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## **Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future**

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**WORKER UNITY AND THE LAW: A  
COMPARATIVE ANALYSIS OF THE NATIONAL  
LABOR RELATIONS ACT AND THE FAIR  
LABOR STANDARDS ACT, AND THE  
HOPE FOR THE NLRA'S FUTURE**

*Jonathan Fox Harris\**

INTRODUCTION

The National Labor Relations Act (“NLRA”)<sup>1</sup> and the Fair Labor Standards Act (“FLSA”)<sup>2</sup> were passed in the same era—1935 and 1938, respectively—and both were intended to help the economy and workers recover from the devastation of the Great Depression. The Acts were viewed as significant governmental interventions into the employer–employee relationship. With the NLRA, Congress took a dramatic pro-worker stance, asserting that supporting workers’ collective bargaining rights would balance the power dynamics in the employment relationship and help to prevent labor disputes.<sup>3</sup> On the other hand, in passing the FLSA, Congress did not state support for collective action; rather, its intention was to force employers to compensate workers for individual violations in wage and hour provisions to ensure workers earned enough to reinvest in the economy and boost the nation out of the

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<sup>1</sup> National Labor Relations Act (NLRA), Pub. L. No. 74–198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)). For ease of reference, each citation to the NLRA includes the relevant NLRA section as well as the corresponding U.S. Code section.

<sup>2</sup> Fair Labor Standards Act (FLSA), Pub. L. No. 74–718, 52 Stat. 1067 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2006)). For ease of reference, each citation to the FLSA includes the relevant FLSA section as well as the corresponding U.S. Code section.

<sup>3</sup> NLRA § 1, 29 U.S.C. § 151 (2006) (“Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, . . . and by restoring equality of bargaining power between employers and employees.”); see also Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2686 (2008) (“Congress intended the law to facilitate worker organizing and collective action—declaring it to be the ‘policy of the United States’ to protect ‘full freedom of association [and] self-organization’ among workers”).

Great Depression.<sup>4</sup> The FLSA does not provide support for collective activity as a means of equalizing power relations in the employment relationship.<sup>5</sup>

Over the years, the NLRA's ability to support collective action by workers, and thus to modify the power imbalance in the workplace, has been diminished both legislatively, through the Taft–Hartley amendments,<sup>6</sup> and through case law. Courts and the National Labor Relations Board (“NLRB” or “Board”), the administrative agency set up to adjudicate claims brought under the NLRA, have restricted the classes of employees protected by and eligible for remedies and collective representation under the NLRA, as well as the classes of employers and associated entities held liable for NLRA violations and susceptible to union pressure tactics. Practically speaking, these limitations have greatly reduced workers' ability to organize collectively for improved conditions, workplace power, and respect and dignity on the job. In contrast, Congress has passed few legislative limitations to the scope of the FLSA, and the courts have generally expanded—not limited—the FLSA's application over the years. But despite its gradual watering down and the courts' and NLRB's partial perversion of Congress's stated goals, the NLRA remains a statutory regime supporting workers' collective action, and recent court and NLRB decisions as well as pro-worker appointments to the NLRB<sup>7</sup> suggest that the NLRA has not lost all its muscle.

This Note posits that Congress, the courts, and the NLRB have limited the original power of the NLRA because of concerns that the NLRA disrupts fundamental power dynamics in the market economy by allowing workers to collectively take control away from

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<sup>4</sup> FLSA § 2, 29 U.S.C. § 202 (2006) (“The Congress hereby finds that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . [is] burdening commerce and the free flow of goods in commerce”).

<sup>5</sup> The FLSA does allow for collective action suits, but they rarely support worker organizing because the process is heavily dominated by lawyers and judges. Additionally, such suits are difficult to initiate because of the presumption that potential class members are not a part of the suit unless they affirmatively opt in. 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).

<sup>6</sup> Labor Management Relations Act, 1947 (Taft–Hartley Act), Pub. L. 80–101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–197 (2006)).

<sup>7</sup> President Obama appointed two new Democratic NLRB members, which creates a Democratic majority on the Board. Steven Greenhouse, *Deadlock is Ending on Labor Board*, N.Y. TIMES, Apr. 1, 2010, at B1.

the business class.<sup>8</sup> On the other hand, business interests and the wealthy, long dominant in Congress and significantly represented in the federal judiciary,<sup>9</sup> have not viewed the FLSA as equally threatening because the FLSA does not seek to modify the power imbalances in the workplace. Therefore, Congress has left the FLSA relatively intact, even expanding its worker protections, and courts have interpreted FLSA protections relatively liberally when compared with their treatment of the NLRA.

This Note begins by reviewing the legislative and social histories of both Acts as well as subsequent modifications to the Acts. It also contrasts interpretations of the NLRA and the FLSA in litigation, revealing how the NLRA has generally been reduced in its application and has even been used to divide workers, while the FLSA and its individual rights regime have been comparatively expanded in application. Specifically, this Note examines the courts' and the NLRB's denials of NLRA remedies and collective organizing rights to many undocumented workers<sup>10</sup> and temporary workers<sup>11</sup> and of reducing the categories of employers and associated entities<sup>12</sup> liable for NLRA violations and subject to union pressure.<sup>13</sup> Meanwhile, courts approve FLSA remedies regardless of immigration status and have expanded the application of the joint employer doctrine, ensuring that even indirect employers are held

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<sup>8</sup> The terms "business class" and "business interest" are used interchangeably with the term "employer." While not all employers completely represent the interests of the business class, enough do to allow for such a generalization for the purposes of this Note. A detailed analysis of this dichotomy is beyond this Note's scope.

<sup>9</sup> See Ellen J. Dannin, *University of San Francisco Law Review 2009 Symposium: The Evolving Definition of the Immigrant Worker: The Intersection Among Employment, Labor, and Human Rights Law*, 44 U.S.F. L. REV. (forthcoming Fall 2009) ("employee acts of union support, employee mutual aid or protection, and other concerted actions are unlikely to be seen by employers or courts as positive characteristics in employees; rather, employers and courts are more likely to see them as disloyal and making an employee unfit for employment."); see also Posting to Free Republic blog, <http://www.freerepublic.com/focus/f-news/1736536/posts> (Nov. 10, 2006, 17:24 EST) (showing net worth of surveyed congresspeople ranging from \$12 million to \$234 million); Scott Baker, *Should We Pay Federal Circuit Judges More?*, 88 B.U. L. REV. 63 (2008) (analyzing wealth of federal judges).

<sup>10</sup> See *infra* notes 55–71 and accompanying text.

<sup>11</sup> See *infra* notes 72–78 and accompanying text.

<sup>12</sup> In particular, courts and the NLRB have failed to recognize NLRA-imposed employer liability under the joint employer doctrine, and have failed to allow unions to pressure employer-associated entities under the ally doctrine. See discussion *infra* Part B.

<sup>13</sup> Courts and the NLRB have also restricted NLRA remedies for workers in other areas. For example, the NLRB has drastically expanded the possible work duties that would make a worker a "supervisory" employee and thus ineligible for union representation. See *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006).

liable for FLSA violations.<sup>14</sup> A growing chorus of worker-friendly scholars and labor leaders, including AFL–CIO President Richard Trumka, have advocated for the scrapping the NLRA and the NLRB<sup>15</sup> because of the NLRA’s perceived inability to assist workers organize and because of the courts’ and the NLRB’s willingness to use the NLRA to harm worker collective action. This Note concludes with an argument that, despite these calls, recent case law, the potentially pro-worker composition of an Obama NLRB, and Congress’s consideration of the Employee Free Choice Act (a pro-labor revision to the NLRA)<sup>16</sup> all demonstrate that important worker victories are still possible under the NLRA. Therefore the NLRA and the NLRB should be preserved. Ideally, this Note will assist creative advocates in identifying the windows of opportunity that still exist in the NLRA, which, if litigated, can unleash the power of the NLRA for workers’ collective interests.

### I. HISTORY AND SUBSEQUENT MODIFICATIONS OF NLRA

When Congress passed the NLRA in 1935, it intended to affirmatively alter the power disparities between workers and employers to promote the free flow of commerce.<sup>17</sup> It sought to do this by legalizing and encouraging workers to have collective associations—just as employers had organized for years—to increase their bargaining power.<sup>18</sup> Thus, the NLRA states:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and

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<sup>14</sup> See, e.g., *Ling Nan Zheng v. Liberty Apparel Co.*, No. 99 Civ. 9033 (RJS), 2009 WL 1383488 (S.D.N.Y. May 18, 2009) (granting motion for liquidated damages based on jury finding that manufacturer of garments produced by workers of contractor liable for FLSA violations as a joint employer); see also *Ling Nan Zheng v. Liberty Apparel Co.*, 556 F.Supp. 2d 284 (S.D.N.Y. 2008) (applying six joint employer factors to deny defendant garment manufacturer’s summary judgment motion); *Lopez v. Silverman*, 14 F.Supp. 2d 405 (S.D.N.Y. 1998) (applying a set of wide ranging factors to find garment jobber was a joint employer of contractor’s employees) .

<sup>15</sup> See, e.g., comments of AFL–CIO President Richard Trumka, *infra* text accompanying note 151.

<sup>16</sup> Employee Free Choice Act of 2009, H.R. 1409, S. 560, 111th Cong. (2009); see also American Rights at Work, <http://www.americanrightsatwork.org/employee-free-choice-act/> (last visited Mar. 16, 2010).

<sup>17</sup> NLRA § 1, 29 U.S.C. § 151 (2006).

<sup>18</sup> *Id.* (“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . by depressing wage rates.”).

designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>19</sup>

Congress intended the NLRA and the NLRB to trump other federal statutes that operate in the area of labor relations and stated that the NLRA was to be “‘paramount over other laws that might touch upon similar subject matters’ in order to ‘dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining.’”<sup>20</sup>

As legal scholar Jennifer Gordon observes, “decades of union activism . . . set the stage for the negotiation of the rights enshrined in the National Labor Relations Act.”<sup>21</sup> The drafters of the NLRA recognized that workers gain power through collective action—individual worker action is insufficient to fulfill the NLRA’s goal of altering the power imbalances at the workplace.<sup>22</sup> Therefore, the core protections that the NLRA conveys to workers are the right to collectively organize to demand better terms and conditions of employment and the right to engage in mutual aid and support.<sup>23</sup> Some of the defining features of the NLRA include the identification of a recognized union as the workers’ exclusive bargaining representative,<sup>24</sup> protections from discharge or other disciplinary actions for workers attempting to form a union or to otherwise act concertedly regarding the terms and conditions of employment,<sup>25</sup> and protections from employer discrimination for union activity.<sup>26</sup> When originally enacted, the NLRA prohibited only employers, not workers’ representatives, from engaging in certain specified “unfair labor practices.”<sup>27</sup> Additionally, the NLRA originally allowed “closed shops,” workplaces where union membership was re-

<sup>19</sup> *Id.*

<sup>20</sup> See Sachs, *supra* note 3, at 2685 n.1 (quoting S. REP. NO. 573, at 15 (1935), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 2315 (1949)).

<sup>21</sup> JENNIFER GORDON, SUBURBAN SWEATSHOPS 166 (2005).

<sup>22</sup> See generally S. REP. NO. 573 (1935), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 2315 (1949).

<sup>23</sup> NLRA § 7, 29 U.S.C. § 157 (2006).

<sup>24</sup> NLRA § 9, 29 U.S.C. § 159 (2006).

<sup>25</sup> NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (2006).

<sup>26</sup> NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (2006).

<sup>27</sup> NLRA § 8(a)(1)–(5), 29 U.S.C. § 158(a)(1)–(5) (2006). Congress later prohibited workers’ representatives from committing certain unfair labor practices. See *infra* text accompanying note 38.

quired in order to get a job,<sup>28</sup> and did not prohibit secondary boycotts against “neutral” third parties. The NLRA was viewed by many as a nod to the increasing political power of organized workers, and a concrete step towards the balancing of workplace strength between employers and workers, or at least white workers.<sup>29</sup> “The NLRA embodies rights that our forebears worked and struggled for over many decades,”<sup>30</sup> points out labor law professor Ellen J. Dannin, and “the NLRA [expresses] values of democracy, solidarity, social and economic justice, fairness, and equality.”<sup>31</sup> Indeed, the NLRA was seen as a monumental and sweeping act that would establish the rules for an industrial democracy.<sup>32</sup>

This, of course, is not to say that the NLRA sailed through Congress without a fight. Business-friendly congresspeople proposed numerous failed amendments to the NLRA,<sup>33</sup> but were able to exclude agricultural workers and domestic workers from the definition of “employee”<sup>34</sup> on the argument that these workers were too few in number in a single workplace to need collective representation, and were too insignificant to affect interstate commerce.<sup>35</sup> These categorical exclusions laid the groundwork for Congress’s, the courts’, and the Board’s later additions to the list of workers unable to enjoy statutory protections when attempting to act collectively for improved workplace conditions.

The business class did not lay down its arms after the NLRA’s passage. Just over a decade after passing the NLRA, Congress sig-

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<sup>28</sup> This closed shop status allowed workers in transient jobs such as waitressing and construction to have their primary affiliation with the union and not with the employer. See GORDON, *supra* note 21, at 60. This was seen as a mechanism to increase union bargaining power in those industries. See *id.* at 61. However, the NAACP and other civil rights groups strongly opposed the closed shop system because most unions at the time prevented Black workers from joining, and Black workers were thus excluded from those workplaces. HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 104–05 (1977).

<sup>29</sup> See generally HILL, *supra* note 28.

<sup>30</sup> ELLEN J. DANNIN, *TAKING BACK THE WORKERS’ LAW* 16 (2006).

<sup>31</sup> *Id.* at 166.

<sup>32</sup> See generally Sachs, *supra* note 3, at 2685.

<sup>33</sup> Dannin, *supra* note 9.

<sup>34</sup> NLRA § 2(3), 29 U.S.C. § 152(3) (2006).

<sup>35</sup> 79 Cong. Rec. 9720, 9720–21 (1935); *North Whittier Heights Citrus Ass’n v. NLRB*, 109 F.2d 76, 80 (9th Cir. 1940) (“there never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain”); Fred Witney, *Agricultural Workers Under National Labor Relations Law*, INST. OF LAB. & INDUS. REL. BULL. (U. of Ill., Urbana–Champaign, Ill.) Series A, Vol. 2, Special, Mar. 1948, available at [http://www.archive.org/stream/agriculturalwork02witn/agriculturalwork02witn\\_djvu.txt](http://www.archive.org/stream/agriculturalwork02witn/agriculturalwork02witn_djvu.txt).



nificantly limited the NLRA's strength because the NLRB was viewed as too pro-union and infiltrated by communists.<sup>36</sup> In 1947, Congress betrayed the pro-union mandate of the NLRA and responded to political pressure from business and farm associations, under the guise of anti-communism, by passing the Labor Management Relations Act, commonly known as the Taft-Hartley Act.<sup>37</sup> The Taft-Hartley Act amended the NLRA by, among other things, prohibiting unions, and not only employers, from engaging in unfair labor practices;<sup>38</sup> eliminating the closed shop;<sup>39</sup> excluding supervisors and independent contractors from the definition of protected "employees";<sup>40</sup> and prohibiting secondary boycotts against "neutral" entities that were not part of a primary labor dispute.<sup>41</sup> The effects of the amendments were to limit the classes of employees who could organize collectively and to outlaw important economic weapons and organizing tools available to workers.<sup>42</sup> As labor historian Nelson Lichtenstein explains:

Taft-Hartley advocates saw the law as a proxy for a much larger social and political project whose import extended well beyond the recalibration of the "collective bargaining" mechanism. Indeed, the Taft-Hartley law stands like a fulcrum upon which the entire New Deal order teetered. Before 1947 it was possible to imagine a continuing expansion and vitalization of the New Deal impulse. After that date, however, labor and the left were forced into an increasingly defensive posture.<sup>43</sup>

## II. NLRB AND COURT RULINGS HAVE CONSTRICTED NLRA PROTECTIONS FOR WORKERS

Congress is not the only entity to limit worker protections and narrow the definition of covered "employees" under the NLRA. Courts and the NLRB have also severely reined in NLRA protections.<sup>44</sup> As discussed in this Part, courts and the NLRB have re-

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<sup>36</sup> NATIONAL LABOR RELATIONS BOARD, *THE FIRST SIXTY YEARS—THE STORY OF THE NLRB 1935–1995*, at 17 (1995), available at [http://www.nlr.gov/publications/History/thhe\\_first\\_60\\_years.aspx](http://www.nlr.gov/publications/History/thhe_first_60_years.aspx).

<sup>37</sup> *Id.* at 20.

<sup>38</sup> Labor Management Relations Act, 1947 (Taft-Hartley Act) (amending NLRA by adding §8(b), codified as amended at 29 U.S.C. § 158(b) (2006)).

<sup>39</sup> *Id.* at § 8(b)(2), 29 U.S.C. § 158(b)(2) (2006).

<sup>40</sup> *Id.* at § 2(3), (11), 29 U.S.C. § 152(3), (11) (2006).

<sup>41</sup> *Id.* at § 8(b)(4), (e), 29 U.S.C. § 158(b)(4), (e) (2006).

<sup>42</sup> DANNIN, *supra* note 30, at 15.

<sup>43</sup> Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 *CATH. U. L. REV.* 763, 765 (1998).

<sup>44</sup> For example, within five years of the NLRA's enactment, the courts had authorized employers to hire people to permanently replace strikers. *NLRB v. Mackay Radio*

duced the classes of “employees” afforded the NLRA’s protections;<sup>45</sup> prevented many undocumented immigrant workers from recovering back pay as a result of discharge for protected union activity;<sup>46</sup> denied temporary workers the right to organize a union with their permanent coworkers;<sup>47</sup> and hampered the enforcement of two doctrines that impose broader liability for NLRA violations against workers (the joint employer doctrine<sup>48</sup>) and allow unions to pressure more categories of employers and associated entities (the ally doctrine<sup>49</sup>). In these ways, the courts and the NLRB have perverted the NLRA’s original purpose—to redress the power inequalities in the workplace—by narrowing the classes of workers who are protected under the NLRA and allowing employers to pit workers against each other.

#### A. *Narrowed Definition of NLRA-Covered “Employees”*

In the 1974 decision *NLRB v. Bell Aerospace Co. Division of Textron, Inc.*, the Supreme Court excluded “managerial” employees from NLRA coverage.<sup>50</sup> Managerial employees are defined as “those who formulate and effectuate management policies by expressing and making operative the decisions of their employer.”<sup>51</sup> Seven years later, in *NLRB v. Hendricks County Rural Electric Membership Corp.*, the Court excluded “confidential” employees, defined as “persons who exercise managerial functions in the field of labor relations,” from NLRA coverage.<sup>52</sup> Most recently, in *Oakwood Healthcare, Inc.*, the Board expanded the possible work duties that would make a worker a “supervisory” employee and thus ineligible

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& Tel. Co., 304 U.S. 333, 345–46 (1938). This severely undermined the Act’s intent. DANNIN, *supra* note 30, at 17.

<sup>45</sup> *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 288 (1974) (excluding “managerial” employees); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) (excluding “confidential” employees); *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006) (expanding duties defining an NLRA-exempt “supervisory” employee).

<sup>46</sup> *Hoffman Plastic Compounds, Inc. v. NLRB (Hoffman Plastic)*, 535 U.S. 137 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

<sup>47</sup> *Oakwood Care Ctr.*, 343 N.L.R.B. 659 (2004).

<sup>48</sup> *See TLI, Inc.*, 271 N.L.R.B. 798 (1983) (setting formalistic joint employer standard).

<sup>49</sup> *SEIU Local 525 v. NLRB*, 52 F. App’x 357 (9th Cir. 2002) (articulating strict standard for when a union can target a secondary “allied” employer in an organizing campaign).

<sup>50</sup> *Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. at 288.

<sup>51</sup> *Id.* (quoting *Palace Laundry Dry Cleaning*, 75 N.L.R.B. 320, 323 n.4 (1947)).

<sup>52</sup> *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 180–81 (1981) (quoting *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946)).

for union representation.<sup>53</sup> These three decisions have acted as “judicial amendments” to the NLRA,<sup>54</sup> limiting protections for wide swaths of vulnerable workers and effectively prohibiting millions of workers from organizing together for mutual aid.

*B. Restrictive Definition of Workers Eligible for Remedies and Collective-Bargaining Representation under NLRA: Undocumented Immigrants and Temporary Workers*

The past two and a half decades have witnessed a striking decline in workers’ collective activity because of Supreme Court and NLRB rulings limiting the types of workers who are protected and entitled to the full panoply of remedies for employer abuses under the NLRA. As demonstrated in this Part, two fast-growing categories of workers—undocumented immigrants and temporary workers—now face serious obstacles in organizing collectively with their documented and permanent coworkers.

1. Undocumented Immigrant Workers

The only two times that the Supreme Court has addressed the rights of undocumented immigrant workers under the NLRA were in rulings withholding NLRA remedies.<sup>55</sup> The Court began in 1984 in *Sure-Tan, Inc. v. NLRB*, in which the Court, reversing the NLRB’s decision, barred undocumented workers who had returned to their country of origin from collecting back pay for the time after having been illegally fired for protected union activity.<sup>56</sup> The Court held that the workers were not “available” for work—a requirement for back pay remedies—because they would be violating immigration laws if they were to return to the United States without being legally admitted.<sup>57</sup> Reinstatement with back pay, the

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<sup>53</sup> Oakwood Healthcare, Inc., 348 N.L.R.B. 686 (2006).

<sup>54</sup> Dannin, *supra* note 9 (expanding on the concept of “judicial amendments” to the NLRA).

<sup>55</sup> *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *Hoffman Plastic Compounds, Inc. v. NLRB* (*Hoffman Plastic*), 535 U.S. 137 (2002); *but see* Dannin, *supra* note 9 (arguing that *Hoffman Plastic* is only the latest in a line of Supreme Court “judicial amendments” to the NLRA—starting with *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (workers’ participation in sit-down strike precluded their ability to receive NLRA remedies for employer’s unfair labor practices), and *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942) (sailors’ refusal to work, characterized as a “mutiny,” precluded their ability to receive NLRA remedies for employer’s unfair labor practices)—that deny NLRA remedies to workers found guilty of violating other federal or state laws while attempting to exercise their NLRA right to protected concerted activity).

<sup>56</sup> *Sure-Tan*, 467 U.S. at 909.

<sup>57</sup> *Id.* at 903.

Court ruled, is conditioned on the ability to be “lawfully . . . present and employed in the U.S.”<sup>58</sup> Despite emphasizing that undocumented workers are still covered as “employees” under the NLRA,<sup>59</sup> by restricting the remedies available to undocumented workers, the Court effectively gave the green light to employers to violate the rights of undocumented workers who had subsequently left the United States, even if their departure directly resulted from an employer-initiated immigration raid.

The Court rejected the NLRB’s ruling in *Sure-Tan* because, while upholding the intentions of the NLRA, the Board’s ruling would have required the worker to violate the Immigration and Nationality Act (“INA”) by unlawfully reentering the country.<sup>60</sup> However, when Congress passed the NLRA, it *intended* that the NLRA would trump other statutory provisions applicable to the area of labor relations.<sup>61</sup> Congress also meant for the Board to administer the NLRA with only limited judicial review.<sup>62</sup> By denying otherwise eligible workers the remedy of back pay under the NLRA, the Court ignored congressional intent in passing the NLRA to encourage collective activity by all workers—modifying the power imbalances at the workplace—and chose instead to represent the interests of employers.

The Court then dropped a bombshell when it released its decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, which virtually eliminated the collective rights of undocumented workers under the NLRA. In that case, the Court expanded its ruling in *Sure-Tan* by denying reinstatement and back pay remedies to undocumented workers who had been fired for protected union activity, but had *not* left the United States.<sup>63</sup> In 1986, Congress passed the Immigration Reform and Control Act (“IRCA”), which, for the first time, made it illegal for employers to knowingly hire persons to work in the United States without proper work authorization.<sup>64</sup> The Court used this law to expand the *Sure-Tan* holding. Therefore, undocumented workers who had stayed in the United States after being illegally fired on account of their union organizing ac-

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 891.

<sup>60</sup> *Id.* at 903–05.

<sup>61</sup> *See supra* note 22.

<sup>62</sup> The Supreme Court itself has acknowledged this, writing “[t]he exercise of the [empiric] process [of administration] was committed to the Board, subject to limited judicial review.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

<sup>63</sup> *Hoffman Plastic*, 535 U.S. 137.

<sup>64</sup> 8 U.S.C. § 1324(a)(3)(A) (2006).

tivities were also “unavailable” for work, and were thus ineligible for reinstatement and back pay for the time from which they were unlawfully fired.<sup>65</sup>

Again, by favoring the IRCA and the INA over the NLRA,<sup>66</sup> the Court overlooked Congress’s original intent to have the NLRA be “paramount over other laws that might touch upon similar subject matters.”<sup>67</sup> Instead of casting blame on the employer for violating the NLRA by unlawfully firing the undocumented workers—still considered “employees” under the NLRA—the Court blamed the workers for violating the IRCA.<sup>68</sup> Thus, the Court characterized it as a case of an “innocent” employer who unknowingly hired undocumented workers who knowingly and fraudulently presented false documents to obtain employment. In his dissent, Justice Breyer correctly recognized that having the IRCA trump the NLRA actually undermines the IRCA’s express goals of preventing employer abuses of workers because it encourages employers to exploit undocumented workers even *more* because they know that they will not be held liable for reinstatement and back pay—two of the NLRA’s most significant remedies—if they fire those workers for union activity.<sup>69</sup>

*Hoffman Plastic* was a severe shock to the labor movement and advocates for immigrant worker rights. “The *Hoffman Plastics* case eviscerated undocumented immigrants’ right to organize,” argues labor law professor Jennifer Gordon.<sup>70</sup> “Now an employer who notes that an undocumented worker is wearing a ‘Union Yes’ button, or has attended a single union meeting, can rest assured that if he fires her he will never be fined a penny.”<sup>71</sup> Indeed, the Court sent a clear message that it will not protect collective action among undocumented workers by punishing significantly an employer for

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<sup>65</sup> *Hoffman Plastic*, 535 U.S. at 145.

<sup>66</sup> *Id.* at 149.

<sup>67</sup> See S. REP. NO. 573 (1935), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 2315 (1949); Dannin *supra* note 9 (“the Court has created a special doctrine that allows this nation’s most basic labor law to be preempted by other laws . . . when those other laws are the source for legal misdeeds by employees”).

<sup>68</sup> *Hoffman Plastic*, 535 U.S. at 148–49.

<sup>69</sup> *Id.* at 155–56 (Breyer, J., dissenting); see also Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195 (arguing that imposing employer sanctions for hiring undocumented workers distorts both labor and immigration law by providing an incentive for employers to hire and exploit undocumented workers).

<sup>70</sup> GORDON, *supra* note 21, at 51.

<sup>71</sup> *Id.* The NLRA does not include a provision whereby an employer may be fined for violating the Act.

breaking the law. More importantly, in *Sure-Tan* and *Hoffman Plastic*, the Court condoned employers' dividing workers who share a common interest along immigration lines, thus hurting *all* workers. By denying one set of workers the full panoply of remedies, it harms the rest of the workers and hinders collective action among the working class.

## 2. Temporary Workers

In 2004, the NLRB further restricted the group of NLRA-covered workers in *Oakwood Care Center*.<sup>72</sup> In that case, a union petitioned for workers who were solely employed by Oakwood Care Center, an assisted living facility, along with workers who were jointly employed by Oakwood Care and a temporary staffing agency, N&W, to be included in the same bargaining unit.<sup>73</sup> The Board found that permitting a combined unit of solely and jointly employed employees, as the Board had previously done,<sup>74</sup> contravened section 9(b) of the NLRA by requiring different employers to bargain together regarding employees in the same unit.<sup>75</sup> The Board held that "combined units of solely and jointly employed employees are multiemployer units and are statutorily permissible *only with the parties' consent*."<sup>76</sup>

This decision effectively prevents temporary workers—products of a relatively new trend of massive temporary employment—from having a collective bargaining agreement because, while temporary workers are still technically able to form unions, an employer of permanent workers such as Oakwood Care would likely never consent to a multiemployer unit. Therefore, the temporary workers would be forced to organize on their own, without the strength of their permanent coworkers. This division of workers in the same workplace would likely prevent the weaker temporary workers from winning a collective bargaining agreement. In their dissent, Board members Wilma Liebman and Dennis P. Walsh recognized this, writing,

The Board now effectively bars yet another group of employees—the sizeable number of workers in alternative work arrangements—from organizing labor unions, by making them get their employers' permission first. That result is surely not

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<sup>72</sup> *Oakwood Care Ctr.*, 343 N.L.R.B. 659 (2004).

<sup>73</sup> *Id.* at 659.

<sup>74</sup> *See M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000) (authorizing multiemployer bargaining units).

<sup>75</sup> *Oakwood Care Ctr.*, 343 N.L.R.B. at 663.

<sup>76</sup> *Id.* (emphasis added).

what Congress envisioned when it instructed the Board, in deciding whether a particular bargaining unit is appropriate, ‘to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act.’<sup>77</sup>

The dissent also correctly noted that the majority’s refusal to place the workers in the same bargaining unit harms the permanent workers employed directly by Oakwood Care because, when attempting to organize for better wages and working conditions, they can be pitted against the temporary workers who are barred from organizing with them.<sup>78</sup>

These recent Supreme Court and NLRB decisions splinter workers with common interests, further undermining the purposes of the NLRA. While undocumented workers and temporary workers are still covered “employees” under the NLRA, their practical abilities to organize with their coworkers have been severely limited.

*C. Restrictive Definitions of Liable Employers and Employer-Associated Entities Subject to Union Pressure under NLRA*

In addition to reducing the classes of workers eligible for certain NLRA remedies, courts and the NLRB have limited the range of employers liable for NLRA violations as well as the categories of employers and associated entities that unions may legally pressure during organizing campaigns. Specifically, the Board and the circuit courts of appeals have (1) shrunk the categories of employers that can be held jointly responsible for NLRA violations (i.e. joint employers),<sup>79</sup> and (2) limited the application of the ally doctrine<sup>80</sup> pursuant to which third parties can be found to be “allies” of an employer in its anti-union campaign, and thus not protected by the NLRA secondary boycott prohibition.<sup>81</sup> These actions by the Board and courts further divide workers and contravene the express intent of the NLRA to encourage collective bargaining.

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<sup>77</sup> *Id.* at 663–64 (Liebman, M., and Walsh, M., dissenting) (quoting NLRA § 9(b), 29 U.S.C. §159(b)).

<sup>78</sup> *Id.*

<sup>79</sup> *Airborne Express*, 338 N.L.R.B. 597 n.1 (2002).

<sup>80</sup> *SEIU Local 525 v. NLRB*, 52 F. App’x 357, 360 (9th Cir. 2002).

<sup>81</sup> Unions sometimes attempt to pressure other entities associated with the primary employer, so that those associated entities will in turn pressure the primary employer to negotiate with the union. However, NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (2006), known as the “secondary boycott” provision, prohibits a union from exerting such pressure on an entity with which the union does not have a labor dispute.

### 1. Joint Employer Doctrine

The NLRB has generally applied a narrow definition of “joint employers,” limiting the types of de facto employers that can be held liable for NLRA violations.<sup>82</sup> In *TLI, Inc.*,<sup>83</sup> the NLRB set the current standard for determining joint employer status. The Board wrote, “where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act.”<sup>84</sup> The Board added, “there must [also] be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.”<sup>85</sup> In applying these relatively formalistic factors<sup>86</sup> that recognize only direct and immediate employment relationships, the Board has been explicit in rejecting the joint employer test previous to *TLI*, which also recognized indirect employment relationships.<sup>87</sup>

The narrow NLRA joint employer factors fail to take into account complex nontraditional forms of employment, especially in the growing area of subcontracting. In a 1991 case, *Southern California Gas Co.*, the NLRB affirmed an administrative law judge’s ruling that a building management company that fired a union cleaning contractor on account of anti-union animus was not liable for the workers’ unlawful discharge because it was not a joint employer.<sup>88</sup> Decisions like this have helped to give employers that subcontract services immunity from liability for unfair labor practices committed against workers in union drives, tipping the playing field even more in favor of employers.<sup>89</sup>

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<sup>82</sup> A common joint employer arrangement works as follows: an employer contracts out services but effectively controls the terms and conditions of employment for the contractor’s employees.

<sup>83</sup> *TLI, Inc.*, 271 N.L.R.B. 798 (1983).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (quoting *Laerco Transportation & Warehouse*, 268 N.L.R.B. 324 (1984)); *Airborne Express*, 338 N.L.R.B. 597 n.1 (2002)).

<sup>86</sup> The NLRA joint employer test is formalistic and narrow relative to the FLSA joint employer test. See *infra* Part IV. While the NLRB has certainly recognized joint employer status, and has at times applied other, more expansive factors *sui generis*, see discussion of *CNN America, Inc.*, *infra* Part V, the factors are unquestionably stricter than those found in the FLSA test.

<sup>87</sup> *Airborne Express*, 338 N.L.R.B. at 597 n.1 (acknowledging Board’s rejection of former joint employer standard found in, for example, *Floyd Epperson*, 202 N.L.R.B. 23 (1973), *enforced*, 491 F.2d 1390 (6th Cir. 1974), and *Jewel Smokeless Coal Corp.*, 170 N.L.R.B. 392, 393 (1968), *enforced*, 435 F.2d 1270 (4th Cir. 1970)).

<sup>88</sup> *S. Cal. Gas Co.*, 302 N.L.R.B. 456, 461 (1991).

<sup>89</sup> See generally, Roger Waldinger, et al., *Helots No More: A Case Study of the Justice for*



## 2. Ally Doctrine

The ally doctrine is an exception to the NLRA secondary boycott prohibition. Under the ally doctrine, an entity loses its NLRA section 8(b)(4) secondary boycott protection as a neutral third party when it enmeshes itself in anti-union activities against the primary employer's workers.<sup>90</sup> However, the federal courts have limited the classes of primary employers and associated entities that may be susceptible to union pressure by narrowly interpreting the ally doctrine. In *SEIU Local 525 v. NLRB*, the Ninth Circuit held that certain third parties cannot be held liable for anti-union activities as allies of employers.<sup>91</sup> In that case, the union argued that the landlords and tenants of a building whose cleaning contractor the union was attempting to organize were allies of the contractor because they had enmeshed themselves in the labor dispute by actively supporting the contractor's anti-union campaign.<sup>92</sup> The union thus posited that the landlord and tenants were not covered by the prohibition against secondary pressures and that the union's picketing was not unlawfully targeting the landlord and tenants as neutral third parties.<sup>93</sup> The court, however, ruled that the landlord and tenants were not the contractor's allies because, under the ally doctrine, the putative ally must either be performing struck work for the primary employer or must "fall into the category of those who, because of common ownership, control and integration of operations, become so identified with the primary employer that they are treated as a single enterprise."<sup>94</sup> These narrow factors are similar to the formalistic factors for NLRA joint employment under *TLI, Inc.*, further demonstrating the refusal of the courts and the Board to impose employer liability or allow unions to pressure employer-associated entities under the NLRA unless a very limited set of factors are satisfied.

Because of the subsequent legislative distortions of the NLRA and the federal court and NLRB limitations on the NLRA's ability to protect workers' collective action, the NLRA and the NLRB no longer accurately reflect Congress's original intention to address power imbalances in the workplace. Jennifer Gordon argues that "interpreted against the interests of workers by generations of con-

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*Janitors Campaign in Los Angeles*, 11–12 (Lewis Ctr. for Reg'l Policy Studies, Working Paper No.15 Apr. 1996), available at <http://escholarship.org/uc/item/15z8f64h>.

<sup>90</sup> *SEIU Local 525 v. NLRB*, 52 F. App'x 357, 360 (9th Cir. 2002).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

servative courts, and administered by a backlogged, hamstrung, and sorely underfunded administrative agency,” the NLRA is no longer “the manifesto for the right of workers to bargain collectively envisioned by its pro-labor drafters and early supporters.”<sup>95</sup> Employers seeking to maintain unilateral control over the workplace have caused this systematic dismantling of the NLRA because Congress drafted the NLRA to encourage workers to act together, not individually, in support of their interests. And courts and the Board have followed suit by individualizing the collective rights enumerated in the NLRA, fundamentally distorting the NLRA’s purposes.<sup>96</sup> Despite Justice Thurgood Marshall’s proclamation that “[t]hese are, for the most part, collective rights, rights to act in concert with one’s fellow employees,”<sup>97</sup> cases such as *Sure-Tan*, *Hoffman Plastic*, *Oakwood Care Center*, *TLI, Inc.*, *Southern California Gas*, and *SEIU Local 525* demonstrate a jurisprudence that divides workers, which business interests welcome.

### III. LEGISLATIVE HISTORY AND SUBSEQUENT MODIFICATIONS OF FLSA

As opposed to the NLRA, it appears that legislative and judicial treatment of the FLSA still generally comports with the original intention of Congress to establish a baseline of substantive wage and hour protections for individual workers. Perhaps this is because the FLSA does not encourage workers to collectively alter the power imbalances at the workplace, as does the NLRA.<sup>98</sup> Powerful business interests, therefore, have not viewed the FLSA with as much hostility, and thus its protections of individual worker rights

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<sup>95</sup> GORDON, *supra* note 21, at 298.

<sup>96</sup> Dannin, *supra* note 9 (citing Edward Scheunemann, *The National Labor Relations Act Versus the Courts*, 11 ROCKY MT. L. REV. 135, 146 (1939)).

<sup>97</sup> *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975).

<sup>98</sup> Some scholars argue that the different treatments of the NLRA and the FLSA can be explained by the statutes’ differing definitions of “employee” and by the differing types of remedies afforded by the NLRA and the FLSA. The FLSA broadly defines an employee as anyone who “suffer[s] or [is] permit[ted] to work,” FLSA § 3, 29 U.S.C. 203(g) (2006), while the NLRA has a much narrower definition because of its exclusions of several categories of workers, see *supra* Parts I and II, and by the fact that FLSA remedies are retrospective (damages only) while NLRA remedies are prospective (reinstatement, back and front pay, etc). Author’s communication with Ellen J. Dannin (Oct. 2009) (on file with author). However, the definitions of “employee” are different precisely because Congress, the courts, and the NLRB have made them so, arguably to preclude workers’ collective activity which business interests find more threatening than individual worker attempts to vindicate substantive rights. As for retrospective versus prospective relief, that is simply the nature of the statutes, and, while courts may find it easier to only calculate and impose retrospective relief, it is virtually impossible to do so while carrying out the purposes of the NLRA.

are still enforced. In fact, FLSA rights have been expanded over the years, partially because they can distract individual workers from acting collectively to increase worker power.<sup>99</sup> While the NLRA contains *procedural* rights “essential to any effort to raise wages and improve working conditions beyond the minimums prescribed by law,” the FLSA contains *substantive* rights that “set basic floors on workplace conditions.”<sup>100</sup> Business interests figure that it is less dangerous for individual workers to fight for minimum rights that are already statutorily guaranteed than it is for workers to fight collectively to co-determine, along with their employers, the terms and conditions of their employment. This is not to say that employers have not fought vigorously against FLSA protections—they have.<sup>101</sup> However, relatively speaking, employers are more comfortable with the FLSA than with the NLRA.<sup>102</sup>

Nowhere in the preamble of the FLSA does Congress state an intention, as it does in the NLRA, to encourage workers to act collectively to address the inequities in the workplace.<sup>103</sup> Instead, the congressional intent was to address “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” and to support the “free flow of goods in commerce” by preventing labor

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<sup>99</sup> James Brudney, *The Changing Workplace: Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1563 (1996); see also GORDON, *supra* note 21, at 170.

<sup>100</sup> GORDON, *supra* note 21, at 152.

<sup>101</sup> For example, spurred by the business lobby, the Department of Labor promulgated regulations in 2004 that broaden the definition of “professional” workers exempted from FLSA coverage. 69 Fed. Reg. 22122, 22260 (Apr. 23, 2004) (codified at 29 C.F.R. §§ 541.300–304 (2009)). Furthermore, pro-business groups kept Congress from raising the minimum wage for ten years, from 1996 until 2007. FLSA Amendments of 1996, Pub. L. No. 104–88, 110 Stat. 1929; Fair Minimum Wage Act of 2007, Pub. L. No. 110–28, 121 Stat. 188. Even still, today’s minimum wage is nothing close to a living wage. And the business lobby has hotly challenged the joint employer doctrine under the FLSA. See *infra* Part IV(B).

<sup>102</sup> For example, Republicans and big businesses are fiercely resisting the Employee Free Choice Act (EFCA), an act that would substantially increase NLRA rights for workers attempting to unionize. See, e.g., Deborah L. Cohen, REUTERS, *Now Playing: The Employee Free Choice Act* (Apr. 29, 2009), <http://www.reuters.com/articlePrint?articleId=USTRE53S67T20090429> (writing that big business has “staged aggressive publicity campaigns to win public support” and that the EFCA “makes [big business’s] blood boil”); see also Sam Stein, HUFFINGTON POST, *Cheney Whacks EFCA, Labor Welcomes Him as a Spokesman* (May 12, 2009), [http://www.huffingtonpost.com/2009/05/12/chene-whacks-efca-labor\\_n\\_202611.html](http://www.huffingtonpost.com/2009/05/12/chene-whacks-efca-labor_n_202611.html) (calling the EFCA “one of the GOP’s biggest rallying cries”). See generally Ctr. for Union Facts, <http://www.UnionFacts.com> (last visited Mar. 18, 2010).

<sup>103</sup> See NLRA §1, 29 U.S.C. § 151 (2006).

disputes.<sup>104</sup> These are all ideals that most people can support, if not morally, then at least on a model of economic efficiency—well-treated workers are more productive and well-paid workers spend more money to boost the national economy. Significantly, the FLSA does not seek to empower workers to address the power imbalances that lead to exploitation in the first place.

Congress enacted the FLSA in 1938 with the support of unions, child advocates, and other parts of civil society.<sup>105</sup> Much of the focus of the FLSA was on eliminating child labor and the unfair competition that Southern employers gave Northern employers because of the dearth of wage and hour regulations in the South.<sup>106</sup> Getting a fair labor bill passed despite the opposition of the conservative anti-New Deal Supreme Court was also a personal goal of President Franklin D. Roosevelt.<sup>107</sup> The final version of the FLSA, passed in 1938, applied to only about one-fifth of the labor force.<sup>108</sup> It banned oppressive child labor and set a minimum hourly wage of 25 cents and a maximum workweek of 44 hours.<sup>109</sup> It is worth noting that the FLSA originally excluded many groups of workers, including employees of certain retail establishments,<sup>110</sup> employees of common air carriers,<sup>111</sup> all agricultural workers,<sup>112</sup> bus drivers and other trolley and bus company employees,<sup>113</sup> and food packing and dairy workers<sup>114</sup> from minimum wage and overtime pay regulations.

As opposed to its treatment of the NLRA, Congress has generally expanded and extended FLSA protections to individual workers over the years. While the FLSA originally excluded more categories of workers than the NLRA, the statutes have now switched, with the NLRA now excluding more types of workers than the FLSA. Congress has repealed all of the worker exclusions in the FLSA except for those dealing with certain farm workers.<sup>115</sup>

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<sup>104</sup> FLSA § 2(a), 29 U.S.C. § 202(a) (2006).

<sup>105</sup> Jonathan Grossman, U.S. Dep't of Labor, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV. (1978), available at <http://www.dol.gov/oasam/programs/history/flsa1938.htm>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1067 (1938).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> In 1966 and again in 1983, Congress extended FLSA coverage to certain classes of farm workers. FLSA Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830, 838

In 1966, Congress extended FLSA coverage to workers in public schools, nursing homes, laundries, and the entire construction industry.<sup>116</sup> In 1974, domestic workers obtained coverage under the FLSA, as did all state and local government employees.<sup>117</sup> Congress also added the “hot goods” provision to the FLSA, making it illegal to transport, offer for transportation, ship, deliver, or sell any goods produced in violation of minimum wage or overtime pay laws.<sup>118</sup> Despite the general trend of expanding FLSA coverage over the years, Congress and the Department of Labor have also restricted it for certain groups of workers.<sup>119</sup> Furthermore, Congress has only voted to raise the minimum wage nine times since the FLSA’s enactment in 1938.<sup>120</sup> But while the FLSA has been no panacea for workers’ rights, it has remained relatively true to Congress’s original intention of providing a baseline of substantive workplace rights, especially when compared to the NLRA.

#### IV. SIGNIFICANT COURT RULINGS HAVE EXPANDED APPLICATION OF FLSA

Federal courts have also generally augmented FLSA remedies for workers and have expanded the classes of employers liable under the FLSA. As described in this Part, courts have expressly ruled that undocumented immigrant workers are eligible for FLSA remedies, as opposed to NLRA remedies. And courts have liberally applied the joint employer doctrine under the FLSA, while restricting its application under the NLRA.

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(1966); Migrant and Seasonal Agricultural Worker Protection Act (MSPA), Pub. L. No. 97-470, 96 Stat. 2583 (1983).

<sup>116</sup> FLSA Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (1966).

<sup>117</sup> FLSA Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974) (this was the first time certain domestic workers were expressly included under FLSA coverage).

<sup>118</sup> FLSA § 15(a)(1), 29 U.S.C. § 215(a)(1) (2006).

<sup>119</sup> See, e.g., Fair Labor Standards Amendments of 1974, *supra* note 117, 88 Stat. at 62 (codified as amended at FLSA § 13(a)(15), (b)(21), 29 U.S.C. § 213(a)(15), (b)(21) (2006)) (exempting companionship workers from minimum wage and overtime pay requirements and exempting live-in domestic workers from overtime pay requirements, respectively); 69 Fed. Reg. 22122, 22260, *supra* note 101 (recategorizing workers by pulling professional workers out from under the protections of the FLSA).

<sup>120</sup> U.S. Dep’t of Labor, *History of Changes to the Minimum Wage Law*, <http://www.dol.gov/whd/minwage/coverage.htm> (last visited Mar. 18, 2010). Congress, through various amendments, has voted to raise the minimum wage nine times. Some of those individual amendments, however, incorporated several prescribed raises over a span of years. *Id.*

A. *Undocumented Immigrant Workers Eligible for FLSA Remedies*

As opposed to remedies prescribed by the NLRA, courts have almost always upheld FLSA remedies for workers regardless of their immigration status.<sup>121</sup> The *Hoffman Plastic* holding denying back pay remedies to undocumented workers has been limited to cases adjudicated under the NLRA, despite early fears that it may be applied to other statutes.<sup>122</sup> In a 2002 case, *Flores v. Amigon*,<sup>123</sup> the Eastern District of New York ruled that immigration status is not relevant to a FLSA claim for unpaid wages for work that a bakery worker had already performed. The court reasoned that “unlike the problem posed in *Hoffman Plastic* in which an illegal alien was wrongfully terminated from employment and could not be legally reinstated, . . . here no such impediment exists to repayment of any amounts proved to be owed to plaintiff for work that she already performed.”<sup>124</sup> This holding typifies federal courts’ willingness to recognize undocumented workers as eligible for remedies under the FLSA.<sup>125</sup>

B. *Expansive Definition of Employers Held Liable under FLSA: Joint Employers*

In contrast to the narrowing of the classes of employers held liable for NLRA violations, courts have expanded the types of employers governed under the FLSA. Specifically, courts have applied

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<sup>121</sup> GORDON, *supra* note 21, at 310 n.19; *see also* Zheng Liu v. Donna Karan Int’l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (holding that workers’ immigration status not relevant to FLSA claims that they had been illegally underpaid for work performed); Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) (“There is no question that the protections provided by the FLSA apply to undocumented aliens.”); Patel v. Quality Inn So., 846 F.2d, 700, 704 (11th Cir. 1988) (“FLSA’s coverage of undocumented aliens goes hand in hand with the policies behind the IRCA. . . . If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them.”) (emphasis in original); Flores v. Albertsons, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623 at \*5 (C.D. Cal. Apr. 9, 2002) (“[f]ederal courts are clear that the protections of the FLSA are available to citizens and undocumented workers alike.”); Flores v. Amigon, 233 F. Supp. 2d 462, 462 (E.D.N.Y. 2002) (“Numerous lower courts have held that all employees, regardless of their immigration status, are protected by the provisions of the FLSA.”).

<sup>122</sup> GORDON, *supra* note 21, at 310 n.19.

<sup>123</sup> Flores v. Amigon, 233 F. Supp. 2d 462 (E.D.N.Y. 2002).

<sup>124</sup> *Id.* at 464.

<sup>125</sup> *See, e.g., supra* note 121. While the difference in treatment of undocumented immigrant workers could be explained by the FLSA’s imposition of retrospective remedies, as opposed to the NLRA’s prospective remedies, there is nothing precluding the expansion of the Supreme Court’s *Hoffman Plastic* reasoning to the FLSA—that when a worker violates a federal or state law while exercising her workplace rights, she may no longer enjoy remedies for violations of those workplace rights.

more expansive definitions of joint employers under the FLSA. While the courts are still struggling with this area of law and have not spoken with certainty regarding when to hold contracting employers jointly liable for FLSA violations, they have been willing to progress further in this area under the FLSA than under the NLRA.

In many industries such as the garment industry, a system of contracting exists where manufacturers—typically well-known brands—contract out the production of their goods to avoid responsibility for the labor-intensive assembly stage of production.<sup>126</sup> In the garment industry, the manufacturers dictate to the contractors the price per piece, the turnover time for the items, and the exact specifications of the finished products.<sup>127</sup> Often, the contractors—usually small, family-run operations—violate FLSA wage and hour laws, then close up and disappear, leaving large groups of unpaid or underpaid workers.<sup>128</sup> The manufacturers then disclaim responsibility for the FLSA violations committed by the contractors.<sup>129</sup> In response, and in contrast to the shrinking employer coverage under the NLRA,<sup>130</sup> courts have expanded the FLSA's definition of joint employers to impose liability on the manufacturers for violations committed against the workers by the contractors.

Although it has a long history in the agricultural industry,<sup>131</sup> the FLSA joint employer doctrine has only recently been applied in other areas. Its first application in the garment industry was a 1998 case, *Lopez v. Silverman*,<sup>132</sup> in which the court applied a set of wide-reaching factors to determine whether joint employer status existed under the FLSA.<sup>133</sup>

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<sup>126</sup> See Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 293, 299–300 (2003); see also Laura Ho et al., *(Dis)assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 385–86 (1996).

<sup>127</sup> Lung, *supra* note 126, at 301.

<sup>128</sup> *Id.* at 302 n.89, 305.

<sup>129</sup> *Id.* at 294.

<sup>130</sup> However, the NLRA does extend employer coverage to manufacturers in the garment industry by exempting unions from liability for secondary boycotts of manufacturers during a labor dispute with a contractor. See NLRA § 8(e), 29 U.S.C. § 158(e) (2006).

<sup>131</sup> See generally *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

<sup>132</sup> *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998).

<sup>133</sup> The factors were:

(1) the extent to which the workers perform a discrete line-job forming an integral part of the putative joint employer's integrated process of production or overall business objective; (2) whether the putative joint employer's premises and equipment were used for the work; (3) the extent of the putative employees' work for the putative joint employer;

A year later began the decade-long saga of *Ling Nan Zheng v. Liberty Apparel*, where 26 garment workers sued a garment manufacturer for FLSA violations committed by the contractor.<sup>134</sup> The case was appealed to the Second Circuit, which rejected a formalistic approach to the employment relationship—the analysis that courts and the NLRB embrace in determining joint employer status under the NLRA—when determining whether an entity is a joint employer under the FLSA.<sup>135</sup> The court wrote, “[t]he broad language of the Fair Labor Standards Act . . . demands that a district court look beyond an entity’s formal right to control the physical performance of another’s work before declaring that the entity is not an employer under the FLSA.”<sup>136</sup> The court found the four narrow factors establishing a formal employment relationship<sup>137</sup> to be sufficient but not essential in finding joint employer status.<sup>138</sup> It then named a set of six factors<sup>139</sup>—factors narrower than those named in *Lopez* but still expansive compared to the formalistic joint employer standard under the NLRA—to determine joint employer

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(4) the permanence or duration of the working relationship between the workers and the putative joint employer; (5) the degree of control exercised by the putative joint employer over the workers; (6) whether responsibility under the contract with the putative joint employer passed “without material changes” from one group of potential joint employees to another; and (7) whether the workers had a “business organization” that could or did shift as a unit from one putative joint employer to another.

*Id.* at 419–20.

<sup>134</sup> *Ling Nan Zheng v. Liberty Apparel Co.*, No. 99 Civ. 9033 (RCC), 2002 WL 398663 (S.D.N.Y. Mar. 13, 2002).

<sup>135</sup> *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003).

<sup>136</sup> *Id.*

<sup>137</sup> These factors were whether the entity:

(1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.

*Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984).

<sup>138</sup> *Ling Nan Zheng*, 355 F.3d at 64.

<sup>139</sup> The six factors were:

(1) whether [the putative joint employer’s] premises and equipment were used for the plaintiffs’ work; (2) whether the [contractor] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [the putative joint employer’s] process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which [the putative joint employer] or their agents supervised plaintiffs’ work; and (6) whether plaintiffs worked exclusively or predominantly for [the putative joint employer].

*Id.* at 72.



status. The court also stated that additional factors could be applied on an ad hoc basis according to the particular facts presented in a case.<sup>140</sup>

In early 2009, the Southern District of New York denied a motion to set aside a jury award for garment workers, holding that Liberty Apparel, the manufacturer, was a joint employer and thus jointly liable for the FLSA violations committed by its contractors.<sup>141</sup> This groundbreaking outcome will likely lead to the further expansion of the joint employer doctrine under the FLSA.

As demonstrated by the above analysis, Congress and courts have generally upheld or expanded FLSA coverage of workers and of employers. Meanwhile, they have reduced NLRA protections for workers and liabilities for employers. It is likely that this conflicting application of the two statutory regimes is due to the fact that the FLSA does not seek to challenge the power imbalance at the workplace that underlies the market economy.

## V. NLRA STILL CONTAINS SEEDS OF PROMISE

Despite the systematic dismantling of the NLRA over the years and suggestions that the NLRA is impotent or even anti-worker,<sup>142</sup> the NLRA is still a powerful statutory regime supporting worker unity and collective action, as demonstrated by recent court and Board decisions.<sup>143</sup> Additionally, President Barack Obama has appointed a pro-labor majority to the Board<sup>144</sup> and Congress is considering the Employee Free Choice Act (“EFCA”),<sup>145</sup> a proposed overhaul of the NLRA that would strengthen its ability to promote worker unity.<sup>146</sup> As former Board Member Dennis P. Walsh has written, “[t]he National Labor Relations Act and the Board that

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<sup>140</sup> *Id.* at 71–72.

<sup>141</sup> *Ling Nan Zheng v. Liberty Apparel Co.*, No. 99 Civ. 9033 (RJS), 2009 WL 1383488, at \*1 (S.D.N.Y. May 18, 2009).

<sup>142</sup> *See generally* Sachs, *supra* note 3 (arguing that the NLRA has become a tool used against worker organizing).

<sup>143</sup> All Board decisions by a two-Member Board from January 1, 2008 to the time of this Note’s publication have been disputed, and as of the publication of this Note, the Supreme Court has yet to rule on the validity of those decisions. However, it has granted certiorari on the issue in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (2009). Sam Hananel, Associated Press, *Justice Asks High Court to OK Labor Board Rulings* (Sep. 29, 2009) (LEXIS).

<sup>144</sup> President Obama appointed Craig Becker, a union attorney, and Mark Pearce, a labor-side employment law attorney, to the Board. He also appointed existing pro-union Board member Wilma Liebman to Chair. Greenhouse, *supra* note 7.

<sup>145</sup> H.R. 1409, S. 560, 111th Cong. (2009).

<sup>146</sup> *See generally* American Rights at Work, *supra* note 16. (“The legislation would give workers a fair and direct path to form unions through majority sign-up, help

administer[s] it remain the preeminent source of protection for workers who desire to work together to improve their working conditions and engage in the process of collective bargaining.”<sup>147</sup> Even during the anti-union George W. Bush presidency, some NLRB decisions and federal court rulings planted the seeds that will enhance unity at the workplace, rather than enshrine divisions between workers.<sup>148</sup> These developments indicate that the NLRA is still a potential force for worker unity and point to the possibility that the NLRA will truly reflect Congress’s intent of “encouraging the practice and procedure of collective bargaining . . . for the purpose of . . . mutual aid or protection.”<sup>149</sup>

Some advocates, scholars, and labor leaders argue that workers should avoid the NLRA altogether, and instead, look to other statutes like the FLSA<sup>150</sup> or outside the law completely to seek protections while acting collectively to improve workplace conditions. AFL–CIO President Richard Trumka has called the NLRB “clinically dead” and told Congress, “I say abolish the Act. Abolish the affirmative protections of labor that it promises but does not deliver. . . . Deregulate.”<sup>151</sup> Former ACORN head Wade Rathke accused the NLRB of being “complicit with employers.”<sup>152</sup> NLRA abstentionists such as law professor Benjamin I. Sachs back up these claims by pointing to examples of recent successful organizing campaigns that circumvented the NLRA process altogether.<sup>153</sup>

The allegations of the aggressive attacks on union rights are true. But the NLRA is not to blame. Instead, the attacks are products of decades of reactionary court and Board interpretations of the NLRA, “pervert[ing] the express language of the law.”<sup>154</sup> Ellen J. Dannin advocates for a NAACP Legal Defense Fund-style long term litigation campaign to reverse anti-worker precedent.<sup>155</sup> The

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employees secure a contract with their employer in a reasonable period of time, and toughen penalties against employers who violate their workers’ rights.”).

<sup>147</sup> Posting of Dennis P. Walsh to Sage House News: The Cornell University Press Blog, *Dennis Walsh on Taking Back the Workers’ Law*, <http://cornellpress.wordpress.com/2008/08/04/dennis-walsh-on-taking-back-the-workers-law/> (Aug. 4, 2008, 10:09 EST).

<sup>148</sup> See *infra* notes 167–209 and accompanying text.

<sup>149</sup> NLRA §1, 29 U.S.C. § 151 (2006).

<sup>150</sup> See, e.g., Sachs, *supra* note 3, at 2687 (arguing that the FLSA should replace the NLRA as the statute of choice for workers who seek to organize because of the NLRA’s inefficacy).

<sup>151</sup> DANNIN, *supra* note 30, at 5.

<sup>152</sup> *Id.* at 4.

<sup>153</sup> See Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. POL’Y REV. 375 (2007).

<sup>154</sup> DANNIN, *supra* note 30, at 5.

<sup>155</sup> *Id.* at 3.

possibility of using creative legal strategies to improve the application of the NLRA demonstrates that the NLRA is worth saving. After all, as labor scholar Anne Marie Lofaso has noted the NLRA still holds

[p]rimary and oftentimes exclusive jurisdiction over labor-management disputes, and an anti-union Board can create rules that force the parties to use its processes and then stack those rules in favor of de-collectivization. . . . While true liberation of workers might largely come through economic and political channels, we ignore the courts and administrative agencies at our own peril.<sup>156</sup>

Political intervention is a powerful way to manipulate the NLRA's effectiveness. President Ronald Reagan turned the once politically-neutral NLRB into a partisan machine advocating his strong anti-union position.<sup>157</sup> As Ellen J. Dannin writes, "Reagan began the practice of appointing Board members whose mission was to destroy the agency."<sup>158</sup> In appointing Service Employees International Union ("SEIU") Associate General Counsel Craig Becker and union-side labor lawyer Mark Pearce to the NLRB, President Barack Obama has sought to restore a pro-union majority on the Board, which could reverse many of the harsh anti-union Board rulings during the George W. Bush presidency.<sup>159</sup> Labor advocates also hope President Obama will provide the NLRB with adequate funds to carry out its mission—something that has not happened for decades.<sup>160</sup> And union leaders are pushing for passage of the EFCA. While the EFCA's "card check" provision<sup>161</sup>—

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<sup>156</sup> Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act*, (American Constitution Soc'y for Law and Pol'y, Washington, D.C.) May 2008, at 14–15, available at <http://www.acslaw.org/files/ACS%20September%20Massacre.pdf>.

<sup>157</sup> The NLRB was originally seen as an adjudicatory body with the purpose of furthering the pro-labor goals of the NLRA. Presidential nominations to the Board were made with this understanding. However, President Eisenhower abolished this tradition by appointing members to ensure a 3-2 Republican majority. The 5-member Board was thus turned into a partisan sounding board on the current administration's labor policy, and it has remained that way to this day. President Reagan used this 3-2 split to turn the Board into a blatant anti-union body. Posting of Ellen J. Dannin to Working Life blog, *A New Agenda for the Obama NLRB*, [http://www.workinglife.org/blogs/view\\_post.php?content\\_id=11524&highlight=partisan](http://www.workinglife.org/blogs/view_post.php?content_id=11524&highlight=partisan) (Jan. 28, 2009).

<sup>158</sup> *Id.*

<sup>159</sup> Melanie Trottman, *Unions Look to Labor Board to Reverse Bush Policy*, WALL ST. J., June 3, 2009, at A2.

<sup>160</sup> Noting the starving of the NLRB, Ellen J. Dannin writes, "Congress has so severely restricted NLRB budgets that . . . [there now exists] a severe backlog of cases." DANNIN, *supra* note 30, at 8.

<sup>161</sup> H.R. 1409, S. 560 § 2(a), 111th Cong. (2009). The term "card check" refers to a procedure by which an employer is required to recognize a union as its employees'

one of the bill's central features—has attracted the most vehement opposition by business interests and may not survive,<sup>162</sup> the bill also includes binding arbitration for union contracts,<sup>163</sup> and could eventually include prohibitions on employer “captive audience” meetings<sup>164</sup> and mandated union organizer access to worksites.<sup>165</sup> All of these features would serve as counterbalances to Congress's anti-union modifications to the NLRA in decades past.

Despite their optimism, labor advocates cannot rely solely on the promise of a worker-friendly NLRB and a pro-union overhaul of the NLRA. Even under the Obama administration and with a Democratic majority in both houses of Congress, unions have not

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authorized representative when a simple majority of its employees sign cards authorizing the union to serve as the employees' exclusive representative. Currently, an employer is not required to recognize a union when presented with authorization cards signed by a majority of its employees; instead, it may request a secret ballot union election. Such a secret ballot election gives an employer time to campaign against the union, oftentimes by threatening employees with termination or plant closure if the union wins. See GORDON LAFER, AM. RTS. AT WORK, FREE AND FAIR? HOW LABOR LAW FAILS U.S. DEMOCRATIC ELECTION STANDARDS (2005), available at <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/FreeandFair%20FINAL.pdf>.

<sup>162</sup> Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES, July 17, 2009, at A1. However, even if card check authorization is excluded from the EFCA, some argue that the NLRB could singlehandedly mandate card check recognition. According to former NLRB Chairman William Gould, the NLRB could reverse its previous recommendation to the Supreme Court to require a secret ballot election if an employer so insists. Since the Court relied on the Board's expertise in deciding in 1974 that an employer does not have to recognize a union even if a majority of the employees present signed union authorization cards, *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974), the Board could acquire new expertise by examining new evidence and facts to determine that card check recognition is more appropriate than an election. Mark Schoeff Jr., *NLRB Decisions Could Make Card Check a Reality*, WORKFORCE MANAGEMENT, July 2009, available at <http://www.workforce.com/section/03/feature/26/52/97/265299.html>.

<sup>163</sup> H.R. 1409, S. 560 § 3, 111th Cong. (2009). The binding arbitration provision of the EFCA would expedite the collective bargaining process by forcing employers and unions to go to arbitration if they cannot agree on a contract on their own within a reasonable time period. See American Rights at Work, *Union Contract Arbitration in the United States and Canada: How Arbitration Encourages Contract Settlement*, [http://www.americanrightsatwork.org/dmdocuments/ARAWReports/contract\\_arbitration\\_in\\_us\\_and\\_canada.pdf](http://www.americanrightsatwork.org/dmdocuments/ARAWReports/contract_arbitration_in_us_and_canada.pdf) (last visited Mar. 18, 2010).

<sup>164</sup> The term “captive audience meeting” refers to a mandatory meeting held to oppose a union campaign during which an employer typically inundates employees with anti-union propaganda. See American Rights at Work, *Unionbusters 101*, <http://www.americanrightsatwork.org/the-anti-union-network/for-profit-union-busters/unionbusters-101.html> (last visited Mar. 18, 2010). An employer may choose to hold as many of these meetings as it wishes (except for the 24 hour period before the union authorization election administered by the NLRB). See *Frito-Lay, Inc.*, 341 N.L.R.B. 515 (2004); *Blue Cross of Kansas City, Inc.*, 259 N.L.R.B. 483 (1981).

<sup>165</sup> Holly Rosenkrantz, *Specter to Support Senate Vote on Pro-Union Bill in Reversal*, BLOOMBERG.COM, Aug. 14, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=AJE3hnG29Ljo>; Greenhouse, *supra* note 162.

been able to muster the power to push through the EFCA.<sup>166</sup> Until unions can rebuild their political clout by organizing more of the country's labor force, they will need to explore other strategies—including legal strategies—to enhance workers' collective bargaining rights. Specifically, union-side lawyers should attempt to expand the applications of pro-labor rulings to support new worker organizing.

Recent decisions by federal and state courts, and even by the NLRB during the George W. Bush presidency, have upheld NLRA protections for workers and have ruled against employers seeking to pit workers against one another. These decisions supporting worker unity, while relatively few in number, indicate a pro-union trend that a new Board under the Obama administration will likely reinforce. This trend demonstrates that the NLRA, despite its dismantling over the years, can still provide concrete support for workers who wish to organize collectively, and the NLRA should not be scrapped.

A. *Certain Undocumented Immigrant Workers Still Eligible for Remedies under NLRA*

Despite the breadth of the Supreme Court's ruling in *Hoffman Plastic*, courts and NLRB administrative law judges ("ALJs") have ruled that undocumented immigrant workers are eligible for back pay remedies in certain situations based on discharge or discipline for engaging in protected union activity. In *NLRB v. A.P.R.A. Fuel*, which predates *Hoffman Plastic* but arguably remains good law,<sup>167</sup> the Second Circuit found that where an employer *knowingly* hired undocumented employees—as opposed to one who *unknowingly* hired undocumented workers as was the case in *Hoffman Plastic*—and subsequently illegally terminated them for engaging in union activity, the employees could collect back pay remedies.<sup>168</sup> In his dissent in *Hoffman Plastic*, Justice Breyer acknowledged this distinction, writing:

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<sup>166</sup> Much of organized labor's inability to push through the card check provision can be blamed on union infighting. A spell of union factionalization, the extent to which has not been seen in decades, has pulled much of organized labor away from its unified legislative priorities. See Steven Greenhouse, *Infighting Distracts Unions at Crucial Time*, N.Y. Times, July 9, 2009, at B1.

<sup>167</sup> See *Mezonos Maven Bakery, Inc.*, No. 29-CA-25476, 2006 WL 3196754, \*9 (N.L.R.B. Div. of Judges Nov. 1, 2006) ("*Hoffman* did not disturb the conditional reinstatement part of the order in *A.P.R.A.*, . . . in which the employer . . . hired employees knowing that they were undocumented . . .") (on appeal).

<sup>168</sup> *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997).

Were the Board forbidden to assess backpay against a *knowing* employer—a circumstance not before us today . . . —this perverse economic incentive [to hire undocumented workers], which runs directly contrary to the immigration statute’s basic objective, would be obvious and serious.<sup>169</sup>

Soon after the *Hoffman Plastic* ruling, the General Counsel of the NLRB clarified that it would still seek to enforce back pay remedies for undocumented workers where the situations differ from those in *Hoffman Plastic*.<sup>170</sup> Additionally, in *Mezonos Maven Bakery*, a 2006 NLRB ALJ ruling, the judge reinforced the knowing employer distinction and granted undocumented workers back pay for NLRA violations committed by their employer who hired the workers knowing they were undocumented.<sup>171</sup> Relying on this decision, another ALJ ruled a year later in *Handyfat Trading* that nine unlawfully fired undocumented workers were entitled to back pay because the employer knew the workers were undocumented immigrants when it hired them.<sup>172</sup> Even the George W. Bush-appointed NLRB General Counsel Ronald Meisburg stated in 2007 that the Supreme Court “did not directly address whether undocumented discriminatees could be entitled to back pay where no fraud was committed by those discriminatees.”<sup>173</sup> He emphasized that the denial of back pay in *Hoffman Plastic* is “limited to employees who had defrauded their employers” by knowingly presenting false documents in violation of the IRCA.<sup>174</sup>

Though the *Mezonos Maven Bakery* and *Handyfat Trading* decisions have both been appealed, the knowing employer distinction recognized by Justice Breyer, the *A.P.R.A. Fuel* court, and General Counsel Meisburg still gives hope to some undocumented workers that they will enjoy meaningful NLRB protections when organizing collectively. In addition, other recent decisions by the NLRB and courts have granted conditional and non-conditional back pay

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<sup>169</sup> *Hoffman Plastic*, 535 U.S. at 155 (Breyer, J., dissenting).

<sup>170</sup> Arthur F. Rosenfeld, Office of the General Counsel Memorandum GC 02-06 (July 19, 2002), available at [http://www.nlr.gov/shared\\_files/GC%20Memo/2002/gc02-06.html](http://www.nlr.gov/shared_files/GC%20Memo/2002/gc02-06.html).

<sup>171</sup> *Id.*

<sup>172</sup> *Handyfat Trading, Inc.*, No. 29-CA-28181, 2007 WL 2371977 (N.L.R.B. Div. of Judges Aug. 14, 2007) (on appeal).

<sup>173</sup> NLRB General Counsel Meisberg speaking before ABA Section of Labor and Employment Law, posting of Jeffrey M. Hirsch to Workplace Prof Blog, *General Counsel Meisburg Discusses NLRBU Dispute, Backpay to Undocumented Workers*, [http://lawprofessors.typepad.com/laborprof\\_blog/2007/11/general-counsel.html](http://lawprofessors.typepad.com/laborprof_blog/2007/11/general-counsel.html) (Nov. 15, 2007) (quoting BNA Daily Labor Report).

<sup>174</sup> *Id.*

remedies and lost wages to undocumented workers.<sup>175</sup>

*B. Recent Court & NLRB Decisions Rebuff Employer Attempts to Divide Workers using NLRA*

Despite their occurring during possibly the worst decade for labor rights since the enactment of the NLRA, several recent federal court and NLRB decisions have promoted worker unity, upholding the pro-collective action policies of the NLRA. In 2008, the D.C. Circuit upheld a NLRB ruling to unite workers under the same “community of interest,” despite the employer’s attempt to pit the workers against each other.<sup>176</sup> In *Agri Processor Co. v. NLRB*, the employer argued that (1) undocumented immigrant workers are not covered “employees” under *Hoffman Plastic*, and (2) its documented and undocumented workers should be in separate bargaining units because they do not share the same “community of interest.”<sup>177</sup> The court rejected both claims outright, writing that *Hoffman Plastic* does allow undocumented workers to be covered “employees” and that the workers shared the same community of interest because they received the same wages and benefits, faced the same working conditions, answered to the same supervisors, and possessed the same skills and duties.<sup>178</sup> The court stated that “[t]he community of interests test turns ‘on the interests of employees as employees, not their interests more generally.’”<sup>179</sup> Even the Republican-controlled NLRB affirmed the ALJ’s ruling that the workers shared the same community of interest.<sup>180</sup> This decision is significant because it rebuffs a serious attempt by an employer to divide workers and demonstrates that pro-worker-unity decisions are still possible under the NLRA.

Along the same lines, the *Oakwood Care Center* dissent, discussed in Part II, calls for the inclusion of solely and jointly em-

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<sup>175</sup> See *Tuv Taam Corp.*, 340 N.L.R.B. 756 (2003) (conditional back pay award granted; immigration status not relevant at merits stage of case, only at compliance stage); see also *Balbuena v. IDR Realty L.L.C.*, 845 N.E.2d 1246 (2006) (undocumented immigrant workers who were injured and did not tender false documents not barred under IRCA from receiving lost wages, i.e., past wages from time of accident until verdict and future loss of earnings, under New York tort law).

<sup>176</sup> *Agri Processor Co. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008), *aff’g* *Agri Processor Co.*, 347 N.L.R.B. 1200 (Aug. 31, 2006), *cert. denied*, *Agri Processor Co. v. NLRB*, 129 S. Ct. 594 (2008).

<sup>177</sup> *Id.* at 3–4, 9 (company argued that allowing undocumented workers to vote in union election would dilute the votes of the documented workers, proving they do not share same community of interest).

<sup>178</sup> *Id.* at 9.

<sup>179</sup> *Id.* at 8 (emphasis in original).

<sup>180</sup> *Id.* at 3.

ployed workers in the same bargaining unit because they share the same “community of interest.”<sup>181</sup> Particularly persuasive is the dissent’s acknowledgment that combining jointly with solely employed employees in the same bargaining unit—recognizing their shared community of interest—is highly rational, given that more and more employees work in “alternative work arrangements.”<sup>182</sup> Now that Member Liebman, co-author of the dissent, chairs the Board, her analysis has a better chance of commanding a majority of the Board, and the workers in “alternative work arrangements”—including temporary and part-time workers—may rightly be placed in the same bargaining unit as their full-time sisters and brothers. Again, this shows that the NLRB can still interpret the NLRA properly and deny employers’ attempts to create lines of division between workers.

Also in 2008, the Sixth Circuit overturned a decision by the NLRB attempting to divide workers by denying NLRA protections for concerted activity. In *Jolliff v. NLRB*,<sup>183</sup> a group of truck drivers was fired after writing a letter to corporate officers and a major customer of the company complaining of regional managers’ demands that the drivers “fix” their logbooks.<sup>184</sup> The NLRA ruled that such accusations were “maliciously false,” and the workers therefore lost NLRA protection for their concerted activity.<sup>185</sup> However, the Sixth Circuit reversed, finding that there was no malice in the workers’ accusations, and remanding the case to determine if the letter was protected collective activity.<sup>186</sup> On remand, the Board found the firings to have occurred in violation of NLRA section 8(a)(1).<sup>187</sup>

The Seventh Circuit also reversed a Board ruling that sought to divide workers by allowing an employer to lock out its striking workers who had unilaterally agreed to end the strike, while permitting the non-strikers to work.<sup>188</sup> In *Local 15, International Brotherhood of Electrical Workers v. NLRB*, the court ruled that the employer, Midwest Generation, had improperly discriminated against union

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<sup>181</sup> *Oakwood Care Ctr.*, 343 N.L.R.B. at 664–65 (Liebman, M., and Walsh, M., dissenting).

<sup>182</sup> *Id.* at 665.

<sup>183</sup> *Jolliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008).

<sup>184</sup> *Id.* at 602–06.

<sup>185</sup> *TNT Logistics N. America, Inc.*, 347 N.L.R.B. 568, 570 (2006).

<sup>186</sup> *Jolliff*, 513 F.3d at 617.

<sup>187</sup> *TNT Logistics N. America, Inc.*, 353 N.L.R.B. No. 41, 2008 WL 4763505 (Oct. 30, 2008).

<sup>188</sup> *Local 15, Int’l Bhd. of Elec. Workers v. NLRB (Midwest Generation)*, 429 F.3d 651 (7th Cir. 2005).



activity by maintaining its partial lockout after the strikers agreed to return to work, and had failed to show that it had a legitimate and substantial business justification for the partial lockout.<sup>189</sup> Once again, a court ruled against an employer's attempt to pit workers against each other by maintaining a lockout against some workers but not others.

With respect to the NLRA's rigid joint employer standard, a 2008 ALJ decision has indicated that the standard may be becoming more flexible and practical. In *CNN America, Inc.*,<sup>190</sup> an ALJ determined that CNN was a joint employer of a group of camera operators and technicians, who were directly employed by Team Video Services, L.L.C. While recognizing the controlling joint employer standard from *TLI, Inc.*, the ALJ wrote, "[i]n practice, Board decisions do not provide a bright line for determining when a joint employer relationship exists. Each case is pretty much *sui generis* and requires consideration of numerous factors."<sup>191</sup> The ALJ then proceeded to apply factors such as (1) whether the work performed involved the core of the putative joint employer's business,<sup>192</sup> (2) whether the putative joint employer was effectively the only source from which the direct employer could draw upon to compensate its employees,<sup>193</sup> (3) whether the putative joint employer had to give approval before the direct employer could assign overtime hours,<sup>194</sup> (4) whether the putative joint employer determined the number of full-time and daily hires to be employed by the direct employer,<sup>195</sup> and (5) whether the putative joint employer held out the direct employer's employees as its own.<sup>196</sup> Significantly, the ALJ also distinguished this case from *Southern California Gas Co.*<sup>197</sup> Although *CNN America* is on appeal,<sup>198</sup> the decision points to a possible Board trend of loosening the joint em-

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<sup>189</sup> *Id.* at 661.

<sup>190</sup> *CNN America, Inc.*, Nos. 5-CA-31828, 5-CA-33125, 2008 WL 6524258 (N.L.R.B. Div. of Judges Nov. 19, 2008).

<sup>191</sup> *Id.* at \*11.

<sup>192</sup> See *Holyoke Visiting Nurses Ass'n*, 11 F.3d 302 (1st Cir. 1993).

<sup>193</sup> See *Continental Group, Inc.*, 353 N.L.R.B. No. 31 (Sept. 30, 2008), slip op. at 9; *D&F Industries, Inc.*, 339 N.L.R.B. 618, 640 (2003).

<sup>194</sup> See *Quantum Resources Corp.*, 305 N.L.R.B. 759, 760-61 (1991).

<sup>195</sup> See *D&F Industries*, 339 N.L.R.B. at 640; *Capitol EMI Music, Inc.*, 311 N.L.R.B. 997, 1000, 1017 (1993).

<sup>196</sup> *Capitol EMI Music, Inc.*, 311 N.L.R.B. at 1017.

<sup>197</sup> *CNN America, Inc.*, Nos. 5-CA-31828, 5-CA-33125, at \*11 n.10 (citing *S. Cal. Gas Co.*, 302 N.L.R.B. 456, 461 (1991)).

<sup>198</sup> NABET-CWA Local 31 Washington, D.C., Further Update Information on NLRB vs. CNN/Team Video (Sept. 30, 2009), <http://www.nabet31.org/level1.cfm?ID=21> (last visited Mar. 18, 2010).

ployer standard to look more like the expansive FLSA standard, helping to unify jointly-employed workers with their singularly-employed coworkers.

Even in the midst of the “September Massacre” of 2007, when the Board issued a stinging series of anti-union decisions,<sup>199</sup> the Board reversed precedent and upheld a union’s right to continue representing workers after merging with another union. In *Kravis Center for the Performing Arts*, the Board ruled that the lack of due process during a union merger or affiliation does not, in and of itself, allow an employer to withdraw recognition of the union subsequent to the merger or affiliation.<sup>200</sup> The Board determined that such a due process requirement was no longer appropriate after a Supreme Court decision, *NLRB v. Financial Institution Employees of America Local 1182 (Seattle–First)*, and that because the union had majority collective bargaining representative status, the employer was precluded from withdrawing recognition.<sup>201</sup> Following similar logic, the Board also found that when one union disaffiliates with another, resulting in two unions claiming exclusive representation of a bargaining unit, the employer must recognize the union that can demonstrate practical continuity in representation.<sup>202</sup> This decision ensured that Workers United, an SEIU affiliate, will be able to continue representing the 150,000 workers that disaffiliated from another union UNITE HERE.<sup>203</sup> If management tactics and

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<sup>199</sup> See generally Lofaso, *supra* note 156 (One of the most jarring decisions came in *Dana Corp.*, 351 N.L.R.B. 434 (2007), when the Board ruled that employers must notify workers that they have a 45-day window to file for union decertification after learning that the employer has voluntarily recognized the union). However, labor advocates may be able to use language from some of the September Massacre dissents, now that the NLRB will likely have a Democratic majority. For example, Board Member Dennis P. Walsh’s dissents in *Intermet Stevensville*, 350 N.L.R.B. 1349 (2007) (*Intermet I*) and *Intermet Stevensville*, 350 N.L.R.B. 1270 (2007) (*Intermet II*), where the Board refused to issue *Gissel* bargaining orders pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) for egregious violations of the NLRA, may offer a basis for issuing more bargaining orders as soon as the Democrats control the NLRB.

<sup>200</sup> *Raymond F. Kravis Ctr. for the Performing Arts*, 351 N.L.R.B. 143 (2007), *aff’d*, *Raymond F. Kravis Ctr. for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183 (D.C. Cir. 2008).

<sup>201</sup> *Id.*

<sup>202</sup> This principle was the culmination of five decisions by NLRB Regional Directors in Michigan (*Continental Linen Servs., Inc.*, No. GR-7-RM-1491 (June 30, 2009)), Ohio (*Premair of Cleveland, L.L.C.*, No. 8-RM-1111 (June 30, 2009)), Missouri (*Gateway Packaging Co. of Mo.*, No. 17-RM-864 (June 25, 2009)), Minnesota (*Radisson Duluth Hotel*, No. 18-RM-1380 (Aug. 4, 2009)), and California (*Royal Laundry*, No. 20-RM-2868 (June 12, 2009)) (finding continuity of representation was demonstrated by same stewards, local officers, and union staff continuing to bargain and administer the contracts).

<sup>203</sup> Press Release, Workers United, Workers United Wins Landmark National Labor

union infighting grow fiercer, these decisions will help ensure that workers will stay united and not lose their right to union representation.

C. *NLRB & Courts Limiting Independent Contractor Exemption to NLRA*

The NLRB and federal courts have also recently ruled against dividing workers in the area of independent contractors. Under the 1947 Taft–Hartley Act amendments to the NLRA, independent contractors were excluded from the definition of “employees” and were thus unprotected under the NLRA.<sup>204</sup> In 2008, the Ninth Circuit upheld a ruling by the Republican-dominated NLRB that taxi cab drivers—workers whose “independent contractor” status is currently hotly contested—are to be considered covered “employees” for the purposes of the NLRA.<sup>205</sup> In that case, *NLRB v. Friendly Cab Co.*, the court applied the standard common-law agency test to find that the taxi cab company had violated the NLRA by not recognizing its drivers’ authorized union.<sup>206</sup> The court weighed a set of factors<sup>207</sup> under a totality of the circumstances standard, and stated that while no one factor is decisive, the outcome “rests primarily upon the amount of supervision that the putative employer has a right to exercise over the individual, particularly regarding the details of the work.”<sup>208</sup> In addition to *Friendly Cab Co.*, the NLRB ruled in favor of “employee” status over “independent contractor” status

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Relations Board Decision (July 22, 2009), *available at* <http://workersunitedunion.org/content/workers-united-wins-landmark-national-labor-relations-board-decision>.

<sup>204</sup> NLRA § 2(3), 29 U.S.C. § 152(3) (2006); *see also* House Report on Taft–Hartley Act, H.R. Rep. No. 80–245 (1st ed. 1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 309 (1948) (“‘Employees’ work for wages or salaries under direct supervision. ‘Independent contractors’ undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.”).

<sup>205</sup> *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008), *aff’g* *Friendly Cab Co.*, 344 N.L.R.B. 528 (2005). Bush-appointed Chairman Battista and Member Schaumber, along with Clinton-appointed Member Liebman, took part in the decision.

<sup>206</sup> *Friendly Cab Co.*, 512 F.3d at 1098, 1103.

<sup>207</sup> Some of the factors considered included: (1) the company’s ability to control the drivers’ conduct; (2) the company’s strict disciplinary and dress codes; (3) the requirement that drivers carry advertisements without compensation; (4) the drivers’ risk of loss and opportunity for profit; (5) the lack of drivers’ proprietary interest in the business; (6) and the prohibitions on entrepreneurial opportunities available to the drivers. *Id.* at 1097, 1099.

<sup>208</sup> *Id.* at 1096–97 (quoting *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 357 (9th Cir. 1975)).

in several other cases during the George W. Bush presidency,<sup>209</sup> demonstrating that decisions uniting workers can come even during the darkest days of a Republican-controlled Board.

These recent cases, together with President Barack Obama's pro-worker appointments to the NLRB and the proposed Employee Free Choice Act, show that the NLRA is a statutory regime worth saving. Indeed, the NLRA's fundamental purpose is to balance the power disparities between employers and workers by promoting unity among workers. A fully-funded NLRB can carry out its mandate to enforce the NLRA. And by organizing for greater political power and expanding the applications of pro-union court and Board decisions, labor advocates can push the NLRA back to its pro-collective bargaining roots.

## VI. CONCLUSION

The NLRA and the FLSA each have long and tumultuous histories. However, the NLRA's protection of collective action by workers has been beaten beyond recognition, whereas the FLSA's enforcement of a baseline of minimum individual workplace rights has been left relatively unscathed. Perhaps this is the result of the business class's fear of the NLRA's purported objective: to affirmatively address the power imbalance at the workplace by encouraging worker unity and collective bargaining for a voice at work. Of course, employers generally dislike having to give workers more money and benefits, but not as much as they resent having to face

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<sup>209</sup> See, e.g., *Igramo Enter., Inc.*, 351 N.L.R.B. 1337 (2007), *aff'd*, *NLRB v. Igramo Enter., Inc.*, 310 F. App'x 452 (2d Cir. 2009) (finding that drivers for employer that operated medical courier service were employees and not independent contractors after weighing the factors from the common law agency test); *Community Bus Lines*, 341 N.L.R.B. 474 (2004) (finding that, under common law agency test, shuttle bus drivers were employees, not independent contractors); *BKN, Inc.*, 333 N.L.R.B. 143, 144 (2001) (using common law agency test, the Board "considered all the incidents of the individual's relationship to the employing entity," to determine that freelance writers, artists, and designers were employees, not independent contractors); *FedEx Home Delivery*, 351 N.L.R.B. No. 16 (2007) (finding that FedEx committed an unfair labor practice by refusing to bargain with FedEx drivers' authorized union since, under common law agency test, drivers were employees and not independent contractors), *rev'd*, *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). In reversing the Board's decision in favor of employee status in *FedEx Home Delivery*, the D.C. Circuit arguably failed to apply the common law agency test—which focuses on a putative employer's control over the work—and instead created a new test based solely on the workers' entrepreneurial opportunities. See *FedEx Home Delivery*, 563 F.3d at 504–18 (Garland, J. dissenting); see also posting of Mitchell H. Rubenstein to Adjunct Law Prof blog, D.C. Circuit Issues Major Decision Defining Employee Status Under NLRA, <http://lawprofessors.typepad.com/adjunctprofs/2009/04/dc-circuit-issues-major-decision-defining-employee-status-under-nlra.html> (Apr. 23, 2009).

their workers across the table and bargain the terms and conditions of employment, thereby acknowledging that they have lost some control of the workplace. But despite workers' diminution in power under the NLRA, only it—and not the FLSA—provides the statutory regime on which workers must rely when they collectively fight for respect and dignity on the job and equality with the employer. And recent case law and President Barack Obama's appointments to the NLRB indicate that the NLRA will still be there to support workers' collective action. When it was passed, the NLRA was viewed as a radical piece of legislation. With more pro-union NLRB and court interpretations, the NLRA can embolden a unified worker movement for respect and dignity on the job.

