226 The two section 8(b)(1)(A) abstention principles, the one that permeates all of section 8(b)(1)(A),227 and the other found in the section 8(b)(1)(A) proviso that explicitly limits NLRB authority to regulate expulsion, must now be read in the context of this shift in national labor policy.228 However, this shift in labor policy does not justify disregarding the abstention principles of section 8(b)(1)(A) in contexts other than those involving union disciplinary measures that threaten union democracy.

IV. MONITORING THE UNION OFFICER DIRECTION PROCESS

Closely related to the issue of whether Carpenters Local 22 (Graziano Construction Co.) correctly interprets section 8(b)(1)(A) when applied to discipline affecting membership rights, is the question of whether the Board may regulate union discipline of officers that affects their tenure in office. Here, the membership majority's right to insist that officers fulfill their electoral mandate

224. See LMRDA sections 102 and 603, 29 U.S.C. §§ 412, 523 (1988) (corresponds to 73 Stat. 523, 540 (1959)). To be sure, these sections of the LMRDA only preserve existing rights and remedies and do not define what they are. At a minimum, however, they demonstrate Congress' openness to institutions such as the Board participating in the development of union democracy values found in the LMRDA.
225. See supra notes 183-187 and accompanying text.
226. See supra notes 158-177 and accompanying text.
227. See supra notes 63-64 and accompanying text.
228. Arguably, even without the LMRDA, the Board would not exceed its authority by its reading section 8(b)(1)(A) as authorizing the promotion of democracy within labor unions, for the LMRDA merely recognized, and did not create, union democracy's key role in effectuating the goal of employee self-regulation. See supra notes 158-177 and accompanying text.
confronts the reality that subordinate officers may be in the best position to form rival factions and create an active political process within the union. These questions are on the cutting edge of the issue of the legitimacy of the Board's influence upon unions' internal political processes.

Union officials may be either elected or appointed. Some fill constitutional offices, such as president, business agent, secretary-treasurer, trustee, and safety committee member. Others provide the union with normal employee services, including secretarial, accounting, legal, and research services. An elected union office or appointed position may provide full-time employment. Most often, however, union officers and appointed officials have full-time outside jobs and only work part-time for the union. Frequently these officials receive minimal or no compensation, and sometimes compensation is limited to reimbursement for time their union job takes from their regular employment.

The question most frequently confronted by the Board in union officer discipline cases is: what duty of loyalty does a union officer or employee owe the membership majority and the incumbent union leadership? Stated differently, how much authority and discretion does union leadership have when disciplining union officers or employees for insubordination? Permeating these questions is still another: should the Board's rules regulating discipline differentiate between appointed and elected union officers?

It is well established that when a union takes on the role of an employer, the Taft-Hartley Act applies "just as it would to any other employer." Accordingly, a union may not, in the name of expectations of loyalty or otherwise, interfere with its employees' attempts to seek representation from another union. Similarly,

229. See Machinist v. King, 335 F.2d 340 (9th Cir. 1964), cert. denied, 379 U.S. 920 (1964).

230. For ease of reference, incumbents in all of these offices and positions will be referred to as union officers, although only those holding constitutional office are officers of the union.


232. See, e.g., Carpenters Local 925, 279 N.L.R.B. 1051, 1051 (1986) (violation of sections 8(a)(1) and (3) of Act for union to discharge secretary who sought representation by another labor organization); District #1, Marine Eng'rs Beneficial Ass'n, 259 N.L.R.B. 1258, 1269 (1982) (union violation of sections 8(a)(1) and (3) of Act to discharge legislative representative and management trainee for attempts to organize staff). But see Carpenters Local 925, 279 N.L.R.B. at 1051 (no violation of section 8(a)(1) for union to threaten a supervisor
union employees have the same rights as other employees to seek redress of grievances within the framework of their existing employer-employee relationship.\footnote{233}{See, e.g., Teamsters Local 574, 259 N.L.R.B. 344, 352 (1981) (newly elected union secretary-treasurer violated Act by discharging employee who had written union attorney seeking assurance that union employees' rights under their collective bargaining agreement would be honored by new administration); Hotel & Restaurant Employees Local 28, 252 N.L.R.B. 1124, 1124 (1980) (union acting as employer may not discharge business agent for filing sex discrimination complaint against union with state Fair Employment Practice Commission protesting discriminatory pay); Tri-State Carpenters Dist. Council, 250 N.L.R.B. 901 (1980), enforced, 661 F.2d 583 (6th Cir. 1981) (unlawful for union to discharge employee for pursuing, with the assistance of union representative, back wages awarded in previous arbitration proceeding); Louisiana Council 17, AFSCME, 250 N.L.R.B. 880, 889 (1980) (union violates sections 8(a)(1) and (3) of Act by threats and discharges of several employees who acted in concert to protest the firing of another employee of the union). But compare NLRB v. Truck Drivers' Local 705, 630 F.2d 505 (7th Cir. 1980) (union privileged to discharge two business representatives who ignored established procedures by raising pay dispute at stewards meeting and by distributing wage complaint letters to union's executive board at luncheon honoring city's mayor), cert. denied, 450 U.S. 1030 (1981) with Hotel & Restaurant Employees Local 28, 252 N.L.R.B. 1124, 1124 (1980) (union business agent engaged in protected activities by raising sex discrimination charge against union at monthly union membership meeting). It is also clear that an employer violates the Act when, because of intra-union political activities, it discharges a union officer in its employ. See Welfare and Pension Funds, 251 N.L.R.B. 1241, 1246 (1980) (welfare and pension fund, acting as employer, unlawfully discharged employee in retaliation for employee's decision to run for re-election as secretary-treasurer of union). Nor may a union induce such an employer to discriminate because of its employee's intra-union activities. See supra note 182. See also H.H. Robertson Co., 263 N.L.R.B. 1344, 1344 (1982) (unlawful for union to seek discharge of two employees because they were hired by member-supervisor who was officer of union and was locked in bitter political conflict with other union officers).\footnote{234}{See supra notes 183-206 and accompanying text.}\footnote{235}{Retail Clerks Local 770, 208 N.L.R.B. 356, 357 (1974) (union, as employer, does not violate section 8(a)(3) of the Act by discharging six union employees who supported losing candidate in intra-union election).} To date, the Board has resisted the invitation to dismantle the long-standing patronage systems found in most unions. However, the Board has exercised significant control over the selection criteria used to fill appointed union positions. Thus, with respect to removal, or other disciplinary action, taken against union officers or employees for engaging in internal union political activities, the Board has held that a union may take only such retaliatory action as does not affect membership rights.\footnote{234}{The union, however, may remove appointed union officers or employees for seeking to "effect a change in the top management of their Employer Union."\footnote{235}{See supra notes 183-206 and accompanying text.}} The union, however, may remove appointed union officers or employees for seeking to "effect a change in the top management of their Employer Union."\footnote{235}{See supra notes 183-206 and accompanying text.}
protected right to engage in activities designed solely for the purpose of influencing or producing changes in the management hierarchy. . . . An attempt . . . to influence the selection of their chief executive officer is not brought within the protection of the Act because the employer happens to be a union.236

The Board's endorsement of patronage among the appointed officialdom of the union conforms with LMRDA precedent. In Finnegan v. Leu, the Supreme Court held that the discharge of appointed union business agents by a union president, following his election over an incumbent for whom the business agents campaigned, did not violate the LMRDA's free speech protections.237 The Court reasoned that permitting the victorious candidate to appoint a staff with compatible views fosters "responsiveness to the mandate of the union election."238 Indeed a candidate's victory "might be rendered meaningless if a disloyal staff were able to thwart the implementation of his programs."239 In the Supreme Court's view, the patronage system advances the LMRDA's basic objective, which is "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections."240

The Board's steward appointment cases also permit union leadership to reward members for political loyalty. However, the


237. Finnegan v. Leu, 456 U.S. 431, 440-42 (1982). The Court explicitly reserved the question "whether a different result might obtain in a case involving non-policymaking and non-confidential employees." Id. at 441, n.11. Cf. Rutan v. Republican Party of Ill., 110 S.Ct. 2729, 2732 (1989) (political party affiliation may not be used as basis of promotion, transfer, recall, and hiring decisions of non-policymaking, non-confidential public sector employees). For a discussion of the protection granted to elected union officials by the LMRDA, see infra notes 276-278 and accompanying text.


239. Sheet Metal Workers v. Lynn, 488 U.S. 347, 354-55 (1989). The Court noted that "[w]hile such patronage-related discharges had some chilling effect on the free speech rights of the business agents, we found this concern outweighed by the need to vindicate the democratic choice made by the union electorate." Id. at 355.

use of patronage is limited by the Board's regulation of selection criteria for appointed positions other than job steward. The Board has concluded that in order to achieve job efficiency, "a union may consider loyalty in choosing individuals for policy-making, steward-type positions." In *Shenango Inc.*, a union removed a safety committee chairman from his position for supporting an opposition candidate in the international union's presidential election. In finding the removal lawful, the Board reasoned that the union's right to use political loyalty as a selection criterion arises from its legitimate interest in filling its appointive offices with those who can most effectively serve the union and the membership. "Retention of a plant safety committee chairman who is hostile to or in disagreement with the leadership may be undesirable or ineffective for a host of valid reasons." The Board acknowledged that political patronage can be used to retaliate against members who engage in protected activities but held that "[t]he union is legitimately entitled to hostility or displeasure toward dissidence in such positions where teamwork, loyalty, and cooperation are necessary to enable the union to administer the contract and carry out its side of the relationship with the employer."

The steward appointment cases underscore the unions' right to self-governance, while simultaneously implying that the Board may have the authority to restrict its exercise. The Board's decisions allow unions to consider political loyalty when filling an appointed position, if the fulfillment of the position's responsibilities requires teamwork, loyalty and cooperation. However, under the

243. Id. The Board did not explain the "host of valid reasons," or otherwise explain why retention of a plant safety committee chair's disagreement with the local leadership regarding the best choice for international union president would be "undesirable" or make job performance "ineffective." The Board also did not cite record evidence supporting these dire effects.
245. See Kudla v. NLRB, 821 F.2d 95, 100 n.1 (2d Cir. 1987) (need for political loyalty is presumed for policy-making steward-type jobs as at least a selection criterion for placing a steward on a job when a project first begins). *But cf.* Paintsmiths, Inc. v. NLRB, 620 F.2d
Shenango test a union may not consider political loyalty as a selection criterion for those appointed positions the Board finds do not require “teamwork, loyalty and cooperation.” The Board also can prohibit a union from using political loyalty as a selection criterion in a particular case, if it can be shown to have been applied arbitrarily. 246 In short, the Board has not completely abstained from regulating the processes by which unions select their appointed officers. Although the Board has granted the unions complete autonomy in establishing selection criteria for politically sensitive appointive union offices, it has impliedly reserved the authority to regulate the criterion used to fill positions which do not require political loyalty to union leadership.

Other than the steward appointment cases, and cases involving efforts by union employees to oust the incumbent union leadership, 247 the NLRB has refused to distinguish between disciplinary action that affects an officer’s rights as a member (i.e., eligibility to vote, attend union meetings, and run for office) and that which only affects the officer as an officer (i.e., removal from office). For example, a union may expel a member for filing a decertification petition with the NLRB; 248 so also, a union may remove and bar from office an officer who files such a petition. A union may not expel a member for filing an unfair labor practice charge with the NLRB; 249 nor may a union remove a union officer, appointed 250 or

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246. See Kudla v. NLRB, 821 F.2d 95, 101-02 (2d Cir. 1987) (rejected candidate for job steward has right to information regarding how union has made previous appointments of job stewards to determine “whether the loyalty standard was applied evenly or was merely a pretext for preferential treatment of individuals favored by incumbent officials”).


248. See supra notes 91-95 and accompanying text.


250. See supra notes 65-75 and accompanying text.

251. See, e.g., Toledo World Terminals, Inc., 289 N.L.R.B. No. 89, 12, 130 L.R.R.M. (BNA) 1503, 1508 (unlawful for union to remove appointed dock steward from position for disloyalty in filing unfair labor practice charge against union); National Post Office Mail Handlers Local 308, 281 N.L.R.B. 1074, 1074 n.2 (1986) (“internal union considerations . . . cannot prevail in the face of the overriding public interest in unimpeded access to the Board . . . ”); Local 212, UAW, 257 N.L.R.B. 637, 637 (1981) (removal of chair of fair employment practices committee for filing unfair labor practice charge against union unlawful even
The Board's policy of denying the union constituency the right to prevent its officers from filing Board charges, against either the union or an employer, has generated considerable criticism. One of the first to do so was NLRB Member Brown in his dissent in *Meat Cutters Local 590.*253 There, an elected job steward filed Board charges that arose out of an intra-union dispute over the proper policy for resolving a grievance against an employer. The union removed the steward from his position but did not affect his membership rights. Finding no violation of the Act, Member Brown argued that the Board must look "through the charge to the underlying nature of [the] dispute."254 "All that is involved is a disagreement between a shop steward and his superiors in the Union on the handling of a grievance."255 Stated differently, "it is 'plainly internal affairs of the union [that] are involved,' and there is here no 'overriding public interest' in opening up Board processes to resolve this purely internal Union matter."256

Board Member Fanning protested against the same policy in a case involving the discharge of two union employee-members for protesting the union's business practices by filing a formal complaint with the Department of Labor. In *Carpenters Local 35,* he argued that as members of the union, those filing charges against the union were entitled to the protection of their membership rights.257 As employees, however, they had no greater right than other employees to engage in conduct detrimental to their em-

though removal did not affect person's employment status or cause him to suffer any loss of seniority, money, or union membership), enforced 690 F.2d 82, 85 (6th Cir. 1982) (immaterial that removal does not affect employment status, seniority, etc.; it chills others who might wish to file unfair labor practice charges against the union). But see NLRB v. Boilermakers, 581 F.2d 473, 474 (5th Cir. 1978) (union may remove steward who failed to pursue grievance through grievance procedure and instead filed unfair labor practice charge against employer on behalf of grievant); General Am. Transp. Co., 227 N.L.R.B. 1695 (1977).

252. See, e.g., Meat Cutters Local 590, 181 N.L.R.B. 773, 776 (1970) (unlawful to remove elected union officer from position because officer filed unfair labor practice charge against union); Longshoremen's Local 1387, 148 N.L.R.B. 897, 916 (1964) (unlawful to place local in trusteeship and remove elected officers for filing duty of fair representation charges with NLRB).


254. Id. at 773 (Member Brown dissenting).

255. Id. (Member Brown dissenting).

256. Id. n.4 (Member Brown dissenting) (citing NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418, 424 (1967)).

ployer’s business. The Act, he argued, does not protect “actions whose target is [the union’s] business practices . . . .”258 A union’s right to manage its business must include the “right to manage its own business affairs without interference from employees who are also members.”259

The courts also have criticized the Board’s approach. In NLRB v. Boilermakers, an appointed union steward was removed from his position for filing unfair labor practice charges against the employer without first exhausting the contractual grievance procedure as required by both the union contract and the union’s senior leadership.260 The Board ruled that his removal violated the Act. The court of appeals refused to enforce the Board’s ruling, reasoning that “upon assuming union office, [the steward] undertook duties also to carry out and further union policies and to help assure its success as a collective bargaining agent.”261 Concluding that its credibility as a bargaining agent would be furthered by adherence to contractual commitments, the union “could reasonably expect its representatives’ loyalty and support in pursuit of that policy. [The steward’s] discharge for defiance of the leadership reflected the legitimate internal concerns of any functioning enterprise.”262

The Fifth Circuit Court of Appeals was extremely critical of the same policy when it reviewed an NLRB decision in which the Board denied a union the right to remove an elected union officer who had filed an unauthorized unfair labor practice charge in the union’s name. In International Association of Iron Workers, the Board held that neither “alleged fraudulent misrepresentations nor any other asserted internal union considerations raised by the [union] can prevail in the face of ‘the overriding public interest’ in ‘unimpeded access to the Board.’”263 The Board reasoned that

258. Id. at 799 (Member Fanning dissenting).
259. Id. at 799 n.23 (Member Fanning dissenting).
260. NLRB v. Boilermakers, 581 F.2d 473 (5th Cir. 1978) (union may remove appointed steward who failed to pursue grievance through grievance procedure and instead filed unfair labor practice charge against employer on behalf of grievant), rev’g International Bhd. of Boilermakers, 227 N.L.R.B. 1695 (1977).
261. NLRB v. Boilermakers, 581 F.2d 473, 477 (5th Cir. 1978).
262. Id. The majority also cited LMRDA free speech cases upholding a union’s right to discipline officers for insubordination. Id. The dissent argued: 1) that any restraint on Board access violates the Act, and 2) the LMRDA is distinguishable because it is designed to protect free speech and the Taft-Hartley Act is designed to guarantee Board access. Id. at 479-81 (Vance, J., dissenting).
"'any effort to equate the institutional interests of a union with the statutory rights of employees is inappropriate.'"\(^{264}\) This holding is quite remarkable when viewed in light of the Board's historical practice of balancing individual employee interests and union institutional interests in union discipline cases.\(^{265}\)

The court of appeals was incredulous:

We . . . note that the Board's assertion that unions may not regulate even wholly internal affairs, if such regulation in any way interferes with Board access, blatantly contravenes the well-established internal-union-affairs exception established by Marine & Shipbuilding Workers. We cannot help but read much of the original decision as a conscious attempt by the Board to expand its jurisdiction and power in disregard of obvious circumscribing authority.\(^{266}\)

Apart from whether the Board's decision in Iron Workers was mere power aggrandizement, it is unjustified for the Board to refuse to accord unions sufficient autonomy to remove officers whose insubordination harms the unions' legitimate interests. Outside the context of Board access cases, the NLRB has recognized that unions have a legitimate interest in directing their officers and preventing insubordination.\(^{267}\) Indeed, the Board permits unions to

(quoted NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418, 424 (1967)).

264. International Ass'n of Iron Workers, 277 N.L.R.B. 1071, 1072 n.3 (1985) (citing Machinists Local 1414, 270 N.L.R.B. 1330, 1334 (1984)) (emphasis in original). In a supplemental opinion the Board reaffirmed its original holding. Without abandoning its no-balance ideology, it argued in the alternative that even if some balancing is appropriate, unimpeded Board access "is rarely outweighed by a union's institutional interests." 285 N.L.R.B. 770, 772 (1987).

265. See, e.g., supra notes 147-150 and accompanying text.

266. NLRB v. Iron Workers, 864 F.2d 1225, 1230 (5th Cir. 1989). The court, nevertheless, enforced the Board's order, agreeing with the Board's supplemental decision, see supra note 264, that, on balance, the union's institutional interests in this instance were insufficient to justify the officer's removal. Id. at 1232-35. The court noted: 1) that the record was ambiguous regarding whether authorization was required as a condition of filing an unfair labor practice in the union's name, 2) that the officer was disciplined before the union investigated whether the officer had received authorization to file the Board charge, 3) that the removed officer was not a full-time paid employee of the union who would owe a higher duty of loyalty than an unpaid elected officer, and 4) that removing the officer and fining him was excessive—removal alone would be sufficient to vindicate the union's legitimate interest in enforcing the officer's duty of loyalty as an officer. Id. at 1231-35.

For a discussion of the Supreme Court's "plainly internal affairs of the union" exception to the prohibition against impeding Board access, see supra notes 72-73 and accompanying text.

267. For example, as may any employer, a union may discipline an officer-employee for dereliction of duty. See Retail Clerks Local 770, 208 N.L.R.B. 356 (1974). Unions also have
remove officers who, in an official capacity and without authorization, contact governmental agencies other than the NLRB. The Board affords the unions this degree of autonomy even though it generally takes the position that the Act prohibits any union action that impedes access to governmental agencies.

Certainly, if a legitimate union policy prohibits its agents from filing unauthorized charges or complaints in the union's name, there can be little justification for depriving the union of the right to remove the insubordinate officer. The union has a legitimate interest in choosing the causes with which it wishes to be associated. Anyone may file a charge or complaint with agencies such as the NLRB, the Department of Labor, or the Equal Employment Opportunity Commission. Therefore, no overriding public interest is frustrated by a union rule that prohibits its agents from misrepresenting the right to protect themselves from officer-employees' insubordination, even insubordination touching rights protected by section 7 of the Act. See Marine & Shipbuilding Workers, 277 N.L.R.B. 1548, 1567 (1986) (lawful to discipline local union executive secretary refusing to join international in repudiating collective bargaining agreement which union had right to repudiate); Industrial Workers Region 8, 265 N.L.R.B. 566 (1982) (appointed international union employee interfered with internal affairs of locals to which he was not assigned and contrary to union policy). See also NLRB v. Truck Drivers Local 705, 630 F.2d 505, 508 (7th Cir. 1980) (union privileged to discharge two appointed business agents who sought wage increase by ignoring established procedures by raising wage complaints at stewards' meeting, and potentially embarrassing union by distributing wage complaint leaflet at a luncheon honoring the city's mayor: "[The] right to petition for wage increases must nonetheless be balanced against the employer's right to expect a basic loyalty on the part of employees in the performance of their assigned duties.").

There are, however, limits on the right to discipline officers for insubordination. See, e.g., Sheet Metal Workers Local 204, 246 N.L.R.B. 318 (1979) (union violated Act by removing chief steward who provided NLRB affidavit without presence of union lawyer contrary to instructions of union president: union has legitimate interest in requiring assistance of counsel but removal of chief steward for advising member to file unfair labor practice against union alleging denial of fair representation arising out of grievance handling is violation of the Act).

268. See Newspaper Guild Local 26, 265 N.L.R.B. 382, 400 (1982) (no violation of Act for union to expel grievance committee chair for filing, in his official capacity and without proper authorization, charges against employer with Equal Employment Opportunity Commission where union had promulgated rule requiring such charges be filed with union's approval after consultation with legal counsel and where officer had reason to know that charge would disrupt union's attempt to settle certain grievances).

269. See, e.g., Carpenters Local 35, 264 N.L.R.B. 795 (1982) (unlawful to discharge two union employees for going to the Department of Labor to protest union election and financial irregularities), enforced, 739 F.2d 479 (9th Cir. 1984); Hotel Employees Local 28, 252 N.L.R.B. 1124 (1980) (unlawful reprisal against union business agent for filing charge with state FEP commission to protest her own conditions of employment); Teamsters Local 528, 237 N.L.R.B. 258 (1978) (unlawful to refuse to reappoint member as job steward because member filed charges against union with the Equal Employment Opportunity Commission).
senting the union's association with a particular charge or complaint. The public's interest would be better served by discouraging union agents from misrepresenting the real parties in interest to government agencies.

Sometimes it is necessary for a union to have the ability to remove a complaining officer even though the officer has filed a charge or complaint with a government agency in his or her own name. The Board should recognize several circumstances under which removal of the complaining officer may be justified. First, as the court reasoned in Boilermakers, a union should be able to remove an officer who files an unfair labor practice charge against an employer, or files a charge against the employer with any other government agency, when such a charge compromises the union’s credibility as a collective bargaining agent, or otherwise undermines the union's capacity to bargain effectively. The assumption of union office brings with it a commitment “to carry out and further union policies and to help assure its success as a collective bargaining agent.” Accordingly, the union can “reasonably expect its representatives’ loyalty and support in pursuit of [bargaining policies],” and, therefore, discharge those employees who fail to meet such expectations.

Second, as the Supreme Court stated in Marine & Shipbuilding Workers, when a union removes a union officer for filing a Board charge against the union, removal may be justified only when the “plainly internal affairs of the union” are involved. If the issue raised by an officer’s filing an unfair labor practice charge against the union involves a statutory policy that is not “far beyond internal union interests” and the union’s internal appeal process is sufficient to effect an adequate remedy, then there is no “overriding” labor policy that justifies a prohibition of discipline. Yet, the Board proceeds as if Marine & Shipbuilding

271. Id. at 477.
272. Id. It would not be remarkable for the Board to find conduct undermining the union's bargaining status as unprotected by the Act for that principle underlies the doctrine that wildcat strikes are unprotected by the Act. See Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975); BARTOSIC & HARTLEY, supra note 119 at 208-10.
273. See supra notes 72-73 and accompanying text.
275. See supra note 78 and accompanying text. Meat Cutters Local 590, 181 N.L.R.B.
Workers contained no language limiting NLRB authority.

Finally, the NLRB should differentiate between the discipline of appointed union officers and the discipline of elected union officers. The basis for this distinction arises from closely related LMRDA precedent. In Finnegan, the Supreme Court ruled that the LMRDA "does not restrict the freedom of an elected union leader to choose [an appointed] staff whose views are compatible with his own." Sheet Metal Workers v. Lynn distinguished the Finnegan decision. Finnegan involved removal of an elected union official who had protested a dues increase that senior union officials supported. The Court held that such a removal violated the free speech guarantees of the LMRDA by undermining its basic purpose, ensuring that union leaders remain responsive to their membership. Removal of elected union officials deprives members of the representative of their choice. It denies them their chosen representative's leadership, knowledge, and advice, and it chills the free speech of those who voted for the removed officer.

The NLRB has argued that the implications of LMRDA need not be considered in officer discipline cases. It might be appropriate to disregard Finnegan when a union, in the capacity of employer, is charged with violating employees' rights to self-organization. An appointed union employee should enjoy the same Taft-Hartley Act protections enjoyed by those who work for any other employer. When, however, NLRB regulatory authority rests on the Board's invocation of LMRDA labor policies, the Board should not be able to pick which LMRDA policies it chooses to protect.

773 (1970), may have been such a case (as Member Brown argued in his dissent). See supra notes 253-256 and accompanying text. There, a union removed a union steward for filing a duty of fair representation unfair labor practice charge against the union. The dispute was rooted in an internal union quarrel among officer groups regarding proper grievance handling strategy. But cf. Clayton v. UAW, 451 U.S. 679, 688 (1981) (a duty of fair representation case "raises issues rooted in statutory policies extending far beyond internal union interests").

278. Id. at 354-55.
279. See, e.g., NLRB v. Carpenters Local 35, 739 F.2d 479 (9th Cir. 1984) (NLRB correct that LMRDA protects member rights and is not a limit on Taft-Hartley Act restrictions on union's actions against its employees as employees); NLRB v. Local 212, UAW, 690 F.2d 82 (6th Cir. 1982) (Finnegan limited to retaliation for election activities).
280. See supra notes 232-233 and accompanying text. See also Teamsters Local 420, 257 N.L.R.B. 1306 (1981) (union acting as employer violates section 8(a)(4) by discharging employee who provided NLRB affidavit relating to Board charges filed against union).
This is particularly important when the Board's authority to act rests solely upon its protection of rights found in the LMRDA. One example of this occurs when the Board acts to protect the right of an appointed union officer (who is not an employee of the union) to engage in internal union political activities. The Board's ruling should not be premised upon its power to regulate the discipline of officers whose appointed positions require cooperation and loyalty. Rather, its rulings should be premised upon whether the position falls within the scope of *Finnegan*. Conversely, when a union removes an elected union officer, who is not an employee of the union, for engaging in internal union political activities, the Board's regulatory authority is dependent on its power to protect the national labor policies embedded in the LMRDA. Therefore, the Board's decisions in such cases should be guided by *Lynn*, and a distinction should be made between the removal of an elected officer and the removal of an appointed officer.

**Conclusion**

The NLRB continually claims noninterference in internal union affairs and this claim has become too soothing a shibboleth to be excised from its discourse. Nevertheless, it is important that the NLRB and the public understand the myth of nonintervention. Through control of union disciplinary processes, the Board regulates important aspects of internal union governance—such as member selection and direction of both appointed and elected union representatives. The NLRB has a direct impact upon internal union affairs in many other ways as well.

Some may be neither surprised nor alarmed to discover a government agency hiding behind rhetorical cover. If the Board's protestations of nonintervention shield or deflect its actions from

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282. See supra notes 241-244 and accompanying text.
283. See supra notes 277-278 and accompanying text.
284. See supra note 7.
285. It could be argued that finding cover behind rhetorical boulders falls within a grand tradition of American jurisprudence. The Supreme Court's standing doctrines provide an example. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (three requirements for standing are direct injury, traceability, and redressability); Warth v. Seldin, 422 U.S. 490, 499 (1975) ("generalized grievance" not sufficient to meet injury requirement of standing); Flast v. Cohen, 392 U.S. 83, 102 (1968) (taxpayer does not raise a "generalized grievance" if "there is a logical nexus between the status asserted and the claim sought to be adjudicated").
scrutiny, an important check on the Board's authority is lost. Much of the Board's rhetoric of nonintervention in internal union affairs cannot survive scrutiny. The Board prohibits unions from disciplining members for filing unfair labor practices without first exhausting internal union remedies. These Board decisions read as if the Supreme Court had never rejected the NLRB's assertion of such broad regulatory authority in *NLRB v. Marine & Shipbuilding Workers* by limiting the Board's power to prohibit such discipline where it could be shown that more than "plainly internal affairs of the union [were] involved."\(^{286}\) Moreover, the Board reads much of the dicta in *Scofield v. NLRB* as if the Supreme Court had never retreated from it in *NLRB v. Boeing Co.* and subsequent cases. The implications of the post-*Scofield* cases need to be acknowledged and integrated within the Board's approach to union discipline cases.

The Board, in most opinions, draws no distinction between expulsion and other forms of union discipline. This violates the plain language of the proviso to section 8(b)(1)(A), and ignores both the legislative history of the section and Supreme Court precedent. By regulating expulsion, the Board becomes the final arbiter of whom the majority may exclude from governance. In the Board's cases, the possible impact of this regulatory authority is neither discussed nor even acknowledged.

A considerable amount of the Board's union discipline regulation effectively denies unions the economic weapons necessary to labor-management struggles. The Board has no authority to pursue its own notions of balanced labor relations by supplementing the statutory restrictions Congress placed on union activity. Reviewing courts must check the NLRB's continued usurpation of regulatory authority.

The Board appropriately considers LMRDA policies in its union discipline cases, but does so selectively. *Finnegan v. Leu* and *Sheet Metal Workers v. Lynn* articulate foundation LMRDA policies, as does *Steelworkers v. Sadlowski*. Yet, in the Board's decisions that rest solely on its authority to protect LMRDA policies, it scrupulously avoids any reference to many of the fundamental LMRDA principles contained in these cases. Instead, it focusses narrowly on the LMRDA policies that support the Board's asser-

\(^{286}\) *NLRB v. Industrial Union of Marine Workers*, 391 U.S. 418, 424 (1968).
tion of regulatory authority. Indeed, one would hardly know a reasonable rules proviso exists in the LMRDA after reading the Board’s union officer insubordination cases. The Board proceeds as if Finnegan and Lynn did not exist when it decides cases arising out of union officer insubordination, protected by the free speech guarantees of LMRDA. Yet these cases limit the Board’s regulatory authority in all circumstances except those in which the union is being charged as an employer. If the Board continues to premise extension of its regulatory authority upon the protection of LMRDA policies, it should consider all LMRDA policies, including those that restrain the government, not just those that expand the government’s regulatory authority.

In short, many NLRB union discipline cases frustrate a basic tenet of national labor policy. Governmental regulation should not impinge upon the ability of unions to govern themselves, reduce their effectiveness as collective bargaining agents, or by licensing unions, destroy union independence. Over fifty years have passed since the Supreme Court chided the Board for attempting to expand its authority by regulating internal union affairs through administrative amendment of the Act. Nonetheless, the Board continues to go its own way, its actions often escaping scrutiny because of excessive judicial deference. Only occasionally do the Board’s decisions generate rebuke for clearly ignoring the “internal-union-affairs” exception enunciated in Marine & Shipbuilding Workers, and disregarding the limits of its jurisdiction.

In 1987, Justice Scalia’s frustration with the Board’s intransigence was voiced in a ringing indictment of the Board’s analytical approach to section 8(b)(1)(B) of the Act:

The Board’s approach is the product of a familiar phenomenon. Once having succeeded, by benefit of excessive judicial deference, in expanding the scope of a statute beyond a reasonable interpretation of its language, the emboldened agency presses the rationale of that expansion to the limits of its logic. . . . [Eventually,] there comes a point at which a later

289. NLRB v. Iron Workers, 864 F.2d 1225, 1230 (5th Cir. 1989).
290. Id. See supra notes 23-27 and accompanying text.
incremental step, again rational in itself, leads to a result so far removed from the statute that obedience to text must overcome fidelity to logic.\textsuperscript{291}

This criticism is equally applicable to the Board's interpretation of section 8(b)(1)(A). The NLRB's section 8(b)(1)(A) union discipline cases clearly represent an unwarranted divergence from the statute's plain language.

The concept of voluntary unionism was firmly established by the decisions in \textit{Pattern Makers' League v. NLRB} and \textit{Communicaton Workers v. Beck}. Following that achievement, the next step is a recommitment to the right of union members, who have voluntarily accepted the obligations of membership, to govern their own institutions. Such an action would reconfirm this country's dedication to two of its basic national labor policies: respect for individual rights, and the collective right of the membership majority to participate in self-governing unions free from government regulation.
