CAN THE NLRB DETER UNFAIR LABOR PRACTICES? REASSESSING THE PUNITIVE-REMEDIAL DISTINCTION IN LABOR LAW ENFORCEMENT

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Labor law scholars have long recognized that the National Labor Relations Act no longer deters employers from committing unfair labor practices, especially during the crucial time periods of union organizing drives and first contract negotiations. As a result, the Act's promise of "full freedom of association" has become increasingly illusory. Recent scholarship suggests that discharges based on union activity—the classic employer unfair labor practice—are now commonplace, in large part because employers committed to union avoidance consider them merely a cost of doing business. The remedies available to the National Labor Relations Board to redress labor law violations simply are not burdensome enough to deter unlawful conduct. Scholars and policymakers have recognized this fact and made various proposals for reform.

But scholars have not adequately examined the reasoning underlying the strict limitations on the Board's remedial power. The statute itself appears to supply broad discretion, stating plainly that the Board is empowered to direct offenders to "take such affirmative action . . . as will effectuate the policies of this Act." Shortly after the law was enacted, however, the U.S. Supreme Court severely constrained that discretion, holding in Republic Steel Corp. v. NLRB *that Board remedies may not be "punitive" in nature and that deterrence is not a permissible rationale on which to premise a particular remedy. Since that time, courts have used the* Republic Steel *rule to cut back on the Board's remedial authority. But a comprehensive examination of the basis for, and application of, that rule remains missing in the academic literature.*

In this Comment, the author provides that examination by surveying the application of Republic Steel *to various remedies attempted by the Board and by analyzing whether the rule has any basis in the NLRA. The Comment reveals that the rule never has been applied in a coherent manner and that it lacks support in the legislative history and the statutory language. The author argues that* Republic Steel *has resulted in confusion and inconsistency, and has played no small part in the Board's inability to deter unfair labor practices effectively. Furthermore, the author maintains that Congress intended the Board to*

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exercise broad discretion to affirmatively deter violations of the Act. Ultimately, however, the author concludes that doctrinal change will not come about without action by Congress.

INTRODUCTION

Section 10(c) of the National Labor Relations Act (the NLRA or the Act) authorizes the National Labor Relations Board (the NLRB or the Board) to remedy unfair labor practices by directing wrongdoers to "take such affirmative action . . . as will effectuate the policies of this [Act]."[1] Those policies have long been understood as "encouraging and protecting" collective bargaining and self-organization by employees.[2] Thus, the Act is a

1. 29 U.S.C. § 160(c) (2000).

2. Va. Elec. & Power Co. v. NLRB, 319 U.S. 533, 539 (1943); *see also* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984) (holding that the Act's "avowed purpose" is "encouraging and protecting the collective-bargaining process"). The statute itself 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 and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

measure aimed at assuring public rights, not merely redressing private grievances.[3] Likewise, the Board is, at least nominally, afforded great deference in determining what remedies most appropriately effectuate the policies of the Act.[4]

Such a legislative charge seemingly would provide the Board with the power, indeed the responsibility, to fashion remedies that function to deter violations of the NLRA.[5] But remarkably, the legitimacy of deterring unfair labor practices has stood on shaky ground at best for nearly the entire history of modern American labor law. In 1940, just five years after the original passage of the Act, the U.S. Supreme Court announced a major limitation on the Board's remedial power in *Republic Steel Corp. v. NLRB*.[6] The primary rule of that case declared that remedies under the NLRA may not be "punitive" in nature.[7] The Court further asserted that:

> [I]t is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.[8]

That is to say, the Board may fashion remedies that happen to deter unfair labor practices, but it may not premise a particular remedy on a deterrence rationale.[9] As Justice Harlan wrote in an influential explication of the rule: "[A]

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3. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 192–93 (1941).

4. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964) ("The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" (quoting *Va. Elec. & Power*, 319 U.S. at 540)); *see also Sure-Tan*, 467 U.S. at 898–99; NLRB v. Food Store Employees Union, 417 U.S. 1, 8 (1974); Golden State Bottling Co. v. NLRB, 414 U.S. 168, 176 (1973); NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n.32 (1969). In reality, however, the courts generally have not shown great deference to the Board. J. FREEDLEY HUNSICKER, JR. ET AL., NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 16 (rev. ed. 1986).

5. *See* Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1788 (1983) ("It would seem logical . . . that a major aim of Board action should be the prevention of employer interference with the employees' collective right to self-organization.").

6. 311 U.S. 7 (1940).

7. *Id.* at 10–13.

8. *Id.* at 12.

9. *See id.* Paul C. Weiler has similarly noted:

> In *Republic Steel*, the Supreme Court held that no matter how broad the language of section 10(c), the Board did not have the authority to devise punitive measures designed to deter rather than to compensate. The assumption of the law, then, is that prevention can only be the serendipitous by-product of remedies designed to redress injuries inflicted on employees.

Weiler, *supra* note 5, at 1789 n.69 (citing *Republic Steel*, 311 U.S. at 10–12).

tendency to deter unfair labor practices is not alone sufficient justification for a Board order of affirmative relief . . . . Deterrence is certainly a desirable even though not in itself sufficiently justifying effect of a Board order."[10] This standard has proven difficult to apply, even for the Supreme Court itself.[11]

Indeed, just over a decade after deciding *Republic Steel*, the Court appeared to back away from the punitive-remedial distinction set out in that case. In *NLRB v. Seven-Up Bottling Co.*,[12] the Court upheld the Board's standardized method of computing backpay awards even though it sometimes had the effect of overcompensating unlawfully discharged employees.[13] While asserting that *Republic Steel*'s holding "remain[ed] undisturbed," the Court declined to concern itself with whether forcing an employer to pay employees more than they would have earned had they not been unlawfully discharged constituted a "punitive" measure.[14] Writing for the majority, Justice Frankfurter explained:

> It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is "remedial" and what is "punitive." It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act.[15]

The dissenters charged that the Court effectively had overruled *Republic Steel*.[16] But as discussed below, *Republic Steel*'s ban on punitive remedies remains very much alive. Reviewing courts, and even the Board itself, repeatedly enter the "bog of logomachy" that Justice Frankfurter warned against, inquiring whether a proposed remedy is aimed at punishment or deterrence rather than "effectuating the policies of the Act." Reliance on *Republic Steel* is not always explicit, but its line of reasoning—strictly limiting the scope of that seemingly broad statutory command—is readily identifiable again and again.[17] In fact,

10. Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 659 (1961) (Harlan, J., concurring).

11. *See* HUNSICKER ET AL., *supra* note 4, at 9–10 ("The Supreme Court has cautioned the courts not to engage in a semantic debate concerning what is 'remedial' and what is 'punitive' . . . . Sometimes, however, the Supreme Court has failed to follow its own advice.").

12. 344 U.S. 344 (1953).

13. *Id.* at 345–48.

14. *Id.* at 348.

15. *Id.*

16. *Id.* at 353 (Minton, J., dissenting) ("It seems to us that we enter a 'bog of logomachy' when we start to retract what we plainly said twelve years ago in *Republic Steel* . . . .").

17. A student commentator clearly recognized the implicit reliance on *Republic Steel* in the Supreme Court's most recent statement on Board remedies, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). *See Leading Cases*, 116 HARV. L. REV. 200, 392 (2002); *see also* discussion *infra* Part II.A.2.

Republic Steel and *Seven-Up Bottling Co.* appear to provide two competing standards of review for Board remedies, and there is simply no identifiable way to predict when one will be applied to the detriment of the other.[18]

Meanwhile, empirical evidence suggests that the NLRA has failed to deter the unfair labor practices it purports to ban. In 1994, a commission appointed by the U.S. Secretaries of Labor and Commerce, and chaired by former Secretary of Labor John T. Dunlop, comprehensively studied collective bargaining in the United States and proposed major labor law reforms.[19] Among its findings, the commission determined that "[t]he probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA has increased over time."[20] The commission also found that "[r]oughly a third of workplaces that vote to be represented by a union do not obtain a collective bargaining contract with their employer."[21] These findings corroborate Professor Weiler's striking assertion that "[p]erhaps the most remarkable phenomenon in the representation process in the past quarter-century has been an astronomical increase in unfair labor practices by employers."[22] Likewise, former NLRB Chairman William B.

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18. *See infra* notes 75, 152–154, 208–223, 228–233, 238–240, 252–255 and accompanying text.

19. *See generally* THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'TS OF LABOR & COMMERCE, REPORT AND RECOMMENDATIONS (1994) [hereinafter THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS], *available at* http://www.ilr.cornell.edu/library/downloads/keyworkplacedocuments/DunlopCommissionFutureworkermanagementFinalReport.pdf.

20. *Id.* at 38. In fact, one recent study found that discriminatory discharges for union activity take place during 25 percent of union organizing drives. *See* KATE BRONFENBRENNER, UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING 44 (2000), *available at* http://www.attac.org/fra/toil/doc/cornell.pdf. One possible explanation for the steep increase in unlawful discharges is the rise of a multimillion dollar antiunion consulting industry. For a comprehensive examination of this phenomenon, see generally John Logan, *Consultants, Lawyers, and the "Union Free" Movement in the USA Since the 1970s*, 33 INDUS. REL. J. 197 (2002), *available at* http://www.rightsatwork.org/docUploads/Logan%2DConsultants%2Epdf. For a recent example of antiunion consultants at work, see Steven Greenhouse, *How Do You Drive out a Union? South Carolina Factory Provides a Textbook Case*, N.Y. TIMES, Dec. 14, 2004, at A30.

21. THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 19, at 39.

22. Weiler, *supra* note 5, at 1778. Based on NLRB data, Weiler found that through 1980, unfair labor practice charges against employers had increased by 200 percent since 1965 and 750 percent since 1957. *Id.* at 1779–80. Likewise, the percentage of those charges found to be meritorious increased from 21 percent in 1958 to 39 percent in 1980. *Id.* at 1780 n.34 (citations omitted). Weiler updated his findings in 1990. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 237–39 (1990) (concluding that "[t]he dimensions of the increases in unfair labor practices" remain "quite astounding"). *But see* Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 965–69, 990–98 (1991) (challenging Weiler's methodology and conclusions). Weiler defended his work in Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1021–24 (1991).

Gould IV suggests that the Board's "lack of effective remedies" has "undermined the statute's [policies]."[23] Even Human Rights Watch has weighed in on the issue, concluding:

> The reality of NLRA enforcement falls far short of its goals. Many workers who try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimized in reprisal for their exercise of the right to freedom of association.[24]

Such conclusions are not controversial. The canonical labor law text states flatly:

> Any statutory system for the protection of employee rights will be only as effective as the remedies afforded. Broad declaration of such rights in the statute and in the decisions of the National Labor Relations Board will convince neither employers nor employees if the remedies are meager in impact and slow in coming . . . . Serious weaknesses have been identified—by scholars as well as by the Board itself—in the Board's traditional remedies in cases of employer coercion and discrimination under Sections 8(a)(1) and (3).[25]

Indeed, even those who question the extent to which weak remedies have resulted in the decline of organized labor concede that the remedies available to the Board are ineffective.[26]

At the same time, periodic proposals to amend the NLRA and provide for stronger enforcement mechanisms have proven entirely unsuccessful. In 1977, the House of Representatives passed legislation that would have, among other things, mandated double backpay awards for employees who are unlawfully discharged during an organizational campaign.[27] That bill fell prey to a Senate filibuster.[28] In 1994, the Dunlop Commission recommended

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23. WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB–A MEMOIR 22 (2000); *see also* WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 151 (1993) ("The Act has not been working effectively during much of the past twenty years . . . . [R]emedies for statutory violations are not an effective deterrent.").

24. HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 13–14 (2000), *available at* http://www.hrw.org/reports/2000/uslabor/. Putting human faces on the issue, Humans Right Watch described a number of recent episodes of egregious employer violations. *Id.* at 15–19.

25. ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 253–54 (13th ed. 2001).

26. *See* LaLonde & Meltzer, *supra* note 22, at 964 ("A Board remedy, even after judicial enforcement, may not be sufficiently burdensome to deter future violations.").

27. Labor Reform Act of 1977, H.R. 8410, 95th Cong. (1977); S. 2467, 95th Cong. (1978); *see also* H.R. REP. NO. 95-637 (1977).

28. 124 CONG. REC. 18,398, 18,400 (1978).

holding representation elections within two weeks of the filing of a petition, requiring the Board to seek injunctions against unlawful employer conduct during organizing campaigns and first-contract negotiations, and allowing binding arbitration for first contracts under limited circumstances.[29] None of these proposals ever became law.[30] Likewise, some reformers urge the establishment of a private cause of action to remedy labor law violations,[31] perhaps including the award of punitive damages.[32] Most recently, Senator Edward Kennedy (D-MA) and Representative George Miller (D-CA) introduced legislation that would, among other things, provide for the availability of treble backpay for discriminatory discharges, the assessment of civil penalties against recidivist violators, and mandatory use of the section 10(j) injunction during organizational campaigns and first-contract negotiations.[33] Though organized labor is strongly supporting it, the bill has little chance of becoming law, at least so long as the Republican Party controls Congress.[34]

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29. THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 19, at 10. Professor Weiler, who served as chief counsel of the commission, has emphasized the importance of holding timely elections. *See* WEILER, *supra* note 22, at 253–61; Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 189–90 (2001) ("In the union representation context, the most crucial feature of labor law reform is replacing *protracted* with *promptly-held* elections.").

30. The 1994 Republican takeover of Congress foreclosed that possibility. *See id.* at 177.

31. *See, e.g.*, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1551–58 (2002).

32. *See, e.g.*, Note, *NLRB Power to Award Damages in Unfair Labor Practice Cases*, 84 HARV. L. REV. 1670, 1682–83 (1971).

33. Employee Free Choice Act, H.R. 1696, 109th Cong. (2005); S. 842, 109th Cong. (2005). Perhaps the most crucial portion of the bill from the perspective of organized labor is a provision establishing "card check," which would obviate the need for protracted representation election campaigns by requiring employers to recognize unions for whom a majority of employees have signed authorization cards. *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 435–38 (2002) (discussing the card check system and concluding that it would be "the most desirable format for resolving representational issues"). As Professor Weiler has noted, it is these campaigns that provide employers with the opportunity to commit the most egregious violations. *See* Weiler, *supra* note 5, at 1777–78. Thus, it bears noting that instituting a card check system as a procedure for certifying unions might be the most effective step Congress can take to reduce the number of unfair labor practices committed by employers. It does not, however, resolve the question of whether the NLRB, by exercising its remedial power under section 10(c), can affirmatively deter such violations.

34. *See* Steven Greenhouse, *Labor Rallies in Support of Bill to Back the Right to Join Unions*, N.Y. TIMES, Dec. 11, 2003, at A41 (describing support for legislation among various union leaders and Democratic politicians); Josephine Hearn, *Unions Kick off "Journey of a Thousand Miles,"* THE HILL, Dec. 10, 2003, at 11 (describing Republican opposition to the bill). At the end of the 108th Congress, the bill had 209 House cosponsors and 37 Senate cosponsors. Employee Free Choice Act, H.R. 3619, 108th Cong. (2003); S. 1925, 108th Cong. (2003). At the time this Comment went to press, the current legislation had 174 House cosponsors and 36 Senate cosponsors. *See* http://www.senate.gov.

Such proposals are not new, and it is probably safe to hypothesize that any one of them would be an improvement on the existing system. For years, scholars have decried the Board's failure to deter unfair labor practices.[35] These commentators often note the ban on punitive remedies with disdain, taking as sui generis its foundational, correlative impact on the weakness of Board remedies.[36] Some, most notably Derek Bok, have explicitly questioned the grounding of the *Republic Steel* rule in the statute's text and history.[37] But a comprehensive examination of the doctrine's application and basis remains missing in the academic literature. That is the aim of this inquiry. It is an inquiry of high importance because, as Cynthia Estlund puts it: "The basic statutory language . . . [has] been nearly frozen, or ossified, for over fifty years."[38] Unless and until Congress amends the statutory text, the Board and the courts, by exercising their interpretive role, remain the only institutions capable of restoring some semblance of deterrence to a statutory scheme that has become empty and meaningless without it.

It is the contention of this Comment that the distinction between permissible "remedial" measures and impermissible "punitive" measures is a chimerical one that has left in question the extent to which deterrence is a valid basis for the fashioning of remedies under the Act. The *Republic Steel* rule, and the concomitant question of the scope of the Board's remedial authority, has resulted in confusion and inconsistency, and has played no small part in the Board's inability to deter unfair labor practices effectively. In fact, Congress intended section 10(c) to contain strong deterrence powers, and the Board should be afforded more deference to order remedies designed to deter violations of the Act.

Part I of this Comment discusses the facts of *Republic Steel* and possible limitations on its holding. Then, Part II surveys various remedies that have been accepted as permissibly remedial or rejected as impermissibly punitive over time, concluding that the distinction between the two is often incoherent and that the case law is inconsistent as to the extent to which deterrence is a valid remedial goal under the Act. Finally, Part III examines the legislative

35. Paul Weiler is probably the most prolific contemporary commentator on this subject. *See generally* WEILER, *supra* note 22, at 228; Weiler, *supra* note 29, at 187–88; Weiler, *supra* note 5, at 1769–70. *See also* Befort, *supra* note 33, at 371–74; Estlund, *supra* note 31, at 1537; Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 62–63 (1993).

36. *See, e.g.*, Befort, *supra* note 33, at 373; Weiler, *supra* note 5, at 1788–89, 1789 n.69.

37. *See* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1463 n.193 (1971) (calling the *Republic Steel* rule "highly questionable").

38. Estlund, *supra* note 31, at 1530.

history of the Act as well as judicial interpretation of Title VII of the Civil Rights Act of 1964, a statute with a similar remedial provision, and concludes that Congress did in fact intend deterrence to be a primary purpose of the remedial provision of the NLRA.

I. THE FACTS OF *REPUBLIC STEEL* AND POSSIBLE LIMITATIONS ON ITS HOLDING

The holding of *Republic Steel* can be, and in fact has often been, construed very broadly to bar the Board from ordering any remedy that a reviewing court characterizes as punitive or that is predicated chiefly on a deterrence rationale. But as the Court in *Seven-Up Bottling Co.* seemed to imply in stepping away from the punitive-remedial distinction, the reach of *Republic Steel* need not be so sweeping. In fact, some authorities support the view that *Republic Steel* actually prohibits only the type of remedy the Court explicitly rejected in that case.

In *Republic Steel*, the employer was found to have committed several unfair labor practices, including the discriminatory discharge of certain employees.[39] The discharged employees had found alternative employment with a government-sponsored New Deal work relief program, and thus were not eligible to recover backpay for time they were employed by the government.[40] Nonetheless, the Board ordered the employer to pay the corresponding amount to the government program, concluding that "the unfair labor practices of the company had occasioned losses to the Government financing the work relief projects."[41] The Third Circuit directed enforcement of the Board's order.[42] The Supreme Court, however, concluded that such a remedy operated as an impermissible fine or penalty.[43] In reversing the award to the government, the Court used broad language underscoring the nonpunitive nature of the Board's remedial authority:

> We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction

39. Republic Steel Corp. v. NLRB, 311 U.S. 7, 8 (1940).
40. *Id.* at 8–9.
41. *Id.* at 9.
42. *Id.* at 8.
43. *Id.* at 10 ("[T]hese required payments are in the nature of penalties imposed by law upon the employer,—the Board acting as the legislative agency in providing that sort of sanction by reason of public interest.").

> enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." We have said that the power to command affirmative action is remedial, not punitive.[44]

Ultimately, the Court rejected deterrence alone as a sufficient basis for any particular remedy.[45]

Despite the sweeping rejection of "punitive" remedies found in the language of *Republic Steel*, the Court did little to define exactly which possible remedies, other than the mandated payment to the government specifically at issue in that case, it had in mind. Indeed, a few authorities narrowly interpret *Republic Steel* chiefly as removing from the Board's remedial arsenal orders that require the violator to pay funds to third parties not involved in the litigation. Most notably, just three years after deciding *Republic Steel*, the Supreme Court itself held that a Board order requiring an illegal company-dominated union to fully reimburse its members' dues payments was not the type of punitive measure barred by *Republic Steel*.[46] Distinguishing the earlier case, the Court noted, "This is not a case in which the Board has ordered the payment of sums to third parties . . . ."[47] Likewise, in a later case, the Ninth Circuit rejected a Board order that required the employer and the union to reimburse dues to employees whose rights may never have been violated.[48] The court explained that these employees were "strictly third parties in the sense that the United States Government was a third party in . . . *Republic Steel*."[49]

Indeed, the swift manner with which the *Seven-Up Bottling Co.* Court dispatched with *Republic Steel* as precedent supports these narrower interpretations. After declining to enter the "bog of logomachy" separating the punitive from the remedial, the majority stated simply: "Of course, *Republic Steel* dealt with a different situation, and its holding remains undisturbed."[50] This brief conclusory assertion, coupled with the pointed criticism of the punitive-remedial distinction that immediately preceded it, suggests that the Court itself considered *Republic Steel* to go no further than barring the Board from forcing payments to the government or other third parties. It did not give reviewing courts license to deny deference to the Board's remedial orders

44. *Id.* at 11–12 (citing Consol. Edison Co. v. NLRB, 305 U.S. 197, 235–36 (1938)).
45. *Id.* at 12.
46. Va. Elec. & Power Co. v. NLRB, 319 U.S. 533, 544 (1943).
47. *Id.*
48. Morrison-Knudsen Co. v. NLRB, 276 F.2d 63, 74–76 (9th Cir. 1960).
49. *Id.* at 74.
50. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953) (citing *Republic Steel*, 311 U.S. 7).

based only on the subjective judgment that the remedy at issue seemed overly "punitive."[51] Overbroad language to the contrary was mere dicta.

The reasoning in *Seven-Up Bottling Co.* is equally compelling as a limiting principle when applied to *Republic Steel*'s rejection of deterrence as a primary rationale for remedies under the Act.[52] That language also should be considered dicta because the Board actually sought to justify its remedy in *Republic Steel* not on a deterrence basis alone, but on the theory that the government program was entitled to be compensated for its losses resulting, albeit indirectly, from the employer's unlawful discharges.[53] Thus, the *Seven-Up Bottling Co.* Court's unwillingness to enter the "bog of logomachy" over a remedy's "punitive" or "remedial" nature logically extends to the notion that a remedy justified on deterrence grounds should not be deemed per se illegitimate. Some additional indication that it does not "bear appropriate relation to the policies of the Act" should exist.[54]

This understanding is consistent with the *Republic Steel* dissenters' recognition that deterrence was already built into section 10(c) by the explicit provision of the backpay remedy.[55] Backpay, Justices Black and Douglas made clear, is as much aimed at influencing the potential payor as it is at compensating the payee.[56] Thus, the dissenters clearly understood backpay as a remedy aimed squarely at deterring unfair labor practices as well as making unlawfully discharged employees whole. They wrote:

> The central policy of the Act is protection to employees from employer interference, intimidation and coercion in relation to unionization and collective bargaining. We cannot doubt but that a back pay order as applied to the employer will effectually aid in safeguarding these rights. . . . The knowledge that he may be called upon to pay out the wages his employees would have earned but for their wrongful discharge, regardless of any assistance government may have rendered them during their unemployment, might well be a factor in inducing an employer to comply with the Act.[57]

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51. Of course, as noted above, the Supreme Court has in subsequent years repeatedly taken such license itself. *See* HUNSICKER ET AL., *supra* note 4, at 9–10.

52. *See supra* note 8 and accompanying text.

53. *See Republic Steel*, 311 U.S. at 9 ("[I]t is contended that the Board could properly conclude that the unfair labor practices of the company had occasioned losses to the Government financing the work relief projects.").

54. *Seven-Up Bottling Co.*, 344 U.S. at 348.

55. *See Republic Steel*, 311 U.S. at 14 (Black and Douglas, J.J., dissenting); *cf.* 29 U.S.C. § 160(c) (2000) ("[T]he Board shall . . . requir[e] such person . . . to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .").

56. *See Republic Steel*, 311 U.S. at 14 (Black and Douglas, J.J., dissenting).

57. *Id.*

Seven-Up Bottling Co.'s deference to the Board in determining the appropriate backpay award in a given case dovetails with the idea that deterrence is a purpose of backpay along with compensation.[58]

Nonetheless, the narrow interpretation of *Republic Steel* suggested by *Seven-Up Bottling Co.* generally has not taken hold among reviewing courts. As demonstrated below, *Republic Steel*'s ban on punitive remedies is applied, explicitly or implicitly, in diverse fact situations and often in an inconsistent manner. This is as true for the traditional remedies of backpay and reinstatement as it is for more creative, novel remedies that the Board has attempted over the years.

II. THE APPLICATION OF THE PUNITIVE-REMEDIAL DISTINCTION TO VARIOUS REMEDIES UNDER THE ACT

A. Traditional Remedies: Backpay

1. The Administration of the Backpay Remedy

In their dissent in *Republic Steel*, Justices Black and Douglas emphasized that backpay has the dual purpose of compensating unlawfully discharged employees and deterring employers from discriminatorily discharging employees in the first place.[59] And, they argued, it is inappropriate and unnecessary for courts to consider whether a particular backpay order is "punitive" or "remedial" because Congress explicitly armed the Board with the backpay remedy in the plain text of the Act.[60] "The 'back pay' provision is clear and unambiguous," the dissenters wrote.[61] "Hence, it is enough here for us to determine what Congress meant from what it said."[62] When it comes to the administration of the backpay remedy in particular fact contexts, this view

58. *See Seven-Up Bottling Co.*, 344 U.S. at 348 ("[T]he Board's conclusions may 'express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions' . . . . '[T]he Board was created for the purpose of using its judgment and its knowledge.'" (quoting Chicago, Burlington & Quincy Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907))). The Court continued, "It is the business of the Board to give coordinated effect to the policies of the Act." *Id.* Compare the dissent's contention that "the power of the Board to effectuate the policies of the Act is remedial and is for *the purpose* of making the employee whole." *Id.* at 355 (Minton, J., dissenting) (emphasis added).

59. *See Republic Steel*, 311 U.S. at 14 (Black and Douglas, J.J., dissenting).

60. *Id.* ("[T]he construction of the provision for back pay is not helped by labeling the Act's purpose or the Board's action as either 'punitive' or 'remedial.'"); *see also* 29 U.S.C. § 160(c) ("[T]he Board shall . . . requir[e] such person . . . to take such affirmative action including reinstatement with or without back pay, as will effectuate the policies of this Act . . . .").

61. *Republic Steel*, 311 U.S. at 15 (Black and Douglas, J.J., dissenting).

62. *Id.*

has become predominant. The Supreme Court, starting with *Seven-Up Bottling Co.*, has refused to disturb backpay orders on the ground that the manner in which they were assessed amounted to impermissible punishment. Similarly, the Board and the courts have justified specific backpay awards on deterrence grounds. Therefore, it is clear that in the context of the traditional backpay award, deterrence is understood as a legitimate primary justification for the remedy, *Republic Steel* notwithstanding.[63]

In *Seven-Up Bottling Co.*, the employer challenged the Board's method of calculating the backpay for which the company was liable.[64] The Board's standardized procedure computed backpay on a quarterly basis.[65] In this case, the procedure had the effect of overcompensating the discharged employees because the employer's business was seasonal, and employees tended to earn significantly more in certain quarters than they did in others.[66] The Fifth Circuit denied enforcement of the Board's order, noting, "The employee is entitled to be made whole, but no more."[67] The Supreme Court reversed, emphasizing the deference due to the Board in its effort "to give coordinated effect to the policies of the Act."[68] As stated above, the Court refused to enter the "bog of logomachy" over the distinction between "punitive" and "remedial" orders.[69]

Seven-Up Bottling Co.'s model of deference also characterizes the Court's later cases on the administration of the backpay remedy. For example, in *NLRB v. J.H. Rutter-Rex Manufacturing Co.*,[70] the Fifth Circuit had reduced the amount of backpay a company owed its employees after a long delay in the compliance portion of a Board proceeding resulted in increased liability to the company.[71] The Supreme Court reversed, relying in part on *Seven-Up Bottling Co.*'s broad view of the deference that should be afforded to the Board on remedial matters.[72] The Court noted approvingly: "Either the

63. *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 153–54 (2002) (Breyer, J., dissenting) ("[B]ackpay awards serve critically important remedial purposes. Those purposes involve more than victim compensation; they also include deterrence, *i.e.*, discouraging employers from violating the Nation's labor laws." (citing NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969))); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 904 n.13 (1984) (recognizing the deterrence purposes of backpay).

64. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953).

65. *See id.* at 345.

66. *Id.* at 349.

67. *Id.* at 346 (citing NLRB v. Seven-Up Bottling Co., 196 F.2d 424, 427 (3d Cir. 1952)).

68. *Id.* at 348.

69. *See id.*

70. 396 U.S. 258 (1969).

71. *Id.* at 260–62, 266.

72. *See id.* at 263 (citing *Seven-Up Bottling Co.*, 344 U.S. at 346–47).

company or the employees had to bear the cost of the Board's delay. The Board placed that cost upon the company, which had [violated the Act]."[73] By "shift[ing] the cost of the delay from the company to the employees," the Fifth Circuit "exceeded the narrow scope of review provided for the Board's remedial orders."[74] Notably, the Court made no mention of *Republic Steel*'s ban on punitive remedies, instead focusing on the deference demanded by *Seven-Up Bottling Co.*[75]

Similarly, in *Golden State Bottling Co. v. NLRB*,[76] the Court upheld a Board order holding a successor company liable for a backpay award stemming from the previous owner's unfair labor practice.[77] As in *J.H. Rutter-Rex*, the Court embraced an expansive conception of the Board's remedial authority and did not concern itself with whether holding a nonviolator liable constituted impermissible punishment. The Court explained:

> The Board's orders run to the . . . bona fide purchaser, not because . . . the bona fide purchase is an unfair labor practice, but because the Board is obligated to effectuate the policies of the Act. Construing § 10(c) thus to grant the Board remedial power to issue such orders results in a reading of the section, as it should be read, in the light of "the provisions of the whole law, and . . . its object and policy."[78]

This broad remedial authority in the area of backpay administration has been justified explicitly by the Board and by reviewing courts on deterrence grounds. For example, in a Board case that predated *Seven-Up Bottling Co.*, both the majority and the dissenters appealed to the deterrent purposes of the Act in an action apportioning liability between a union and an employer who had both contributed to a discriminatory discharge.[79] In the case, the union pressured the employer to discharge an employee.[80] The dissenters argued that the union initiated the unlawful action, so in order to deter similar acts

73. *Id.* at 263–64.

74. *Id.* at 266. Interestingly, an earlier Fifth Circuit case seems consistent with the Court's broad view in *J.H. Rutter-Rex* of the Board's remedial authority. In *W.C. Nabors v. NLRB*, decided six years before *J.H. Rutter-Rex*, the Fifth Circuit held that state statutes of limitation and the defense of laches could not bar a long-delayed NLRB backpay award. W.C. Nabors v. NLRB, 323 F.2d 686, 689 (5th Cir. 1963). In holding that such defenses did not apply to the NLRB, the court explained, "The National Labor Relations Board does not exist 'for the adjudication of private rights'; it 'acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining.'" *Id.* at 688 (quoting Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940)).

75. *See J.H. Rutter-Rex*, 396 U.S. at 263.

76. 414 U.S. 168 (1973).

77. *Id.* at 176–77.

78. *Id.* at 177 (quoting Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956)).

79. *See* Acme Mattress Co., 91 N.L.R.B. 1010 (1950), *enforced*, 192 F.2d 524 (7th Cir. 1951).

80. *Id.* at 1010.

by unions, it should pay the bulk of the backpay award.[81] They noted, "The Board is here concerned with back-pay liability, not as an end in itself, but *only as a means of discouraging and preventing unfair labor practices* . . . ."[82] The majority agreed with the dissenters' characterization of the deterrent purpose of backpay, but argued that it would be better served by holding the union and employer jointly and severally liable.[83] That way, the majority argued, unions would be deterred from pressuring employers to commit unfair labor practices and employers would be deterred from acceding to such demands.[84]

This view is consistent with judicial characterizations of backpay as aimed as much, if not more, at deterring unlawful conduct as it is at compensating illegally discharged employees. As the D.C. Circuit once put it:

> The purpose of requiring that the employer make the discriminatee whole . . . has a two-fold objective. First, the back pay remedy reimburses the innocent employee for the actual losses which he has suffered as a direct result of the employer's improper conduct; second, the order furthers the public interest advanced by the deterrence of such illegal acts. While the need for achievement of the private reimbursement objective is obvious, courts have generally placed greater stress on the less apparent goal of furthering public policy.[85]

The Fifth Circuit made the point even more directly: "[T]he purpose of these back-pay awards is to deter unfair labor practices and not to enforce the private rights of the employees."[86]

These cases make clear that in the area of administering backpay awards, the Board enjoys broad discretion, and may in certain circumstances make employees more than whole and impose obligations on nonviolators. Further, they establish that deterrence is in fact a primary purpose of backpay, despite *Republic Steel*'s ban on punitive remedies and its language denying the independent deterrence basis for Board remedies.[87] Here, it seems, the deference principle of *Seven-Up Bottling Co.* has won out over the *Republic Steel* rule. Yet in one area of backpay administration, that notion does not hold true.

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81. *Id.* at 1022 (Herzog, Chairman and Reynolds, Member, dissenting in part).

82. *Id.* at 1021–22 (emphasis added).

83. *Id.* at 1016–17.

84. *Id.*

85. NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1316 (D.C. Cir. 1972); *see also* Concourse Porsche Audi, Inc., 211 N.L.R.B. 360, 362 (1974), *enforced without opinion*, 513 F.2d 637 (8th Cir. 1975).

86. W.C. Nabors v. NLRB, 323 F.2d 686, 691 (5th Cir. 1963).

87. Whether the backpay remedy, as it is currently administered, *effectively* deters unfair labor practices is a different question entirely. *See* Weiler, *supra* note 5, at 1788–89 (concluding that backpay and reinstatement "simply are not effective deterrents to employers who are tempted to trample on their employees' rights").

2. The Availability of Backpay to Undocumented Immigrants

The most recent battleground over the purposes and propriety of backpay centers on the remedy's availability to undocumented immigrant workers. The stakes of the issue are high. It is estimated that there are more than 8.5 million undocumented immigrants living in the United States, and more than 60 percent of them are members of the workforce.[88] Significant numbers of these employees work in industries covered by the NLRA.[89] Because of their precarious legal status, these workers are particularly susceptible to exploitation, and perhaps therefore, particularly attractive to businesses seeking inexpensive and submissive labor.[90] Sensitive to this reality, the Supreme Court has held that undocumented workers are covered by the Act, and that discharging such a worker for engaging in union activities is an unfair labor practice.[91] Indeed, the Court explicitly recognized that providing

88. B. LINDSAY LOWELL & ROBERTO SURO, THE PEW HISPANIC CTR., HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 5–7 (2002), *available at* http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf. The effect that President George W. Bush's guest worker proposal would have on these numbers is not at all clear. *Cf.* Louis Uchitelle, *Plan May Lure More to Enter U.S. Illegally, Experts Say*, N.Y. TIMES, Jan. 9, 2004, at A12.

89. *See* LOWELL & SURO, *supra* note 88, at 7–8. For example, The Pew Hispanic Center estimates that there are 620,000 undocumented workers in the construction industry, nearly 1.2 million in the manufacturing industry, and more than 1.4 million in the wholesale and retail industry. *Id.* at 7.

90. One recent illustration involves the enormous retailer Wal-Mart, which has successfully resisted union organizing drives for many years and has been severely criticized for paying substandard wages and providing meager benefits to its employees. *See, e.g.*, BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 144–45, 178–85 (2001) (describing the low-wage life of a Wal-Mart employee and the antiunion culture of the company); Abigail Goldman & Nancy Cleeland, *An Empire Built on Bargains Remakes the Working World*, L.A. TIMES, Nov. 23, 2003, at A1 (recounting Wal-Mart's myriad wage-and-hour and labor law violations). In October 2003, after a four-year investigation, federal immigration officials rounded up more than 250 undocumented immigrants working at 60 Wal-Mart stores around the country. Steven Greenhouse, *Wal-Mart Raids by U.S. Aimed at Illegal Aliens*, N.Y. TIMES, Oct. 24, 2003, at A1. Charges were dropped after Wal-Mart agreed to pay the government $11 million. Steven Greenhouse, *Wal-Mart to Pay U.S. $11 Million in Lawsuit on Illegal Workers*, N.Y. TIMES, Mar. 19, 2005, at A1. After the raid, one of the targeted employees explained that he worked 56 hours a week making $6.25 an hour, 363 nights a year (Christmas and New Year's Eve being the only exceptions). *See* Steven Greenhouse, *Cleaner at Wal-Mart Tells of Few Breaks and Low Pay*, N.Y. TIMES, Oct. 25, 2003, at A10. "We don't know nothing about days off," he told a reporter. "We don't know nothing about nights off, we don't know health insurance, we don't know life insurance, and we don't know anything about 401(k) plans." *Id.* A class action wage-and-hour lawsuit against Wal-Mart is pending. Steven Greenhouse, *3 Chains Agree in Suit Over Janitors' Wages and Hours*, N.Y. TIMES, Dec. 7, 2004, at A18.

91. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002) (noting that employers who discharge undocumented workers in violation of the Act are subject to judicially enforceable cease-and-desist orders); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891–92 (1984) (holding that undocumented workers are "employees" within the meaning of section 2(3) of the Act).

undocumented workers with the same collective bargaining rights as their legal counterparts is fully consistent with the enforcement of immigration laws because it reduces the incentive for employers to seek out cheap foreign labor.[92] But when it comes to the remedies available to undocumented workers whose rights have been violated, the Court has not been so generous.

In March 2002, a divided Supreme Court announced in *Hoffman Plastic Compounds, Inc. v. NLRB*[93] that awarding backpay to unlawfully discharged undocumented workers was inconsistent with federal immigration policy and thus barred entirely.[94] This decision ended nearly two decades of confusion over the extent of the Board's power to remedy unfair labor practices committed against illegal immigrants. Thus, a survey of the legal landscape leading up to *Hoffman Plastic* is necessary to understand the implications of its holding.

The Supreme Court first addressed the collective bargaining rights of undocumented workers in 1984 in *Sure-Tan, Inc. v. NLRB*.[95] That case involved two leather processing companies that knowingly had employed several illegal immigrants.[96] After a successful organizing drive, the employees of the two companies voted to be represented by a union, and the NLRB regional office certified that union.[97] The companies' owner then contacted the Immigration and Naturalization Service (INS) and asked it to check the immigration status of several of his employees.[98] As a result, five employees were forced to leave the country.[99] The Board held that the employers had committed unfair labor practices by contacting the INS "solely because the employees supported the Union" and "with full knowledge that the employees in question had no papers or work permits."[100] The Board found that backpay was an appropriate remedy, but it left to a later proceeding the determination of the amount of the backpay award.[101] The Seventh Circuit enforced the Board's order as to the unfair labor practice findings but determined that, because the

92. *Sure-Tan*, 467 U.S. at 893–94. The Court explained:

> If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.

Id.

93. *Hoffman Plastic*, 535 U.S. 137.
94. *Id.* at 151–52.
95. 467 U.S. 883 (1984).
96. *Id.* at 886–87.
97. *Id.*
98. *Id.* at 887.
99. *Id.*
100. *Id.* at 888 (quoting Sure-Tan, Inc., 234 N.L.R.B. 1187 (1978)).
101. *Id.* at 889.

employees were unavailable to work in the United States and thus almost certainly would not be entitled to backpay under the Board's normal processes, backpay should be calculated as a reasonable amount necessary to "effectuate the policies of the Act."[102] The court held that six months backpay was appropriate, and the Board later agreed with this approach.[103]

On appeal, the Supreme Court upheld the unfair labor practice findings[104] but reversed the backpay award.[105] The Court held that awarding six months backpay was too speculative and thus went beyond effectuating the policies of the Act.[106] Writing for the majority, Justice O'Connor asserted that "it remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices."[107]

The Court acknowledged in *Sure-Tan* that denying backpay in this situation would undercut the deterrent purposes of the remedy, but it asserted that allowing backpay would conflict with the NLRA's apparent requirement that remedies not be speculative. Moreover, denying backpay would undermine the immigration laws by allowing individuals to collect backpay for time when they were not "legally available" to work in the United States.[108] Nonetheless, appealing to Justice Frankfurter's warning in *Seven-Up Bottling Co.*, the Court asserted that it was not deciding whether or not a backpay remedy here would be impermissibly punitive under *Republic Steel*.[109] The dissenters charged that the majority had essentially proven its own position on backpay wrong in recognizing that providing undocumented workers with the full protection of the Act would actually disincentivize illegal immigration.[110] Underscoring the deterrent purposes of backpay, Justice Brennan wrote:

> Once employers, such as petitioners, realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost backpay, their "incentive to hire such illegal aliens" will not decline, it will increase. And the purposes of both the NLRA and the Immigration

102. *Id.* at 889–90.
103. *Id.* at 890.
104. *Id.* at 894–98.
105. *Id.* at 900–01.
106. *Id.*
107. *Id.* at 900 (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941) (emphasis added)).
108. *See id.* at 904 n.13.
109. *Id.* at 905 n.14.
110. *See id.* at 912 & n.3 (Brennan, J., dissenting in part).

> and Naturalization [sic] Act (INA) that are supposedly served by today's decision will unquestionably be undermined.[111]

Justice Breyer would later echo these sentiments in his *Hoffman Plastic* dissent.[112]

Unlike the later *Hoffman Plastic* decision, however, *Sure-Tan* did not explicitly ban backpay for undocumented workers in all circumstances. Indeed, the reach of its holding was not at all clear, and the situation was made more complicated by Congress's 1986 passage of the Immigration Reform and Control Act (IRCA), which for the first time explicitly outlawed the employment of illegal immigrants.[113] Differing interpretations of the meaning of *Sure-Tan* in light of IRCA abounded.[114] Under the Reagan and the George H.W. Bush Administrations, the Board and its General Counsel interpreted *Sure-Tan*, and later, IRCA, as banning backpay for undocumented immigrants outright.[115] The Board and its General Counsel reversed course during the Clinton Administration, asserting that IRCA allowed and perhaps even demanded, backpay for undocumented workers.[116]

The circuit courts also split on the meaning of *Sure-Tan*'s holding and its applicability in light of IRCA. For example, in *Local 512, Warehouse & Office Workers' Union v. NLRB*,[117] the Ninth Circuit held that *Sure-Tan* only banned backpay for undocumented immigrants who were no longer living in the United States.[118] The court noted that *Sure-Tan* was primarily concerned with the speculativeness of the backpay award given the immigrants' unavailability

111. *Id.* at 912.

112. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 154 (2002) (Breyer, J., dissenting) ("[I]n the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity. Hence the backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay." (citations omitted)).

113. 8 U.S.C. § 1324(a) (2003); *see also* INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194 (1991) (explaining that IRCA made the prevention of illicit employment of illegal immigrants central to immigration policy).

114. *See Hoffman Plastic*, 535 U.S. at 142 n.2 (listing contradictory interpretations of IRCA's effect on backpay under the NLRA).

115. *See* Felbro, Inc., 274 N.L.R.B. 1268, 1269 (1985), *enforcement denied*, Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705 (9th Cir. 1986) (holding that *Sure-Tan* prohibits backpay for undocumented workers); Memorandum from Rosemary M. Collyer, General Counsel, NLRB, to All Regional Directors 1 n.2, No. GC 87-8 (Oct. 27, 1987) (stating that IRCA prohibits backpay for undocumented workers), *available at* 1987 WL 109409.

116. *See* A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 416 (1995), *enforced*, 134 F.3d 50 (2d Cir. 1997) (concluding that IRCA empowered the Board to award backpay to undocumented workers regardless of competing interpretations of *Sure-Tan*); Memorandum from Fred Feinstein, General Counsel, NLRB, to All Regional Directors 1, No. GC 98-15 (Dec. 4, 1998) (providing that undocumented workers were eligible for backpay), *available at* 1993 WL 1806350.

117. 795 F.2d 705 (9th Cir. 1986).

118. *Id.* at 717, 722.

for work in that case.[119] But such an award would not be speculative when the workers remained in the United States and presumably were free to search for new work despite their illegal status (until, of course, the INS caught up with them).[120] Based on the same deterrence rationale contained first in Justice Brennan's *Sure-Tan* dissent and later in Justice Breyer's *Hoffman Plastic* dissent, the Ninth Circuit held that backpay was available for undocumented immigrants who remained in the United States.[121] In contrast, the Seventh Circuit held that *Sure-Tan* and IRCA prohibited undocumented workers from collecting backpay despite their continued presence in the United States.[122] The Seventh Circuit reasoned that such immigrants were legally unavailable for work within the meaning of *Sure-Tan*, regardless of whether they were, in fact, working or searching for work.[123]

Clearly, the Supreme Court faced an unsettled legal landscape when it heard oral arguments in *Hoffman Plastic*. Rather than resolve the conflicting interpretations of *Sure-Tan*, the five-justice majority chose instead to base its holding primarily on IRCA.[124] In the case, the employer violated section 8(a)(3) of the NLRA by discharging an employee for engaging in union activities.[125] Consistent with its decision in *A.P.R.A. Fuel Oil Buyers*,[126] the Board ordered backpay, measured from the time of the discharge to the time four and one-half years later when the employer first learned that the employee was an undocumented immigrant.[127] The D.C. Circuit enforced the Board's order.[128] The Supreme Court reversed, holding that IRCA foreclosed the availability of backpay for illegal immigrants.[129] Writing for the majority, Chief Justice Rehnquist argued that awarding backpay to such workers would directly flout Congress's express intent to criminalize the employment of undocumented

119. *Id.* at 717.
120. *Id.*
121. *Id.* at 718, 722; *accord* NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 57–58 (2d Cir. 1997).
122. Del Rey Tortilleria v. NLRB, 976 F.2d 1115, 1121–22 (7th Cir. 1992).
123. *Id.* at 1119.
124. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (choosing to address the issue "through a wider lens").
125. *Id.* at 140.
126. A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408 (1995), *enforced*, 134 F.3d 50 (2d Cir. 1997).
127. *Hoffman Plastic*, 535 U.S. at 141–42.
128. *Id.* at 142.
129. *Id.* at 151.

immigrants.[130] In light of its holding, the Court, as in *Sure-Tan*, declined to consider whether such a remedy would be punitive under *Republic Steel*.[131]

More notably, however, the Court made short shrift of backpay's role as a deterrent to unfair labor practices, making only the brief conclusory assertion that a cease-and-desist order would be sufficient to ensure that the employer did not "get[ ] off scot-free."[132] In contrast, Justice Breyer's dissent, like Justice Brennan in *Sure-Tan*, focused largely on the essential deterrence rationale of the backpay remedy.[133] Viewed as a deterrent, Justice Breyer explained, backpay not only conforms with IRCA but in fact bolsters its central purpose. He wrote:

> [T]he general purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment, which like a "magnet" pulls illegal immigrants toward the United States. . . . To deny the Board the power to award backpay . . . might very well increase the strength of this magnetic force. That denial lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer's incentive to find and to hire illegal-alien employees.[134]

The *Hoffman* dissenters—Justice Breyer, joined by Justices Ginsburg, Stevens, and Souter—recognized that the deterrence provided by backpay does not generally inhere in the Board's other traditional remedies. By taking that remedy away, the majority "undermine[d] the public policies that underlie the Nation's labor laws."[135]

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130. *Id.* at 148–49. Chief Justice Rehnquist stated:

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. . . . The Board asks that we overlook this fact and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.

Id.

131. *Id.* at 152 n.6.

132. *See id.* at 152.

133. *See id.* at 153–54 (Breyer, J., dissenting).

134. *Id.* at 155 (citations and original emphasis omitted). Numerous commentators have concurred with Justice Breyer's analysis. *See, e.g.*, Christopher David Ruiz Cameron, *Borderline Decisions:* Hoffman Plastic Compounds, *the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 32–34 (2003); Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc., *Produce Disposable Workers?*, 14 LA RAZA L.J. 103, 132 (2003); Thomas J. Walsh, Hoffman Plastic Compounds, Inc. v. NLRB: *How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313, 335 (2003); Dennise A. Calderon-Barrera, Note, Hoffman v. NLRB: *Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119, 134 (2003).

135. *See Hoffman Plastic*, 535 U.S. at 160 (Breyer, J., dissenting).

This understanding of the NLRB's remedial authority, unlike that of the majority, comports with the Court's previously expressed views on the deference due to the Board in its administration of the backpay remedy. Justice Frankfurter's words in *Seven-Up Bottling Co.* are compelling:

> [I]n devising a remedy the Board is not confined to the record of a particular proceeding. . . . [T]he relation of remedy to policy is peculiarly a matter for administrative competence. . . . That competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding.[136]

As discussed above, the Court's previous cases in the area of backpay have emphasized that so long as the Board tailors a remedy toward effectuating the policies of the Act, it is unnecessary for a reviewing court to go any further.[137] Here, the majority did not counter Justice Breyer's convincing demonstration that allowing backpay for undocumented workers is, in fact, so tailored.[138] It focused instead on the concern that such workers would be "rewarded" for breaking the law if backpay was available to them.[139]

Although *Republic Steel* did not take a starring role in *Hoffman Plastic*, its spirit dominated the case.[140] As in *Republic Steel*, the *Hoffman Plastic* Court concerned itself primarily with the remedy's effect on the payee, rather than on the payor and potential future payors. In *Republic Steel*, the Court could not countenance a remedy that enriched a third party not harmed directly by the employer's unfair labor practice.[141] Likewise, in *Hoffman Plastic*, the Court could not accept the compensation of an individual who broke the law, even though in making that choice, it allowed an employer that also broke the law

136. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953) (citation and internal quotation marks omitted).

137. *See id.* at 348.

138. *See Hoffman Plastic*, 535 U.S. at 153 (Breyer, J., dissenting). Justice Breyer stated:

> The Court does not deny that the employer in this case dismissed an employee for trying to organize a union—a crude and obvious violation of the labor laws. And it cannot deny that the Board has especially broad discretion in choosing an appropriate remedy for addressing such violations. Nor can it deny that in such circumstances backpay awards serve critically important remedial purposes.

Id. (citations omitted).

139. *See id.* at 151 (concluding that allowing backpay "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations").

140. *See Leading Cases*, *supra* note 17, at 393 ("Though the Court declined to frame its analysis in terms of limits on Board authority to order punitive awards, *Hoffman* is most profitably read in light of this longstanding doctrine.").

141. Indeed, one commentator has suggested that the most reasonable resolution of this conflict would be to require such employers to make the "backpay" payment to the government, rather than the undocumented employee. *Id.* at 399. This, of course, would directly contravene *Republic Steel*'s ban on third-party payments. *Id.*

to get away with little more than the "slap on the wrist" of a cease-and-desist order.[142] Although the punitive rationale of *Republic Steel* differed from the immigration enforcement rationale of *Hoffman Plastic*, the result was the same: The Supreme Court substituted its judgment for that of the Board, and in *Hoffman Plastic*, it did so even though the Board's remedy clearly "[bore] appropriate relation to the policies of the Act."[143] This lack of deference stands in stark contrast to the Court's general view of backpay, as discussed above, and calls into question the clear implication suggested by the Court's earlier cases—and explicitly conceded in *Sure-Tan*—that backpay is premised as much on deterrence grounds as it is on compensation grounds.

B. Traditional Remedies: Reinstatement

The NLRB's other traditional remedy for a discriminatory discharge is reinstatement. Like backpay, Congress explicitly provided for reinstatement in the language of section 10(c).[144] While reinstatement is mainly premised on "make-whole" grounds, there is a less apparent, yet certainly compelling, deterrence justification for the remedy as well.[145] By its nature, traditional reinstatement of employees discharged in violation of section 8(a)(3) of the Act is clear-cut in its application, and thus not subject to litigation over its "punitive" or "remedial" characteristics. By expressly providing for reinstatement in the language of the Act, Congress made clear that the remedy is tailored to effectuate the policies of the Act.[146] But the Board has, on occasion, ordered reinstatement in less traditional fact situations; such remedies spur an analysis of the punitive-remedial distinction and of the underlying justifications for the remedy itself.

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142. *See Hoffman Plastic*, 535 U.S. at 137.

143. *See* NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953).

144. 29 U.S.C. § 160(c) (2000) ("[T]he Board shall . . . requir[e] such person . . . to take such affirmative action including reinstatement . . . as will effectuate the policies of this Act . . . .").

145. *See* Weiler, *supra* note 5, at 1791. Weiler states:

> [Reinstatement] seems nicely designed to play both a reparative and a preventive role. The dismissed employee gets his job back, and his fellow workers see the power of collective action and labor law protection. Not only is the employer deprived of the fruits of its illegal behavior, but it also suffers a serious erosion of its hitherto absolute sway within its own plant. The prospect of such a result would seem to be a major disincentive to flouting the law in the first place.

Id.; *see also* Carson City Nugget Casino, Inc., 161 N.L.R.B. 532, 541 n.36 (1966) ("The return to employment of a union adherent is not only the final achievement of the Act's protection in respect to such employees but it is the most realistic and articulate demonstration of the Act's paramount protection to other employees.").

146. *Cf.* 29 U.S.C. § 160(c).

A frequent scenario is that of a supervisor, who, falling outside the individual protection of the Act, is discharged in order to restrain or intimidate employees in exercising their rights under the Act. The Board and the courts have commonly held that the discharge of a supervisor can amount to an unfair labor practice, and that such violation of law can be remedied by reinstatement of the supervisor.[147] A 1990 case well illustrates the policy issues at stake in such a remedy. In *Kenrich Petrochemicals, Inc. v. NLRB*,[148] the employer discharged a supervisor who was related to several employees involved in a union organizing drive and a successful union election campaign.[149] The Third Circuit affirmed the Board's finding that, under the circumstances, this discharge violated section 8(a)(1).[150] Sitting en banc, the court reversed its own three-judge panel and upheld the Board's order that the employer reinstate the supervisor.[151] The court justified the remedy largely on the ground of deterring future unfair labor practices by the employer.[152] *Seven-Up Bottling Co.*, the court explained, demanded that deference be afforded to the Board: "In fashioning a remedy in a particular proceeding, the Board may draw on the knowledge and expertise it has acquired during its continuous engagement in the resolution of labor disputes and need not confine itself to the record of the dispute before it."[153] The dissent, in contrast, argued that *Republic Steel* required the opposite result: "Insofar as the majority's holding rests on its assumption that the Board's remedy will deter Kenrich from attempting future retaliatory discharges of relative-supervisors, it is inconsistent with *Republic Steel Corp.*"[154]

While it is fairly well established that the Board may reinstate a supervisor whose discharge interfered with employees' section 7 rights, the same does

147. *See, e.g.*, Delling v. NLRB, 869 F.2d 1397 (10th Cir. 1989); NLRB v. Adver. Mfg. Co., 823 F.2d 1086 (7th Cir. 1987); Howard Johnson Co. v. NLRB, 702 F.2d 1 (1st Cir. 1983); Belcher Towing Co. v. NLRB, 614 F.2d 88 (5th Cir. 1980); Russell Stover Candies, Inc. v. NLRB, 551 F.2d 204 (8th Cir. 1977); Pioneer Drilling Co. v. NLRB, 391 F.2d 961 (10th Cir. 1968); Oil City Brass Works v. NLRB, 357 F.2d 466 (5th Cir. 1966); NLRB v. Talladega Cotton Factory, 213 F.2d 209 (5th Cir. 1954).

148. 907 F.2d 400 (3d Cir. 1990) (en banc).

149. *Id.* at 403–04.

150. *Id.* at 406–07.

151. *Id.* at 411.

152. *Id.* at 408–09. The court explained:

> If that discharge is left unremedied, the fears engendered by that discharge and [the company president's] later threats will not be dispelled. Rather, a powerful message will be sent out to the supervisors and employees of Kenrich that the company may, without fear of redress, use family member supervisors as hostages.

Id.

153. *Id.* at 405 (citing NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953)).

154. *Id.* at 415 n.5 (Greenberg, J., dissenting).

not hold true for employees who quit their jobs after being unlawfully intimidated by superiors for engaging in union activities. In *NLRB v. Coats & Clark, Inc.*,[155] the Fifth Circuit held that *Republic Steel* precluded such a remedy.[156] There, a union activist was singled out for criticism and harassment by her supervisors.[157] After the machine she operated failed to work properly, she became so exasperated with her working conditions and treatment that she abruptly quit her job.[158] The Board held that because the unfair labor practices did not immediately precipitate the employee's resignation, the employer's actions did not amount to a constructive discharge in violation of section 8(a)(3).[159] Nonetheless, the Board ordered that the employee be reinstated because the employer's other serious unfair labor practices would not be remedied effectively by a cease-and-desist order alone.[160] The court concluded that the reinstatement could only be justified on deterrence grounds, and this justification did not square with *Republic Steel*.[161]

As these decisions demonstrate, even in the narrow set of cases in which a reinstatement order must be justified, courts have been far from consistent in interpreting the basis of the Board's remedial authority. In *Kenrich*, the court based its result almost entirely on deterrence grounds, and in *Coats & Clark*, the court flatly rejected such a rationale. Reading these cases, it is extremely difficult to resolve the competing teachings of *Republic Steel* and *Seven-Up Bottling Co.*

C. The Rise and Fall of the Nonmajority Bargaining Order

In *NLRB v. Gissel Packing Co.*,[162] the Supreme Court held that under certain circumstances, the Board may set aside a representation election whose results were not favorable to the union, or refuse to hold such an election at all and instead order the employer to bargain with the union.[163] Specifically, the Court ruled that when an employer has engaged in a campaign of unfair labor practices, making a fair election unlikely, the Board may rely on a union's previous authorization card majority to provide the

155. 241 F.2d 556 (5th Cir. 1957).
156. *Id.* at 561–62.
157. *Id.* at 557–58.
158. *Id.* at 558–59.
159. *Id.* at 559.
160. *Id.*
161. *See id.* at 560, 562.
162. 395 U.S. 575 (1969).
163. *Id.* at 610.

basis for a bargaining order.[164] But in dicta, the Court went further. It suggested that, even in the absence of any previous showing of a pro-union majority, a bargaining order might also be appropriate "in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices."[165] This dictum has proven the most controversial aspect of the Court's decision, prompting considerable disagreement among Board members and reviewing courts.[166] Thus, the questions surrounding the so-called "non-majority bargaining order" provide fertile ground for an assessment of the competing arguments over the remedial purposes of bargaining orders in general. However, it is important to note that these questions are, at least for now, moot. In 1984, the Board concluded that it did not have the authority to issue nonmajority bargaining orders, and that remains the law today.[167]

Nonetheless, the arguments that were made over the issue in the 1970s and 1980s are instructive in considering the extent of the Board's remedial powers. In *Gissel* itself, the Supreme Court recognized that bargaining orders serve deterrence as well as corrective purposes.[168] Other courts have made clear that deterrence, in fact, can be viewed as the primary purpose of bargaining orders.[169] This deterrence rationale makes a great deal of sense. As Professor Weiler has noted:

> [T]he prospect of such an order should be a significant deterrent to antiunion conduct, because an employer that violated the law in order to avoid unionization could end up with a union anyway, whereas an employer that campaigned vigorously within the law would stand a fair chance of winning the election and thereby excluding the union from its plant.[170]

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164. *Id.* at 614.

165. *Id.* at 613 (citing NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967)).

166. HUNSICKER ET AL., *supra* note 4, at 162.

167. *See* Gourmet Foods, Inc., 270 N.L.R.B. 578, 583 (1984); *accord* First Legal Support Services, LLC, 175 LRRM 1141 (2004). *But see id.* at 1145 (Liebman, Member, dissenting) (arguing that *Gourmet Foods* should be overruled).

168. *Gissel*, 395 U.S. at 612.

169. *See, e.g.*, Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35, 50 (D.C. Cir. 1980). The court explained:

> Deterrence is, of course, a legitimate remedial purpose and the need for deterrence has resulted in many bargaining orders in cases where it is clear the employees no longer support the Union . . . . Facts suggesting that a bargaining order would have little or no deterrent value have been heavy factors in prior decisions not to enforce proposed bargaining orders.

Id. (footnote omitted).

170. Weiler, *supra* note 5, at 1793–94. However, Weiler concludes that the bargaining order in practice has not been an effective deterrent. *Id.* at 1794.

This justification is perhaps even stronger for nonmajority bargaining orders, because in those cases, there has not been any showing of majority support for the union. Thus, an employer should be even less inclined to wage a campaign of unfair labor practices in opposition to a union for which employees have never demonstrated, and might never demonstrate, support.[171]

The Board first issued a nonmajority bargaining order in 1981 in response to a remand from the Third Circuit.[172] Initially, a majority of the Board did not believe that it had the authority to order such a remedy.[173] Two dissenting members argued that a bargaining order was necessary to remedy the employer's flagrant violation of the Act and to deter others from engaging in similar conduct.[174] In remanding the case, the Third Circuit held for the first time that such orders were available to the Board in the face of "outrageous" and "pervasive" unfair labor practices.[175] Prior cases had repeated the *Gissel* dictum, suggesting that the nonmajority bargaining order was within the NLRB's statutory authority, but none had ruled directly on the issue.[176] A year later, the Board issued a nonmajority bargaining order of its own accord for the first, and what ultimately would turn out to be the last, time. In *Conair Corp.*,[177] the employer engaged in a series of unfair labor practices "designed to intimidate and undermine its employees' support for the Union" amid a nascent organizing drive.[178] The Board found that its other remedies could not "effectively dissipate" the employer's illegal campaign, and thus a bargaining order was appropriate despite the union's lack of a previous card majority.[179]

On review, the D.C. Circuit held that the Board did not have the authority to issue nonmajority bargaining orders and denied enforcement of

171. *See* Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 136 (1964) ("If [a non-majority bargaining order] could help deter the commission of flagrant unfair practices, there is good reason to believe that the net effect would be to promote, and not impair, the legitimate interests of employees as a whole.").

172. *See* United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. 772 (1981).

173. United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1064–65 (3d Cir. 1980).

174. United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1037 (1979) (Fanning, Chairman and Jenkins, Member, concurring in part and dissenting in part) (asserting that the Board should not "reward[ ] most the greatest misconduct").

175. *United Dairy Farmers*, 633 F.2d at 1069.

176. *See, e.g.*, NLRB v. Montgomery Ward & Co. Inc., 554 F.2d 996, 1002 (10th Cir. 1977); J.P. Stevens & Co. Inc. v. NLRB, 441 F.2d 514, 519 (5th Cir. 1971); NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 568–69 (4th Cir. 1967).

177. 261 N.L.R.B. 1189 (1982).

178. *Id.*

179. *Id.* at 1193.

the remedy.[180] The court posed the "dilemma" of the nonmajority bargaining order in the following manner:

> [I]f the Board lacks authority to issue them, employers who offend the law most egregiously will escape the most stringent remedy in the NLRB's arsenal; if the Board has the authority and exercises it to sanction patent and incessant employer unfair labor practices, employees may be saddled for a prolonged period with a union not enjoying majority support.[181]

Once again, this formulation mirrors the issue raised by *Republic Steel*: Must the Board focus its remedial force only on making whole the specific employees whose rights were violated? Or may it also seek to send a message to the party who violated those rights, and in the process, deter others from acting similarly in the future? In *Republic Steel*, the dissenters' view that backpay focused equally on the payor and the payee did not win the day.[182] But the Court in *Gissel*, citing longstanding precedent, explicitly emphasized the role of bargaining orders in ensuring that employers not "profit" from their own wrongs.[183] In a situation where the employer's unlawful conduct had made a fair election impossible, without the prospect of a bargaining order, the employer would "in effect be reward[ed]" for breaking the law.[184]

Nonetheless, in *Conair*, the D.C. Circuit held in essence that the Board was precluded from holding the employer accountable for its illegal actions because otherwise a union might be imposed on a majority of employees who do not support it.[185] But the Supreme Court already had addressed and dismissed this same concern in *Gissel*, noting: "There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so. . . ."[186] And as Judge Wald noted in her *Conair* dissent, it is a "heavy irony" that the Board is precluded from issuing a remedy on the principle of majority rule when that remedy is, in fact, designed to respond to the employer's successful effort to undermine that same principle.[187] Judge Wald

180. Conair Corp. v. NLRB, 721 F.2d 1355, 1384 (D.C. Cir. 1983).

181. *Id.* at 1378 (footnote omitted).

182. *See* Republic Steel Corp. v. NLRB, 311 U.S. 7, 14 (1940) (Black and Douglas, J.J., dissenting).

183. NLRB v. Gissel Packing Co., 395 U.S. 575, 610 (1969) (citing Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944)).

184. *See id.*

185. *See Conair*, 721 F.2d at 1379. The court suggested that only Congress could make such a choice. *Id.*

186. *Gissel*, 395 U.S. at 613.

187. *Conair*, 721 F.2d at 1398 (Wald, J., dissenting); *see also* Bok, *supra* note 171, at 134–36 (refuting arguments that nonmajority bargaining orders would seriously impede majority rule).

went on to discuss the clear deterrence value of nonmajority bargaining orders, and the accompanying concern that employers can wage concerted unlawful campaigns in their absence without fear of serious legal ramifications.[188] She concluded by observing that the court's ruling took from the Board "its only effective means to remedy and deter a massive campaign of coercive and illegal conduct by an employer bent on crushing inchoate union organization."[189] After *Conair*, the Board did not attempt to issue another nonmajority bargaining order.[190] A year later, it explicitly rejected the practice.[191]

As in the undocumented worker cases, *Republic Steel* itself does not play a significant, explicit role in the debate over the nonmajority bargaining order. But its specter certainly haunts the issue, as Professor Bok recognized when he first proposed the remedy.[192] Clearly, nonmajority bargaining orders (and bargaining orders in general) serve strong deterrent purposes. The Supreme Court clearly validated and emphasized these purposes in *Gissel*.[193] If deterrence was consistently recognized as a primary aim of section 10(c), the concern over majority rule might not overcome the order's other remedial functions. If the Board had the clear power—and perhaps more significantly, the clear responsibility—to focus its remedial tools on ensuring that employers do not benefit from their illegal acts, the bargaining order might be seen as an essential remedial tool that could not be so easily set aside, even where the union has not yet attained majority support. But in the absence of such an understanding of the Board's role in the enforcement of the Act, deterrence is merely one factor weighing in favor of the remedy that does not, in itself, justify anything.[194]

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188. *See Conair*, 721 F.2d at 1400 (Wald, J., dissenting).

189. *Id.*

190. HUNSICKER ET AL., *supra* note 4, at 163.

191. Gourmet Foods Inc., 270 N.L.R.B. 578, 583 (1984). A dissenting Board member echoed many of Judge Wald's sentiments. *See id.* at 593 (Zimmerman, Member, dissenting) ("By renouncing the use of [nonmajority] bargaining orders, my colleagues render the Board powerless to provide full deterrence of unfair labor practices and full restitution of employee rights in cases of the most egregious misconduct, if an employer acts before an organizing union can achieve majority status.").

192. *See* Bok, *supra* note 171, at 138 n.274 (addressing the potential argument that such orders are punitive); *see also Gourmet Foods*, 270 N.L.R.B. at 583 n.29 (arguing that per *Republic Steel*, nonmajority bargaining orders cannot be justified on deterrence grounds); *id.* at 593 n.31 (Zimmerman, Member, dissenting) (asserting that such orders meet the requirements of *Republic Steel*).

193. NLRB v. Gissel Packing Co., 395 U.S. 575, 610 (1969) (citing Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944)).

194. *Cf.* Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 659 (1961) (Harlan, J., concurring) ("Deterrence is certainly a desirable even though not in itself sufficiently justifying effect of a Board order.").

D. Monetary Remedies for Failures to Bargain in Good Faith

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to bargain in bad faith.[195] This section frequently applies when an employer stonewalls a recently certified union in hopes of delaying the completion of a collective bargaining agreement and dissipating union support in the meantime.[196] The Board's traditional remedy for such a violation is simply to issue "an order specifically directing the employer to bargain in good faith,[197] a measure that has not proven to be an effective deterrent, especially because litigation over the issue can take years to complete.[198] The Supreme Court held in *H.K. Porter Co., Inc. v. NLRB*[199] that the Board may not order the employer to accede to any proposed contractual provision, even if its refusal to agree to that provision is based entirely on its bad-faith desire to avoid reaching an agreement.[200] The Board also may not direct the parties to submit to binding arbitration to determine the terms of a collective bargaining agreement.[201] As a result of this legal framework, employers willing to utilize any means necessary to undermine union support among their employees have little disincentive to bargain in bad faith.

One possible solution to the disincentive problem is the prospect of a monetary remedy for bad-faith bargaining. And in the years immediately following *H.K. Porter*, the NLRB and the D.C. Circuit engaged in a debate over the propriety of monetary remedies for section 8(a)(5) violations. First,

195. 29 U.S.C. § 158(a)(5) (2000).

196. *See* WEILER, *supra* note 22, at 249–50. The Dunlop Commission's finding that fully one-third of the workplaces that vote for unionization never actually achieve a collective bargaining agreement suggests that this is a common employer tactic. *See* THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 19, at 39.

197. WEILER, *supra* note 22, at 250.

198. *See id.* Professor Weiler notes that "by the time the Board order has been issued, the composition and sentiments of the workforce may have changed markedly, and much of the union's support may have melted away." *Id.*

199. 397 U.S. 99 (1970).

200. *Id.* at 102.

201. *See* WEILER, *supra* note 22, at 250. Such a remedy for first-contract negotiations is an important characteristic of Canadian labor law. *See id.* In 2002, the state of California enacted binding arbitration for first-contract negotiations between employers and agricultural workers, whose collective bargaining rights are governed by state law. Arbitration will occur when the parties have failed to reach an agreement after one year, when the employer has violated state labor law, and when state-ordered mediation has failed. CAL. LAB. CODE §§ 1164, 1164.11 (West 2005). The Employee Free Choice Act would also provide for first-contract arbitration under certain circumstances. H.R. 1696, 109th Cong. (2005); S. 842, 109th Cong. (2005).

in a case known colloquially as *Tiidee I*,[202] the D.C. Circuit affirmed the Board's finding that an employer committed various unfair labor practices, including failing to bargain in good faith, when it refused to negotiate with the union after the union won a Board election.[203] The court further held that the employer's refusal to bargain was "clear and flagrant" and that its claims in the ensuing litigation were "patently frivolous."[204] In response to the section 8(a)(5) violation, the Board ordered the employer to bargain but refused to go further.[205] On review, the union sought an additional remedy requiring the employer to make the employees whole for the increased wages and benefits they would have garnered from a collective bargaining agreement in effect during the three years that had passed since the union won the election.[206] The court signaled substantial agreement with the union's position and remanded to the Board with instructions to consider additional relief.[207] As in the *Republic Steel* dissent, the court emphasized the Board's remedial responsibility not only to compensate the employees, but also to ensure that the employer does not benefit from its unlawful actions. "Effective redress for a statutory wrong," the court stated, "should both compensate the party wronged and withhold from the wrongdoer the 'fruits of its violation.'"[208] The employer, the court made clear, should not be allowed to profit from its years of frivolous delay.[209] Deterring such conduct is a fundamental purpose of the Board's remedial power.[210]

Shortly after the D.C. Circuit's decision in *Tiidee I*, a divided Board rejected the make-whole approach.[211] In *Ex-Cell-O Corp.*,[212] the Board held that providing make-whole relief in the face of a section 8(a)(5) violation would require undue speculation as to what a collective bargaining agreement

202. Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir. 1970) (*Tiidee I*).

203. *Id.* at 1246–47.

204. *Id.* at 1248.

205. *Id.* at 1249.

206. *Id.* at 1248–49.

207. *Id.* at 1253.

208. *Id.* at 1249 (citing Montgomery Ward & Co. v. NLRB, 339 F.2d 889, 894 (6th Cir. 1965)).

209. *Id.* at 1250–51.

210. *Id.* at 1251 (suggesting that without the availability of make-whole relief, employers would be "induce[d] to . . . wrongdoing") (citing Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264–65 (1946)).

211. Ex-Cell-O Corp., 185 N.L.R.B. 107, 108 (1970), *rev'd sub nom.* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971). Although the D.C. Circuit remanded *Ex-Cell-O* with instructions for the Board to follow the *Tiidee I* rule, the Board has since followed its own decision in *Ex-Cell-O* and denied make-whole relief for unlawful refusals to bargain in good faith. HUNSICKER ET AL., *supra* note 4, at 205 & n.122.

212. *Ex-Cell-O*, 185 N.L.R.B. at 107.

between the parties would have looked like.[213] This, the three-member majority suggested, would amount to the imposition of substantive contractual terms, which *H.K. Porter* expressly prohibited.[214] Therefore, although the Board recognized that its existing remedies did not adequately protect employee rights,[215] it concluded that it could not order make-whole relief in response to bargaining violations without explicit authorization from Congress.[216] The dissenters, however, appealed to the teaching of *Seven-Up Bottling Co.* in criticizing the majority's approach:

> It is well settled that a reimbursement order is not a redress for a private wrong, since the Act does not create a private cause of action for damages, but is a remedy created by statute and designed to aid in the achievement of the public policy embodied in the Act. . . . [W]here the defendant's wrongful act prevents exact determination of the amount of damage, he cannot plead such uncertainty in order to deny relief to the injured person, but rather must bear the risk of the uncertainty which was created by his own wrong.[217]

This language tracks the reasoning of *J.H. Rutter-Rex*, in which the Supreme Court, applying *Seven-Up Bottling Co.*, held that the Board could properly decide whether the employer that violated the Act should bear the risk of increased backpay liability resulting from delayed litigation.[218] In that case, the blame for the slow process lay with the Board.[219] But here, it was the employer's decision not to bargain with the certified union that caused the morass of litigation.[220]

This inconsistency begs the question: Why should the employees have to bear the risk of delay in exercising their right to bargain collectively, but not in vindicating their right to engage in union activities without fear of retaliation?

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213. *Id.* at 109–10.

214. *Id.* at 110.

215. *Id.* at 108 ("A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation.").

216. *Id.* at 110.

217. *Id.* at 117 (McCulloch and Brown, Members, dissenting) (citing NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953) (other footnotes omitted)).

218. NLRB v. J.H. Rutter-Rex Mfg. Co., Inc., 396 U.S. 258, 263–64 (1969).

219. *See id.* at 260–62.

220. *Ex-Cell-O*, 185 N.L.R.B. at 107. Here, the employer refused to bargain in order to obtain court review over the representation election results. *Id.* Although the Board rejected the employer's objections to the election, it did not consider the employer's violation flagrant or its objections frivolous. *Id.* at 108–09. But the Board majority refused to distinguish a case, such as *Tiidee I*, in which the employer's conduct was reprehensible and aimed solely at undermining the employees' section 7 rights. *Id.* at 109–10. Even in those cases, the Board said, make-whole relief should not be available. *Id.*

The *Ex-Cell-O* majority, in addressing this question, expressed concern about the speculativeness of a make-whole remedy based on a nonexistent collective bargaining agreement.[221] But the dissent suggested several methods that the Board might use to approximate the amount of relief to which employees were entitled, such as looking to other contracts between the same employer and union, other contracts in the same industry and in the same geographical area, and Bureau of Labor Statistics averages.[222] In most cases, such estimation would certainly be enough to make the remedy consistent with *Seven-Up Bottling Co.*, in which the Supreme Court upheld a backpay award that clearly overcompensated the unlawfully discharged employees.[223] Instead, the Board, like the Supreme Court in *Republic Steel*, judged the propriety of the remedy based on its effect on the payees and ignored its effect on the payor. What the Board considered unduly speculative was the amount of money that the employees could collect. What would not be speculative is the message that such make-whole relief would send to employers committed to resisting unionization by any means necessary.

The Board ultimately won the battle over make-whole relief for section 8(a)(5) violations,[224] but on remand from *Tiidee I*, it proposed a sort of compromise remedy that spawned its own intellectual debate. Rather than order full make-whole relief, the Board required the employer to reimburse the Board and the union for the litigation costs and attorney's fees incurred as a result of the employer's frivolous attempt to evade its bargaining responsibility.[225] This Board decision became known as *Tiidee III*. Shortly thereafter, the D.C. Circuit held in a separate case that when the employer has engaged in "pervasive" and "flagrant" misconduct and has pursued frivolous litigation to delay bargaining, the union and Board are

221. *Id.* at 110.
222. *Id.* at 118 (McCulloch and Brown, Members, dissenting).
223. *See* NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348–50 (1953).
224. HUNSICKER ET AL., *supra* note 4, at 205 n.122.
225. Tiidee Prods., Inc., 194 N.L.R.B. 1234, 1236–37 (1972).

entitled to be compensated for their litigation costs.[226] It later reaffirmed this view in its own disposition of *Tiidee III*.[227]

Deterring employers from using Board processes to exacerbate and extend unlawful refusals to bargain clearly motivated both the Board and the court. As the Board explained, assessing litigation costs in appropriate situations was necessary "to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest."[228] Again, this reasoning adheres to the broad language of *Seven-Up Bottling Co.*, emphasizing the discretion due to the Board in "giv[ing] coordinated effect to the policies of the Act."[229] But in 1997, nearly a quarter century after affirming the legitimacy of this remedy, the D.C. Circuit overruled its own longstanding precedent and held in *Unbelievable, Inc. v. NLRB*[230] that the Board did not have the statutory authority to award litigation costs.[231] The majority asserted that litigation costs could not be squared with *Republic Steel*,[232] and Judge Wald, in dissent once again, took the broader view that awarding such costs clearly "effectuates the policies of the NLRA."[233]

In the majority's view, the Board could not levy litigation costs on intransigent employers in an effort to deter frivolous litigation. This, the court stated, is exactly the type of punitive measure the Board is not empowered to impose.[234] It explained, "To the extent that the power to shift fees is justified as a deterrent to frivolous litigation . . . , the power is punitive and therefore beyond the Board's delegated authority."[235] In contrast, Judge Wald

226. Food Store Employees Union v. NLRB, 476 F.2d 546, 551 (D.C. Cir. 1973). In *Food Store*, the D.C. Circuit, relying on the Board's decision in *Tiidee III*, expanded a previous Board order in a similar case to include litigation costs. *Id.* The Supreme Court later reversed on the ground that the circuit courts should not enlarge Board orders unilaterally, but should instead remand for reconsideration to the Board when they deem further explanation necessary. NLRB v. Food Store Employees Union, 417 U.S. 1, 10 (1974). The Court expressly declined to rule on whether assessing litigation costs is a legitimate exercise of Board authority. *Id.* at 8 n.9. Thus, the Court did not disturb the D.C. Circuit's reasoning and rule in *Food Store*. *See* Unbelievable, Inc. v. NLRB, 118 F.3d 795, 801 n.** (D.C. Cir. 1997).

227. Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 502 F.2d 349, 354–55 (D.C. Cir. 1974) (*Tiidee III*). For a concise explanation of the procedural dance that led the Board and the D.C. Circuit to embrace the assessment of litigation costs in cases of flagrant misconduct and frivolous litigation, *see id.* at 354 n.16.

228. *Tiidee Prods.*, 194 N.L.R.B. at 1236; *see also Food Store*, 476 F.2d at 550–51 (signaling agreement with the Board's reasoning).

229. *See* NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953).

230. 118 F.3d 795 (D.C. Cir. 1997).

231. *Id.* at 806.

232. *Id.* at 805–06.

233. *Id.* at 810 (Wald, J., dissenting).

234. *Id.* at 805–06.

235. *Id.* at 805.

maintained that preventing the abuse of its own procedures is certainly within the Board's power.[236] In her view, it is absurd to construe section 10(c) so narrowly as to preclude the Board from taking action to ensure the integrity of its own work. She wrote:

> Paradoxically, the majority uses the Board's reimbursement of expenses for its own proceedings to argue that it has exercised its power for punitive rather than remedial reasons . . . . This sounds like doublespeak to me. When Congress determined that an aggrieved party must present unfair labor practices to the NLRB rather than to a court, surely it did not intend for the NLRB to become a dupe, exploitable at will by employers to intensify the harm stemming from their original violation of the labor laws. Inherent in any agency's authority to carry out its designated functions is the power to ensure the fairness, efficiency and integrity of its processes . . . .[237]

Indeed, *Unbelievable* well illustrates how unbelievably ineffectual the Board would be if *Republic Steel*'s ban on punitive remedies were applied consistently and unequivocally in all fact situations.

Yet as discussed above, this is not the case. Once again, *Seven-Up Bottling Co.* provides a compelling comparison. There, the Board overcompensated employees who had been discharged unlawfully, and the Supreme Court upheld the remedy.[238] The dissenters in that case understandably contended that a straightforward application of *Republic Steel* required the opposite result.[239] But here, the Board sought only to assess attorney's fees in the most outrageous cases—those in which the employer pursued litigation solely in hopes of delaying bargaining and undermining the union. To hold that creating a disincentive to such conduct is not within the Board's authority, yet overcompensating employees based on a standardized formula is within that authority, is puzzling to say the least. Such inconsistent jurisprudence suggests that there are two separate standards for judging the propriety of Board remedies: one based on the deference principle of *Seven-Up Bottling Co.* and one based on the punitive-remedial distinction of *Republic Steel.* Moreover, the inconsistency suggests that judges pick which standard to apply based on their own subjective motivations.[240]

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236. *Id.* at 809 ("[B]y the purposeful presentation of an entirely frivolous defense, an employer turns the Board's processes into an instrument of its own unlawful conduct.").

237. *Id.* at 811–12 (citations omitted) (Wald, J. dissenting).

238. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349, 352 (1953).

239. *See id.* at 353–55 (Minton, J., dissenting).

240. *See* George Schatzki, *It's Simple: Judges Don't Like Labor Unions*, 30 CONN. L. REV. 1365, 1366 (1998) (arguing that judges are motivated by a subjective "life view" that rejects "the theoretical foundations for the labor movement").

E. Refunds of Union Dues

Over the course of NLRA history, the Board has ordered the reimbursement of employees for improperly collected union dues in two principal contexts. These are: (1) when employees pay dues, via a paycheck check-off procedure, to an unlawful company-dominated union; and (2) when employees are coerced to join a union by way of an illegal closed-shop provision. But as two key Supreme Court cases demonstrate, the manner with which the remedy is administered depends greatly on which context is at issue.

In *Virginia Electric & Power Co. v. NLRB*,[241] decided just three years after *Republic Steel*, the Court held that employees who have had dues checked off in support of a company-dominated union are entitled to full reimbursement, with no further inquiry necessary.[242] Notably, like Justices Black and Douglas in their *Republic Steel* dissent, the Court emphasized the remedy's effect on the payor, namely the employer that violated the Act. The Court reasoned, "An order such as this, which deprives an employer of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy."[243] Likewise, as the Court would later suggest in *Seven-Up Bottling Co.*, the fact that full reimbursement might compensate employees beyond the actual damages they incurred did not mean that the remedy went beyond effectuating the policies of the Act.[244]

In contrast, in *Local 60, United Brotherhood of Carpenters and Joiners of America v. NLRB*,[245] the Court held that full reimbursement of dues was not an appropriate measure to remedy an illegal closed-shop contract provision.[246] The Court reasoned that a closed-shop provision does not necessarily mean that most of the employees were coerced to join the union.[247] In fact, it was likely that most of the union members in the instant case, perhaps even all of them, joined the union voluntarily before the unlawful provision came into being.[248] Thus, the Court said, the Board's application of a per se rule requiring the union to reimburse each employee fully was punitive and not within

241. 319 U.S. 533 (1943).
242. *Id.* at 539–40.
243. *See id.* at 541.
244. *See id.* at 543 ("It is equally wrong to fetter the Board's discretion . . . by forc[ing] it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge.").
245. 365 U.S. 651 (1961).
246. *Id.* 653–55.
247. *Id.*
248. *Id.* at 654.

the Board's authority.[249] In an oft-cited concurrence, Justice Harlan asserted generally that deterrence cannot itself justify any Board remedy and specifically that deterring unions from entering into closed-shop agreements could not justify the reimbursement of dues to employees who would have been union members with or without the unlawful provision.[250] Unlike in *Virginia Electric & Power Co.*, the Court here gave no deference to a remedy that overcompensated the employees. In fact, Justice Harlan specifically rejected the notion that the Board legitimately could focus on the remedy's effect on the payor.[251]

It is clear that the *Local 60* Court used the *Republic Steel* framework to reach its decision.[252] But in this case, the more deferential *Seven-Up Bottling Co.* standard might have led to the same outcome. In *Local 60*, there was literally no evidence that any employee was coerced to join the union as a result of the closed-shop provision.[253] Therefore, the injustice of exacting significant harm on the union probably outweighed the powerful deterrent of a reimbursement remedy because the union did not actually infringe on any employee's section 7 right to refrain from joining. *Seven-Up Bottling Co.* made clear that courts should not uphold Board remedies that do not "bear appropriate relation to the policies of the Act."[254] A remedy that potentially could bankrupt a union—even one that probably enjoys strong majority support—hardly can be said to bear appropriate relation to the policies of the Act when no employees were actually coerced by the union's illegal conduct. This analysis demonstrates that recognizing deterrence as a legitimate remedial objective of the Act does not mean that the Board would be free to order any remedy it wanted in every case. Indeed, it is perhaps telling that the majority opinion in *Local 60* was written by Justice Douglas, who dissented in *Republic Steel* and joined the majority in *Virginia Electricity & Power Co.*[255]

249. *Id.* at 655.

250. *Id.* at 659–60 (Harlan, J., concurring).

251. *Id.* at 658–59.

252. *See id.* at 655 (citing Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940)); *see also id.* at 657 (Harlan, J., concurring) (citing *Republic Steel*, 311 U.S. at 11–12).

253. *Id.* at 654.

254. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953).

255. It is important to note, however, that Justice Douglas also dissented in *Seven-Up Bottling Co. Id.* at 352–53 (Douglas, J., dissenting). While Douglas argued that the Board should not use its standardized backpay formula in cases where doing so would overcompensate an employee, he did not join Justice Minton in criticizing the majority for allegedly abandoning *Republic Steel. Id.*

F. Independent Torts and State Regulation

Questions about the nature of the NLRA's remedial philosophy radiate implications beyond the Board's authority to remedy unfair labor practices. They also inform discussion of the extent to which state regulation of labor relations is preempted by federal law and the extent to which both federal and state courts can entertain causes of action that directly impact labor concerns. While in-depth discussions of preemption and claims outside of NLRB jurisdiction are beyond the scope of this Comment, it is important to examine how the punitive-remedial distinction affects the resolution of some of these issues. In fact, as might be expected, the Supreme Court has not applied *Republic Steel* any more consistently outside the context of Board review than it has in evaluating the Board remedies discussed above.

In *UAW v. Russell*,[256] for example, the Court held that state courts retain jurisdiction to hear lawsuits over conduct that constitutes both a state law tort and an unfair labor practice under the Act.[257] Further, the Court held that state courts can award punitive damages in response to such conduct, even though the Board cannot.[258] In so holding, the Court emphasized the Board's purpose as a public body not focused on resolving private disputes, noting that its power to compensate employees "is merely incidental to the primary purpose of Congress *to stop and to prevent* unfair labor practices."[259] Although Board remedies "may incidentally provide some compensatory relief to victims of unfair labor practices," courts remain the principal forum for redress of private grievances.[260] Here, the Court explicitly acknowledged that deterrence is the primary function of the Board and that compensation is merely a desirable side benefit. But this formulation is the exact opposite of Justice Harlan's influential explanation of *Republic Steel* just three years later, which described deterrence as "a desirable even though not in itself a sufficiently

256. 356 U.S. 634 (1958).

257. *Id.* at 645–46. Parties may not, however, recover "duplicate compensation" from both the Board and a court. *Id.* at 646. A year after deciding *Russell*, the Court held that states are preempted from regulating conduct arguably protected or outlawed by the NLRA. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959). But the Court made exceptions for conduct of "merely peripheral concern" to labor law and for regulation that is "deeply rooted in local feeling and responsibility." *Id.* at 243–44 (footnote omitted). General state-law torts related to violence and coercion, as dealt with in *Russell*, remain operative in labor contexts. *Id.* at 247–48 & n.6 (distinguishing the facts of *Russell*).

258. *Russell*, 356 U.S. at 646.

259. *Id.* at 642–43 (emphasis added).

260. *Id.* at 645.

justifying effect of a Board order."[261] Strangely, the *Russell* Court used this compensation rationale to justify the availability of punitive damages in such cases, noting simply, "The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board."[262] It is well established, however, that punitive damages are intended to deter and not to compensate.[263] It is ironic, then, that in response to identical conduct, the Board (whose function according to *Russell* is deterrence) may not award punitive damages, but courts (whose function according to *Russell* is compensation) may do so.

In his *Russell* dissent, Chief Justice Warren applied the traditional *Republic Steel* conception of the Act and argued that courts should not be allowed to award punitive damages if the Board could also claim jurisdiction.[264] In contrast to the majority's broad view of the deterrent purposes of the Act, he asserted: "The element of deterrence inherent in the imposition or availability of punitive damages for conduct that is an unfair labor practice ordinarily makes such a recovery repugnant to the [NLRA]."[265]

In *International Brotherhood of Electrical Workers v. Foust*,[266] the Court later came to embrace Warren's reasoning in *Russell*.[267] *Foust* held that punitive damages may not be assessed in duty of fair representation suits by employees against their unions.[268] Here, the Court based its decision in part on *Republic Steel*, explaining that "general labor policy disfavors punishment."[269] In an opinion concurring in the judgment, Justice Blackmun argued that punitive damages should be available in certain circumstances for breach of the duty of fair representation.[270] In doing so, he offered a different interpretation of *Republic Steel*. In his view, that case held only that punitive sanctions were not within the Board's authority; it did not identify a general

261. Local 60, United Bhd. of Carpenters & Joiners of Am. v. NLRB, 365 U.S. 651, 659 (1961) (Harlan, J., concurring).

262. *Russell*, 356 U.S. at 646.

263. *See, e.g.*, BMW of North America v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition." (citations omitted)); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.").

264. *Russell*, 356 U.S. at 652–53 (Warren, C.J., dissenting).

265. *Id.* at 652.

266. 442 U.S. 42 (1979).

267. *Id.* at 51.

268. *Id.* at 52.

269. *Id.*

270. *Id.* at 58–60 (Blackmun, J., concurring).

ban on punitive remedies in national labor policy.[271] He wrote, "*Republic Steel* has no pertinence here, since the federal courts have both the jurisdiction and the authority to impose punitive sanctions."[272]

Seven years later, Justice Blackmun apparently changed his mind. In *Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc.*,[273] the Court unanimously struck down on preemption grounds a state statute denying government contracts to employers who repeatedly commit unfair labor practices.[274] The decision focused primarily on the Board's exclusive role in enforcing the NLRA.[275] Writing for the Court, Justice Blackmun explained that a state statute aimed at deterring violations of the Act impinged on ground that Congress had reserved for the Board alone.[276] The Court returned to the traditional view that *Republic Steel*'s ban on punitive measures does not limit merely the jurisdiction of the Board, but further characterizes the entire statutory scheme set out by Congress.[277] Justice Blackmun wrote:

> The conflict between the challenged . . . statute and the NLRA is made all the more obvious by the essentially punitive rather than corrective nature of Wisconsin's supplemental remedy. The regulatory scheme established for labor relations by Congress is "essentially remedial" . . . . Punitive sanctions are inconsistent not only with the remedial philosophy of the NLRA, but also in certain situations with the Act's procedural logic.[278]

Of course, this understanding of the nonpunitive nature of federal labor policy meshes much more closely with the majority's view in *Foust* than with the view expressed by Justice Blackmun in that case.

These cases illustrate that in considering the authority of other actors to impede on the Board's jurisdiction, the Court has been less than clear about both the NLRB's chief remedial purpose and the applicability of the punitive-remedial distinction outside the realm of the Board. As in the case law dealing with the propriety of specific Board remedies, inconsistency reigns in these decisions.

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271. *Id.* at 55–56 ("The question . . . was simply one of the Board's statutory competence; the Court decided that punitive sanctions were 'beyond the Board's authority' and that it lacked 'jurisdiction' to impose them." (citing Republic Steel Corp. v. NLRB, 311 U.S. 7, 11, 13 (1940))).

272. *Id.* at 56.

273. 475 U.S. 282 (1986).

274. *Id.* at 283, 288–89.

275. *Id.* at 288.

276. *Id.* at 287–88.

277. *Id.* at 288 n.5 (citing *Republic Steel*, 311 U.S. at 10–12).

278. *Id.* (citing *Republic Steel*, 311 U.S. at 10–12).

III. DETERRENCE SHOULD BE UNDERSTOOD AS A PRIMARY PURPOSE OF SECTION 10(C)

A. Legislative History

While the case law attempting to delineate the Board's remedial power is terribly inconsistent, the legislative history of the Act makes clear that Congress aimed to create a statutory scheme that would deter unfair labor practices. Senator Wagner, the chief architect of the original statute, minced no words in explaining the Act's mission during the Senate debate:

> I want to emphasize ever more strongly the constitutional power and the intent of Congress to prevent these unfair labor practices .... While the pending bill of course does not intend to go beyond the constitutional power of Congress, as that power may be marked out by the courts, it seeks the full limit of that power to prevent these unfair labor practices. It seeks to prevent them whether they affect interstate commerce by causing strikes, or by destroying the equality of bargaining power upon which the flow of commerce depends, or by occurring in interstate commerce.[279]

The committee reports on the Act corroborate this view. In fact, both the House and Senate labor committees used the heading "Prevention of Unfair Labor Practices" to introduce the sections of their reports analyzing the Board's remedial authority under the legislation.[280] The House Committee on Labor explained: "The Board is empowered ... to prevent any person from engaging in any unfair labor practice ...."[281] Likewise, the Senate Committee on Education and Labor underscored that the Board would have "exclusive jurisdiction to prevent and redress unfair labor practices."[282] Finally, in signing the legislation, President Franklin Roosevelt noted: "By preventing practices which tend to destroy the independence of labor, [the Act] seeks, for every worker within its scope, that freedom of choice and action which is justly his."[283]

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279. 79 CONG. REC. 7565, 7572 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2339–40 (1985) (statement of Sen. Wagner) [hereinafter LEGISLATIVE HISTORY].

280. S. REP. NO. 74-573, at 14 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2314; H.R. REP. NO. 74-972, at 21 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2977.

281. H.R. REP. NO. 74-972, at 21 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2977.

282. S. REP. NO. 74-573, at 15 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2315.

283. 79 CONG. REC. 10719, 10720 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 3269 (recording the statement of President Roosevelt upon signing the Act into law).

Nothing in the 1947 Taft-Hartley Amendments changed the NLRA's essential deterrence purpose. In fact, Congress actually sought to strengthen the Board's remedial machinery by adding sections 10(j) and 10(l), giving the Board the authority—and in secondary boycott situations, the responsibility—to seek injunctions against unlawful conduct before completing its own proceedings.[284] In adding these sections, Congress aimed to increase the scope of the Board's remedial power.[285] Deterring unfair labor practices remained a paramount concern.[286]

Perhaps not surprisingly, the *Republic Steel* majority fails to cite any legislative history in support of its ban on "punitive" remedies.[287] In his influential *Local 60* concurrence, Justice Harlan does note: "The provision that the Board was to be allowed 'to take such affirmative action . . . as will effectuate the policies of this Act . . .' did not pass the Wagner Act Congress without objection to the uncontrolled breadth of this power."[288] But in support of this contention, Justice Harlan cites only a solitary statement made at a Senate committee hearing, not by a member of Congress, but by a corporate official named Robert T. Caldwell.[289] He ignores the House and Senate committee reports that, on their face, support deterrence as a primary goal of the statute. Of course, Caldwell was not the only management representative who shuddered at the remedial authority that Congress granted to the new Board.[290] But it is Congress, and not corporate America, that makes law.

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284. *See generally* 29 U.S.C. §§ 160(j), (l) (2000).

285. *See* S. REP. NO. 80-105, at 27 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 433 (1985). The Senate Committee explained:

> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. . . .
>
> In subsections (j) and (l) to section 10 the Board is given additional authority to seek injunctive relief.

Id.

286. *See* H.R. CONF. REP. NO. 80-510, at 52 (1947), *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, *supra* note 285, at 556 ("Both the House bill and the Senate amendment in section 10 provided, as does section 10 of the present act, for the prevention of unfair labor practices.").

287. Professor James Gray Pope suggests that the Court was not relying on congressional intent at all when it constructed the ban on punitive remedies, but that the rule is actually a *Lochner*-style liberty of contract analysis. James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 519, 534–39 (2004).

288. Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 657 (1961) (Harlan, J., concurring).

289. *Id.* (citing *National Labor Relations Board: Hearing on S. 1958 Before S. Comm. on Educ. and Labor*, 74th Cong. 448–49 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 1834–35 (statement of Robert T. Caldwell, Attorney for the American Rolling Mill Co.)).

290. *See, e.g.*, *National Labor Relations Board: Hearing on S. 1958 Before S. Comm. on Educ. and Labor*, 74th Cong. 847, *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2233 (statement

It is true, of course, that the legislative history is not particularly illuminating when it comes to the specific remedies, aside from reinstatement and backpay, that Congress envisioned for the Board.[291] Like the statutory language itself, the legislative history on enforcement authority paints in broad strokes. But as one commentator recognized more than forty years ago, the legislative history does make clear that the reason for this vague mandate was to give the Board the discretion to tailor appropriate remedies in diverse fact situations.[292] Ambiguity was meant to expand the Board's authority, not to limit it.

It is perhaps most telling to think about the original context of the NLRA's enactment. The heart of the statute was, and is, section 7, which proclaims that employees have the right to engage in self-organization, collective bargaining, and concerted activities.[293] Most of section 7's text was not new in 1935; it appeared previously in section 7(a) of the National Industrial Recovery Act.[294] But the authority given to the then-existing National Labor Relations Board to remedy and deter violations of that law was extremely limited and, "in the crucial cases of recalcitrant employers the Board [was] up against a stone wall of legal obstacle."[295] The House committee noted sardonically: "[F]ew opponents of the [NLRA] have had the hardihood to avow an opposition to the principles of section 7(a); they take alarm, however, when a serious effort is proposed to enforce the mandate of that law."[296] Indeed, in passing the NLRA, Congress was motivated in large part by a desire to give real meaning to previously articulated rights by giving the Board real power to enforce those rights. The Committee explained:

> The result of all this nonenforcement of section 7 (a) has been to breed a wide-spread and growing bitterness on the part of workers,

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of James A. Emery, General Counsel of the National Association of Manufacturers) (complaining that the NLRA would "create[ ] a pooh-bah of Federal administrative and executive authority").

291. *See* Dennis M. Flannery, Note, *The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 U. PA. L. REV. 69, 69 (1963).

292. *Id.* at 70 ("The congressional determination to draft section 10(c) in indefinite language rather than formulate preordained penalties for each offense allows the Board to set the tenor of its own authority by imaginative and specific treatment of the unique circumstances surrounding each unfair practice.") (footnote omitted).

293. 29 U.S.C. § 157 (2000). The Taft-Hartley Amendments established that employees also have the right to refrain from engaging in these activities. *Id.*

294. *See* H.R. REP. NO. 74-972, at 1–2 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2956–57.

295. *Id.* at 3, *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2959; *see also* S. REP. NO. 74-573, at 6 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2305 ("This breakdown of the law is breeding the very evil which the law was designed to prevent.").

296. H.R. REP. NO. 74-972, at 1 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2957.

> who feel, with much justification, that they have been given fair words, but betrayed by the Government in the execution of its promises. Time after time employees who have sought to organize in pathetic reliance upon section 7 (a) have found themselves discriminated against by the employer, and appeals to the Government for redress have been in vain . . . . The Congress does not propose to withdraw the "new charter of rights" enacted in section 7 (a). The only honest thing for the Congress to do, therefore, is to provide adequate machinery for its enforcement, *which is the object of the present bill.*[297]

It is a sad commentary on the Board's efficacy in preventing unfair labor practices that these words might be just as true today as they were seventy years ago.[298] Surely, such a clear focus on the enforcement of the statutory principles, combined with the broad language directing the NLRB to "effectuate the policies of the Act," suggests that Congress intended for the Board to become a real instrument to change the behavior of employers. Certainly, the Board was not meant to be, in Judge Wald's words, "a dupe,"[299] undermined by judges who reject the statute's primary deterrence purpose in direct contradiction of express congressional intent.

B. Analogizing Section 10(c) to Title VII of the Civil Rights Act of 1964

Comparing section 10(c) of the NLRA to the original remedial provision of Title VII of the Civil Rights Act of 1964 (Title VII) also demonstrates the section's essential deterrent purpose. When Congress originally passed Title VII, outlawing employment discrimination, it based the statute's

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297. *Id.* at 5–6, *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2961 (emphasis added); *see also* 79 CONG. REC. 9668, 9683, *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 3113 (statement of Rep. Connery); *id.* at 9699, *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 3153 (statement of Rep. Marcantonio) ("Merely stating that the employees shall have the right of collective bargaining and then not eliminating the unfair practices, collective bargaining becomes a mere name and a sham. This bill seeks to eliminate unfair labor practices and hence insure [sic] collective bargaining.").

298. *See supra* notes 19–26 and accompanying text. *See generally* Weiler, *supra* note 5, at 1769–70. Weiler states:

> Contemporary American labor law more and more resembles an elegant tombstone for a dying institution . . . . A major factor in this decline has been the skyrocketing use of coercive and illegal tactics—discriminatory discharges in particular—by employers determined to prevent unionization of their employees. The core of the legal structure must bear a major share of the blame for providing employers with the opportunity and the incentives to use these tactics, which have had such a chilling effect on worker interest in trade union representation.

Id.

299. Unbelievable, Inc. v. NLRB, 118 F.3d 795, 812 (D.C. Cir. 1997) (Wald, J., dissenting).

remedial provision on that of the NLRA.[300] Although Title VII has since been amended to provide for the availability of noneconomic and punitive damages in employment discrimination cases,[301] it remains instructive to compare the Supreme Court's interpretation of the basis for the original provision with its interpretation of section 10(c). The original language of Title VII's remedial provision, much like that of the NLRA, instructs courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay."[302]

But unlike the NLRA, Title VII always has been understood as a measure aimed squarely at deterring employment discrimination. Early in the statute's history, the Supreme Court explained that Title VII's purpose was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[303] The Court made clear in explaining the purpose of backpay that one of the chief functions of the statute's remedial provision was to deter violations of the law:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[304]

This reasoning, of course, clashes sharply with the rejection of deterrence as a central purpose of section 10(c), as found in *Republic Steel* and in Justice Harlan's *Local 60, United Brotherhood of Carpenters v. NLRB* concurrence. But as noted previously, those interpretations stem from nearly identical statutory language. Notably, the above interpretation of Title VII provides a strong corrective to Chief Justice Rehnquist's suggestion in *Hoffman Plastic Compounds, Inc. v. NLRB* that a cease-and-desist order is sufficient to ensure that lawbreakers do not "get[ ] off scot-free."[305] Because Congress explicitly modeled Title VII's original remedial provision on section 10(c) of the

300. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975) ("The backpay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act.").

301. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 252–55 (1994).

302. *Albemarle*, 422 U.S. at 419 n.11 (quoting 42 U.S.C. § 2000e-5(g) (1970)).

303. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

304. *Albemarle*, 422 U.S. at 417–18 (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

305. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002).

NLRA, it makes little sense to interpret the former as a command to order remedies that deter violations of the law and the latter as precluding such deterrence without additional justification.

CONCLUSION

During the last three decades, reformers at various times have attempted to beef up the enforcement power of the NLRB by supporting new legislation. All of these efforts have failed, and although the Employee Free Choice Act represents the labor movement's strongest push for reform in years, there is little reason to hope that current efforts to strengthen Board remedies by statute will come to fruition any time soon. Unfortunately, the "ossification" of labor law identified by Cynthia Estlund[306] makes the reversal of longstanding NLRA doctrines essentially impossible without action by Congress. Of course, such action seems quite unlikely in the present political climate.

What may be more likely in the short term is a reaffirmation of the continuing vitality of *Seven-Up Bottling Co.* In *Hoffman Plastic*, four Justices made a strong statement favoring deterrence as a primary aim of Board remedies and deference to the Board in remedying violations of the Act. In doing so, Justice Breyer used less equivocal language than that found in any other Supreme Court opinion examined in this Comment, perhaps with the notable exception of the dissent in *Republic Steel* itself. It is notable also that the five-justice majority did not in any way engage with the dissent's deterrence argument, instead focusing almost entirely on the rationale of immigration law enforcement. If presented with the proper factual circumstances, the Court may be just one new appointment away from a renewed condemnation of the "bog of logomachy" spawned by *Republic Steel.*

Even if such a statement is forthcoming, it probably will not be enough to spur a complete reassessment of seventy years of NLRB case law. If the lines of cases examined in this Comment demonstrate anything, it is that vague congressional mandates about "affirmative action" and "effectuating the policies of the Act" are too easily watered down and ignored. That is why proposing a new doctrinal framework to evaluate the propriety of Board remedies under the current statute feels like an exercise in futility, and for that reason, I decline to do so here. Realistically, it will take legislation along the lines of the Employee Free Choice Act to truly revitalize the enforcement power of the NLRB. It is perhaps ironic that a bill whose effect would be to limit the discretion of the Board by mandating more specific remedies, in

306. *See supra* note 38 and accompanying text.

more specific factual circumstances, is the most promising solution to the NLRB's current malaise. But that irony only demonstrates the power of *Republic Steel* in fettering the discretion of an administrative body that was intended to respond to diverse fact situations with a variety of remedial powers. Unfortunately, the sad conclusion is that until Congress acts, as it did in 1935, the protections of the National Labor Relations Act will remain little more than "fair words" inducing "pathetic reliance" by the working people of this country.[307]

307. *Cf.* H.R. REP. NO. 74-972, at 5 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 279, at 2961.

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