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The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law

Ahmed A. White*

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I. INTRODUCTION

In the winter of 1936–37, Flint, Michigan, played host to perhaps the most significant event in the history of American labor. Hundreds of striking automobile workers seized several factories in a General Motors (GM) production complex and held them for six weeks despite attempts by local authorities and GM agents to oust them. In taking control of the factories, the strikers aimed to force the company to accept their right to form a union of their choice and to compel GM to recognize and bargain with it, as required by the newly enacted Wagner Act. GM's inability to reclaim its factories led to a near-complete shutdown of its operations nationwide and eventually caused the company to surrender to the strikers' main demands. The boldness and tenacity of these "sit-down" strikers and their unexpected victory over this immensely powerful and stridently anti-union corporation catalyzed a nationwide wave of hundreds of sit-down strikes over the next several months. The strikes would eventually prove critical to overcoming entrenched employer resistance to basic labor rights and bringing about, for the first time in American history, extensive unionization of the industrial workforce.

The sit-down strikes represent a tremendously important chapter in American history. Although the historical literature on the strikes remains surprisingly thin, historians have stressed the strikes' integral function in enabling the organization of industrial labor, thereby determining the subsequent course of the labor movement and the political economy of twentieth century America.¹ Legal scholars have also confronted the legacy of the sit-down strikes. Karl Klare and James Pope, among others, have demonstrated the strikes' essential role in overcoming judicial and political opposition to the Wagner Act and making way for a viable system of labor law.² Scholars like Klare and Pope have also called attention to ways that the lawful prohibition of these strikes, which took shape following the GM strike, altered the character of the labor movement. These measures helped suppress more radical and progressive tendencies, laying the groundwork for the stagnation and morbidity that characterized the

¹ See, e.g., SIDNEY FINE, *SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936–1937* (1969); ROBERT H. ZIEGER, *THE CIO: 1935–1955*, at 46–61 (1995); Michael Torigan, *The Occupation of the Factories: Paris 1936, Flint 1937*, 41 *COMP. STUD. SOC'Y & HIST.* 324 (1999).

² Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 *MINN. L. REV.* 265 (1978); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 *COLUM. L. REV.* 1 (2002).

course of the labor movement over the latter half of the twentieth century.³

This scholarship is valuable for exposing the social and political consequences of the sit-down strikes and countering a tendency among many students and scholars of labor to either ignore the sit-down strikes completely or dismiss them as aberrant and episodic phenomena with few lasting consequences.⁴ In fact, the sit-down strikes influenced the evolution of modern labor law in ways that legal scholars and labor historians have yet to explore fully. To be sure, scholars such as Klare and Pope have examined this issue in the context of how the legal campaign against the sit-down strikes shaped the immediate course of labor law as well as the overall jurisprudential landscape of labor relations.⁵ Despite these efforts, there remains an absence of a thorough accounting of the strikes' lasting impact on the practical content of labor law itself and, most especially, how the strikes transformed the contours of the right to strike.

Tracing the legacy of the sit-down strikes is important for two major reasons. The first reason is practical. As this Article demonstrates, legal and political attacks on labor rights that were originally aimed at the sit-down strikes have metastasized into a more general campaign to prohibit a broad range of militant strike practices, even those bearing little outward resemblance to the original sit-down strikes. The consequences for organized labor have been quite grave, as this dynamic helped eviscerate the right to strike and, in effect, deprived labor of weapons it desperately needs to mount any meaningful challenge to the entrenched power of employers in the workplace. In this way, the reaction to the strikes helps to account for the dire state in which organized labor finds itself today. Bringing this out is important not so much because it reveals some simple legal formula for rebuilding labor rights; to the contrary, it is important because it speaks to the tremendous difficulties that await any such effort. Indeed, this Article argues that the reactionary legacy of the sit-down strikes suggests inherent, perhaps insuperable limits that may appertain to the right to strike in liberal society.

³ See generally Pope, *supra* note 2; Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958*, 24 LAW & HIST. REV. 45 (2006); Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275, 335-50 (2004).

⁴ Leading labor law textbooks, for example, typically mention the strikes and the legal decisions they generated only in passing. See, e.g., ARCHIBALD COX ET AL., LABOR LAW 76-80, 573 (14th ed. 2006); MICHAEL HARPER ET AL., LABOR LAW 212 (6th ed. 2003).

⁵ See sources cited *supra* note 3.

The second reason is more academic, as it concerns the state of literature on this subject and the contribution that a thorough accounting of the consequences of the sit-down strikes can make to our understanding of the phenomenon. As this Article stresses, the historical meaning of the strikes is necessarily intertwined with the political and legal results that flowed from them. To the extent that these consequences have not been fully revealed, the historical understanding of the strikes remains fundamentally incomplete.

The legal legacy of the sit-down strikes is anchored by two decisions of the Supreme Court of the United States that addressed the strikes' legality under labor law. Decided within a few years of the Court's decision to uphold the constitutionality of the Wagner Act, *NLRB v. Fansteel Metallurgical Corp.*⁶ and *Southern Steamship Co. v. NLRB*⁷ held that sit-down strikes are illegal and that sit-down strikers may not benefit from the authority of the National Labor Relations Board (the NLRB or Board) to protect workers from employers' assaults on labor rights with the usual remedies of reinstatement and back pay.⁸ More subtly, the Court in *Fansteel* and *Southern Steamship* also acceded to the criminal prosecution of sit-down strikers by state and federal officials, as did the Board in its litigation of these cases. These initial responses to the sit-down strikes would outline a much broader program of limiting the right to strike, involving the federal courts, Congress, the Board, and state and local police and judges. In each of these institutional contexts, the *Fansteel* and *Southern Steamship* cases not only provided a legal foundation on which expanded attacks on the right to strike could be based, but also tethered to their analysis the specter of ungoverned labor militancy and the fiction of a Board and system of labor rights that was (at least until the 1947 enactment of the Taft-Hartley Act) too tolerant of labor's excesses. It is by these means that the sit-down strikes have served to limit the Board's authority under the labor law to protect strikers from employer reprisals, particularly where strikers engage in excessively confrontational or militant tactics; provided a jurisprudential rationale for courts to aggressively police the Board's adherence to this program; and justified a weak view of the preemptive effect of federal labor law, thereby paving the way for states and local governments to use their criminal laws to impose their own limits on the right to strike.

⁶ 306 U.S. 240 (1939).

⁷ 316 U.S. 31 (1941).

⁸ *Id.* at 38, 40–41, 48; *Fansteel*, 306 U.S. at 253, 255–56, 258, 261.

Although they have featured other aims, the immediate goal of most sit-down strikes was to prevent employers from resuming production with replacement workers and crossovers, a goal that, if executed successfully, all but negates the value of a traditional strike. For this reason, sit-down strikes actually continued to occur well after *Fansteel* and *Southern Steamship*. But with these cases so unequivocally prohibiting the tactic, strikers seeking to keep their employers' operations closed have had to turn to other methods, from mass picketing, to blocking streets and plant entrances, to verbal harassment and physical attacks on strikebreakers. Significantly, the concepts originally developed to penalize sit-down strikes have evolved to prohibit these alternative tactics as well. This fact reveals the central logic of this legacy that elevated traditional concepts of private property, authority, and social order above the rights of labor: to enhance the ability of employers to defeat strikes and related modes of labor protest.

It is through this ideological and practical orientation that the sit-down strikes speak to the inherent limits of liberal labor law. From its inception, American labor law has allocated labor rights in a thoroughly liberal fashion that eschews an interventionist, corporatist model of addressing conflicts between labor and employers. Rather, American labor law relies on a relatively *laissez-faire* approach by which a union's power ultimately derives from whatever force it can bring to bear through the strike. Likewise, as reflected in the right it gives employers to replace strikers and resume business operations, American labor law abstains from more interventionist or corporatist approaches to the conduct of strikes themselves.⁹ For a strike to work in such a context, the union must of its own accord stop the employer from carrying on business. And yet, what the sit-down strikes showed—and have continued to confirm through their legacy—is that American labor law doggedly embraces liberal concepts of private property, authority, and order in a fashion that effectively denies workers the only tactics by which they might consistently accomplish a stoppage of their employer's business. The result of this fealty to liberal principles is a system in which the right to strike is prominent in a formal sense, but available in a meaningful way only for the rare workers who are economically irreplaceable, politically entrenched, or otherwise very lucky. Because a meaningful right to strike is so central to a liberal system of labor rights, the larger consequence of

⁹ See SYLVESTER PETRO, *THE LABOR POLICY OF THE FREE SOCIETY* (1957) (summarizing this conception of labor law).

its devaluation is the inevitable bankruptcy of the entire system of labor rights.

In this legacy, this Article argues, can be found not only the full significance of the sit-down strikes but, indeed, the foundation of a great and tragic contradiction: militant unionists brought life to concepts of labor rights through the use of sit-down strikes, and yet those strikes have since, in the determined hands of labor's enemies, been useful for destroying a robust system of labor rights. The strikes are both the embodiment and symbol of organized labor's torturous encounter with modern capitalism. For this reason, above all, no one who hopes to understand the history of labor relations and labor law in modern America can ignore them.

This Article proceeds in several parts. Part II briefly reviews the history of sit-down strikes. It emphasizes their origins in early twentieth-century America and their remarkable proliferation in the 1930s. This Part stresses the sit-down strikes' role in the successful organization of basic industries, in the Court's validation of the Wagner Act, and in employers' eventual (and contingent) acquiescence to a more or less functional system of labor rights. Part III then traces the sit-down strikes' reactionary legacy as it emerged in the period from 1937 to the enactment of the Taft-Hartley Act in 1947. It begins by reviewing the history of *Fansteel* and *Southern Steamship*, and then shows the role that these decisions, the Board's apparent reaction to them, and the strikes themselves played in Congress's and the courts' roles in opening the door to increasingly pointed attacks on all forms of worker militancy. This Part shows how the strikes both influenced the enactment of Taft-Hartley and framed key provisions of that notoriously anti-labor legislation. Part IV continues this critique by demonstrating how the reactionary framework that emerged in response to the strikes has continued to influence the state of labor rights in the decades since Taft-Hartley by limiting the reinstatement of strikers, facilitating the intervention of state and local officials in labor disputes, and subordinating labor law to other regimes of federal policy. Part V concludes by elaborating on how the sit-down strikes' reactionary legacy brings to light the inherent limitations of liberal labor law.

II. A LEGACY OF REFORM: SIT-DOWN STRIKES AND THE RISE OF MODERN LABOR RELATIONS

The influence of the sit-down strikes on the course of labor relations and labor law in the New Deal era has been well chronicled by

labor historians and legal scholars.¹⁰ Although it is not the primary focus of this Article to critique this literature, a review of its main themes frames the discussion of the eventual effect of sit-down strikes on the development of American labor law. To this end, this Part recounts the history of sit-down strikes, from their origins to the GM strike at Flint, to their role in shaping labor relations in the critical period of the late 1930s, and finally to their immediate impact on the course of modern labor relations.

A. *The Early History of Sit-Down Strikes*

The Flint strike embodied the sit-down strike in its most classic form: a work stoppage in which the strikers occupied the workplace to prevent the employer from using it for a considerable period of time. The concept is, however, quite spectral, contemplating not only the classic “stay-in” strike, but a range of less dramatic tactics, including short, “quickie” strikes, characterized by brief, on-the-job work stoppages, and “skippy” strikes, characterized by intentionally sloppy performance on the production line.¹¹ The initial focus of this Article is the classic stay-in strike. But as will become evident as the discussion unfolds, the sit-down strike’s different manifestations all center on a core mode of protest, built around a challenge to the employer’s traditional prerogatives of property and authority.

Sit-down strikes came into their own during the dramatic clash of labor and capital in Flint, Michigan, in the winter of 1936–37 and are forever associated with that moment in history; however, the tactic emerged long before the Flint strike, even though it is impossible to know with complete certainty when the first sit-down strike occurred.¹² Michigan Governor (and future Supreme Court Justice¹³) Frank Murphy, who performed a delicate balancing act in trying to mediate the affair in Flint, quite understandably linked the strikes to the most ancient of origins: the protests of masons building the pyramids of Egypt.¹⁴ The particular claim may be debatable, but Murphy’s general point—that protests resembling the modern sit-down strike surely have occurred since the dawn of civilization—is well taken. Murphy was also able to point to more recent and better-

¹⁰ See *supra* note 2 and accompanying text.

¹¹ IRVING BERNSTEIN, *A HISTORY OF THE AMERICAN WORKER, 1933–1941: THE TURBULENT YEARS* 499 (1969); FINE, *supra* note 1, at 121.

¹² See FINE, *supra* note 1, at 141.

¹³ J. WOODFORD HOWARD, JR., *MR. JUSTICE MURPHY*, at vii (1968).

¹⁴ FINE, *supra* note 1, at 122.

documented examples of sit-down strikes, such as those by builders in fifteenth-century France and those by textile workers in eighteenth-century France and nineteenth-century England.¹⁵ Other examples exist beyond those that Murphy identified. Merchant ships were the scene of considerable labor protest in the eighteenth century, and strikes aboard ship were (and remain) like sit-down strikes by their very nature.¹⁶ The sit-down strike was a common—albeit usually brief and small-scale—feature of maritime labor relations at least through the nineteenth and early twentieth centuries.¹⁷

The first documented sit-down strike in modern America involving factory workers occurred in 1884 in Cincinnati at the Jackson Brewery Company, when striking brewers barricaded themselves in the establishment and beat back attempts by police to oust them.¹⁸ An episode resembling things to come unfolded in 1906 at a General Electric factory in Schenectady, New York, where some 3000 workers under the leadership of the Industrial Workers of the World occupied the factory to protest the company's refusal to reinstate three fired union members.¹⁹ The so-called "folded arms" strikers stayed inside for as long as three days.²⁰

These examples notwithstanding, the sit-down strike remained relatively uncommon in American labor relations until the 1930s.²¹ The impetus for its increasing popularity in that decade, which foreshadows a major theme in the latter sections of this Article, was the increasingly aggressive attempt by workers to realize basic labor rights in the workplace, including the right to organize and compel collective bargaining. Although credit for this upsurge in worker militancy ultimately belongs to the workers themselves, another factor was a change in the legal status of labor rights. Until the New Deal, basic labor rights were all but completely denied to workers by an array of

¹⁵ *Id.*

¹⁶ MARCUS REDIKER, *BETWEEN THE DEVIL AND THE DEEP BLUE SEA: MERCHANT SEAMEN, PIRATES, AND THE ANGLO-AMERICAN MARITIME WORLD, 1700–1750*, at 96–100 (1989).

¹⁷ Briton C. Busch, "Brace and Be Dam'd": *Work Stoppages on American Whaleships, 1820–1920*, 3 INT'L J. MAR. HIST. 95, 98–99 tbl.1 (1991); White, *supra* note 3, at 296–300.

¹⁸ FINE, *supra* note 1, at 122.

¹⁹ MELVYN DUBOFSKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* 71 (Joseph A. McCartin ed., abr. ed. 2000).

²⁰ BERNSTEIN, *supra* note 11, at 499; PHILIP S. FONER, *THE INDUSTRIAL WORKERS OF THE WORLD, 1905–1917*, at 88 (1965).

²¹ See generally FINE, *supra* note 1, at 121–77 (discussing the emergence and proliferation of the sit-down strike in the early twentieth century).

legal doctrines that served the needs of anti-union employers, including the widespread use of injunctions, the enforcement of anti-radical statutes, the discriminatory enforcement of everyday criminal laws, and of course the absence of any laws of consequence affirmatively protecting labor rights.²² In part because of increasingly strident organizing and effective political activism by labor—and in part because such changes accommodated a broader shift in political economy wrought by the Great Depression and the consolidation of monopoly capital—this condition was dramatically transformed in the early 1930s.²³ Of particular importance is Congress passing the Norris-LaGuardia Act in 1932, which significantly limited the ability of employers to use federal court injunctions to undermine labor rights.²⁴ Also important was the 1933 enactment of the National Industrial Recovery Act (NIRA).²⁵ Although the Supreme Court found the NIRA unconstitutional soon after its enactment²⁶—thus setting the stage for a dramatic reversal in *Jones & Laughlin Steel v. NLRB*²⁷ a few years later—the statute was very much the legislative cornerstone of the so-called “First New Deal.”²⁸ Section 7(a) of the NIRA represented the first attempt by Congress to codify basic labor rights.²⁹ Although the NIRA offered no real means of enforcing this provision (and desultory attempts to remedy this by executive order failed),³⁰ it and the Norris-LaGuardia Act created a sense of overall change in labor’s legal condition and helped trigger an upsurge in labor-organizing efforts.³¹

From the outset, this wave of union organization drew on militant tactics, including, for the first time in sustained fashion, sit-down strikes.³² The first modern sit-down strike is generally considered to have occurred in Austin, Minnesota, in November 1933, when ap-

²² CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 33–49 (1985).

²³ See RAYMOND HOLGER, *EMPLOYMENT RELATIONS IN THE UNITED STATES: LAW, POLICY, AND PRACTICE* 12–14 (2004).

²⁴ Pub. L. No. 72-65, 47 Stat. 70 (codified as amended at 29 U.S.C. §101 (2006)).

²⁵ Pub. L. No. 73-67, 48 Stat. 195, *invalidated by* *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

²⁶ *Schechter Poultry*, 295 U.S. at 542.

²⁷ 301 U.S. 1 (1937).

²⁸ See HOLGER, *supra* note 23, at 109.

²⁹ *Id.* at 108.

³⁰ See BERNSTEIN, *supra* note 11, at 172–85.

³¹ See *id.* at 35–125.

³² See *supra* note 21 and accompanying text.

proximately 600 meatpackers seized a Hormel plant in a dispute over wages, working conditions, and the processing of struck livestock.³³ The strikers “released” the plant two days later after the Minnesota governor not only mobilized the National Guard but also helped convince Hormel to agree to arbitration and to abstain from punishing the strikers.³⁴ The Hormel sit-down strike actually occurred several months after rubber workers in Akron, Ohio, began using the quickie sit-down strike to counter their employers’ elaborate and aggressive anti-union tactics.³⁵ But the Hormel strike was a more crucial manifestation of the tactic. The years 1933 through 1935 saw numerous sit-downs of both kinds, particularly in automobile and rubber factories.³⁶ Within a very short time there would be many, many more.

B. *Sit-Down Strikes in the Second New Deal*

In 1936, there were forty-eight sit-down strikes (not counting shipboard strikes) that lasted at least one day; twenty-two of these, involving almost 35,000 total workers, lasted even longer.³⁷ There were many more sit-down strikes of the short, quickie type as well.³⁸ Most of these strikes, regardless of their duration, involved unions affiliated with the CIO (then, the Committee for Industrial Organizing, and later, the Congress of Industrial Organizations), which had recently been formed by American Federation of Labor (AFL) dissidents intent on organizing the industrial workforce.³⁹ Between 1936 and 1939, there would be almost 600 major sit-down strikes, most of which were, again, mounted by industrial workers affiliated with the CIO.⁴⁰

Unlike the 1933 strike at Hormel, the dominant cause of sit-down strikes in the period of the “Second New Deal” was the attempt by workers to organize unions in the face of vigorous—and often vio-

³³ *Strikers Seize Huge Plant; Oust Packing House Owner in Pay Dispute*, CHI. DAILY TRIB., Nov. 12, 1933, at 1.

³⁴ Walter Fitzmaurice, *Packing Plant Is Surrendered by Strike Army*, CHI. DAILY TRIB., Nov. 14, 1933, at 5.

³⁵ Louis Adamic, *Sitdown: II*, THE NATION, Dec. 12, 1936, at 702.

³⁶ FINE, *supra* note 1, at 123; Daniel Nelson, *Origins of the Sit-Down Era: Worker Militancy and Innovation in the Rubber Industry, 1934–38*, 23 LAB. HIST. 198, 205–06 (1982).

³⁷ FINE, *supra* note 1, at 123.

³⁸ See, e.g., Pope, *supra* note 3, at 53–54 (describing dozens of sit-down strikes in Goodyear’s Akron, Ohio plant in 1936 alone).

³⁹ FINE, *supra* note 1, at 123. On the emergence of the CIO, see ZIEGER, *supra* note 1, at 22–24.

⁴⁰ Pope, *supra* note 3, at 46.

lent and criminal—repression at the hands of their employers.⁴¹ This pattern became particularly pronounced in late 1936, just before the Flint strike erupted.⁴² That year, sit-down strikes emerged as a powerful and frequent tactic in the CIO's struggle to overcome employer resistance in the rubber industry.⁴³

The Flint strike is a good example of how the strikes during the Second New Deal typically played out. In 1936, GM was stridently committed to what industrial employers had long called the “open-shop” concept.⁴⁴ The term was meant to suggest these employers’ supposed indifference to whether the people who worked for them belonged to unions, but what it actually meant was that they aggressively opposed attempts by its employees to organize functional, independent unions.⁴⁵ In the mid-1930s, GM enforced its commitment to the open shop by the liberal use of threats and assaults, espionage, discriminatory discharges, and company unions.⁴⁶ A Senate investigation at the time revealed that GM maintained at its plants a full-time staff of more than 1400 well-armed and well-trained company police, backed by an indeterminate number of part-time police.⁴⁷ Moreover, GM fielded what the committee called an “amazing and terrifying” cadre of labor spies and provocateurs at its more than 100 plants.⁴⁸ The company itself employed about 200 spies.⁴⁹ Some of these spies were provided by the more than dozen firms with which GM had contracted to provide espionage services.⁵⁰ Along with Chrysler, GM was the largest client of two of the most prominent labor “detective” agencies, Pinkerton and Corporations Auxiliary.⁵¹ Whether in-house or contracted, these professional spies coerced and cultivated networks of informants—“hooked men”—who in turn spied as well.⁵² Given these layers, it really cannot be said how many spies GM and its

⁴¹ See FINE, *supra* note 1, at 332 (describing the popularity of sit-down strikes in areas where unions are weak).

⁴² Pope, *supra* note 3, at 55–56.

⁴³ See, e.g., BERNSTEIN, *supra* note 11, at 592–600.

⁴⁴ FINE, *supra* note 1, at 29.

⁴⁵ See *id.* at 22–23.

⁴⁶ See *id.* at 29–48; ZIEGER, *supra* note 1, at 47–49; see also BERNSTEIN, *supra* note 11, at 516–19.

⁴⁷ *Hearings Before the Comm. on Education and Labor, 75th Cong. 1998–2001 (1937)* [hereinafter *LaFollette Committee Hearings*].

⁴⁸ S. REP. NO. 75-46, pt. 3, at 46, 56 (1938)

⁴⁹ *Id.* at 23.

⁵⁰ *Id.* at 92–93.

⁵¹ *Id.* at 8, 14, 18.

⁵² *Id.* at 50.

sister companies actually used, but the numbers were clearly enormous. So extensive and convoluted was espionage at GM, that the company found itself in the ridiculous position of spying on its own spies.⁵³

This was all done in defiance of the company's statutory obligations under NIRA and the Wagner Act, and with equal contempt for rulings by the labor boards created under these statutes.⁵⁴ By 1936, the primary target of GM's anti-unionism was the United Automobile Workers (UAW), which was rapidly emerging as the main agent of industrial unionism in the automobile industry.⁵⁵ In the face of GM's resistance, it was impossible for UAW to gain—let alone prove—majority support in the plants.⁵⁶ In such a context, strike success emerged as a prerequisite for organizing success, as rank-and-file workers, fearing for their jobs and safety, waited for a successful strike to prove that the union—or the law—could actually protect them.⁵⁷

The sit-down strike offered an effective response to this dilemma. Most notably, a successful sit-down strike would check the employer's ability to continue production with replacement workers and crossovers.⁵⁸ A sit-down strike could also be executed with the active support of only a minority of workers; a few workers at a critical point could shut down an entire factory.⁵⁹ The ability to succeed with small numbers was an important advantage in the face of employer reprisals.⁶⁰ The tactic also allowed strikers to avoid the risks of arrest and assault by police or company guards, which was often their fate on outdoor picket lines.⁶¹ Furthermore, a sit-down essentially held the safety of the plant hostage, because it forced the employer to play the role of aggressor if it wanted to end the strike by force.⁶² Finally, the sit-down tactic provided the union an extraordinary forum for cultivating loyalty and solidarity among workers, offering rank-and-file workers a salient symbol of the union's ability to confront the em-

⁵³ *Id.* at 22–23, 46–61.

⁵⁴ FINE, *supra* note 1, at 29–48; ZIEGER, *supra* note 1, at 47–49.

⁵⁵ FINE, *supra* note 1, at 63–99; WALTER GALENSON, *THE CIO CHALLENGE TO THE AFL: A HISTORY OF THE AMERICAN LABOR MOVEMENT, 1935–1941*, at 132–34 (1960).

⁵⁶ See FINE, *supra* note 1, at 75 (discussing organizational difficulties at the plant).

⁵⁷ *Id.* at 98–99; ZIEGER, *supra* note 1, at 43–45.

⁵⁸ FINE, *supra* note 1, at 121.

⁵⁹ *Id.* at 122.

⁶⁰ *Id.* at 121.

⁶¹ *Id.* Companies were skeptical of using force inside their plants due to the risk of damage to machinery and other property. *Id.*

⁶² *Id.*

ployer, as well as numerous occasions for the actual practice of mutual support.⁶³

Even before the First New Deal, automobile workers began to challenge the open shop aggressively.⁶⁴ In the summer of 1930, a Communist union with a titular presence in many of the plants led a strike at Fisher Body, a GM subsidiary in Flint, Michigan—one of the plants that would host the great sit-down strike a few years later.⁶⁵ After a few days, the strike was smashed by police who broke up pickets and arrested dozens of strikers.⁶⁶ The company and its allies followed this up with a torrent of anti-radical propaganda.⁶⁷ In March 1932, twenty-three workers and their supporters were shot, with as many as four killed, by police and company guards at a protest against hunger and unemployment at the main gate of Ford's River Rouge megaplant in Dearborn, Michigan.⁶⁸

Although battles such as these failed to end the open shop, they were witness to a powerful undercurrent of conflict and anger among the industry's workers, as well as organizers and activists determined to force the issue. The enactment of section 7(a) of the NIRA amplified this current. A major strike erupted in 1933 at Ford suppliers Briggs Manufacturing and Murray.⁶⁹ In 1934, a strike that began at Fisher Body in Cleveland spread to several other GM plants; however, little came of it.⁷⁰ Later that same year, a strike at Electric Auto-Lite, a parts producer in Toledo, ended in a sustained battle between workers and 1350 National Guardsmen that left two protesters shot dead and a score on both sides injured.⁷¹

The Flint sit-down strike arose amidst increasing use of the tactic in nearby areas, including Detroit, and at other GM facilities nationwide.⁷² In the lead-up to the strike, emboldened UAW organizers

⁶³ *Id.* at 121–22; BERNSTEIN, *supra* note 11, at 499.

⁶⁴ See FINE, *supra* note 1, at 65–66.

⁶⁵ *Id.*

⁶⁶ *Id.* at 66.

⁶⁷ *Id.*

⁶⁸ IRVING B. BERNSTEIN, *A HISTORY OF THE AMERICAN WORKER, 1920-1933: THE LEAN YEARS* 432–34 (1960); FRASER M. OTTANELLI, *COMMUNIST PARTY OF THE UNITED STATES* 33–34 (1991); *Fisher Body Strikers Clash with Troopers*, N.Y. TIMES, Jul. 4, 1930, at 2.

⁶⁹ H.E. Gronseth, *New Ford Due in Two Weeks*, WALL ST. J., Feb. 6, 1933, at 1.

⁷⁰ FINE, *supra* note 1, at 32–34; *Auto Strike Spreads to Two Other Plants*, WALL ST. J., May 1, 1935, at 1; *General Strike in Auto Plants Is Threatened*, CHI. DAILY TRIB., May 12, 1934, at 8.

⁷¹ Rebecca E. Zeitlow & James Gray Pope, *The Toledo Auto-Lite Strike of 1934 and the Fight Against "Wage Slavery"*, 38 U. TOL. L. REV. 839, 845–46 (2007).

⁷² FINE, *supra* note 1, at 128–36.

“harass[ed] supervisors,” orchestrated numerous quickie strikes, and increased membership “tenfold,” signing up some 3000 members in December 1936 alone.⁷³ The immediate triggers of the Flint strike were the company’s discriminatory discipline and discharge of a number of workers, its continuing refusal to engage the UAW in meaningful collective bargaining, and a rumor that the company was about to preempt the strike by removing critical machinery to another facility.⁷⁴

On the surface, the union’s focus on Flint might have seemed foolish because the city’s economy was largely dominated by GM. On the other hand, the union had great success organizing workers in Flint, and not by accident: workers in Flint endured a particularly grim tradition of arbitrary disciplinary tactics and repression of basic labor rights.⁷⁵ Moreover, Flint was the closest thing to a central hub in GM’s far-flung production network and a successful strike there could be especially advantageous.⁷⁶ All of these factors prompted the events in the early winter of 1936. On December 30, 1936, in a move that was outlined by the union’s leaders but executed spontaneously, UAW workers seized Fisher Body Plants Nos. 1 and 2.⁷⁷

The takeover was dramatic, but it unfolded smoothly and quickly. The strikers quickly ejected foremen and managers, secured the sprawling facilities against outside invasion, and set about devising accommodations.⁷⁸ The strikers would hold the factories until February 11, 1936—an extraordinary forty-four days.⁷⁹ During this time they repelled a major assault by the police—an affray known as the “Battle of the Running Bulls”—and defied two court injunctions ordering them to leave.⁸⁰ Weeks into the stand-off, the strikers also improved their position by seizing another plant in GM’s Flint complex, which produced vital engine assemblies.⁸¹ From the outset, the strikers managed to establish in their ranks a degree of order and discipline that impressed even their adversaries.⁸² The logistics involved in

⁷³ ZIEGER, *supra* note 1, at 49–50.

⁷⁴ FINE, *supra* note 1, at 140–44; ART PREIS, *LABOR’S GIANT STEP: THE FIRST TWENTY YEARS OF THE CIO: 1936–1955*, at 53 (2d ed. 1964).

⁷⁵ FINE, *supra* note 1, at 56–63.

⁷⁶ *See id.* at 143.

⁷⁷ *Id.* at 144.

⁷⁸ *Id.* at 156; ZIEGER, *supra* note 1, at 50.

⁷⁹ *See* FINE, *supra* note 1, at 305–06.

⁸⁰ PREIS, *supra* note 74, at 54–56.

⁸¹ FINE, *supra* note 1, at 266.

⁸² Pope, *supra* note 3, at 55–60.

keeping the plants continuously manned and defended by hundreds of workers were impressive enough. As the union had hoped, the shortages created by the strike bottle-necked production and crippled GM; the strike spread to fifteen GM facilities in other parts of the country, eventually idling 136,000 production workers.⁸³

As the strike wore on, GM found itself boxed in by its inability to act and could not convince Michigan Governor Frank Murphy to storm the Flint factories with the National Guard, President Roosevelt to intervene with the CIO leadership, or the strikers to emerge without a settlement in place.⁸⁴ Just as critically, the strike accomplished its goal by totally neutralizing GM's impressive means of labor repression.⁸⁵ Indeed, the strikers' ability to flout those means tended to further enhance their reputation.⁸⁶ Moreover, by succeeding with such an audacious strategy, the strikers were not only able to influence GM directly, but as the strike's rapid spread to other plants revealed, they also communicated to other GM workers the possibility of overcoming the company's strident, seemingly inviolable opposition to labor rights. Under mounting political and economic pressure, GM was forced to yield to a preliminary agreement that provided for the company's eventual recognition of the union as the exclusive agent of the company's industrial workforce.⁸⁷

C. *Sit-Down Strikes and the Construction of Modern Labor Relations*

Perhaps the most important effect of the Flint strike was what it communicated to industrial workers across the country. The strike was front-page news nationwide.⁸⁸ Workers who followed the strike's course could not fail to draw from it the remarkable conclusion that, if properly led and supported, a union could wrest recognition and bargaining concessions from even the most powerful anti-union employers.⁸⁹ Autoworkers in particular responded with a new confidence in industrial unions and in the sit-down tactic. In the weeks

⁸³ FINE, *supra* note 1, at 305; PREIS, *supra* note 74, at 53.

⁸⁴ ZIEGER, *supra* note 1, at 51–53.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See id.*; FINE, *supra* note 1, at 306–07.

⁸⁸ *See General Motors Faces Shutdown in All Plants; Union Bars Local Deals*, N.Y. TIMES, Jan. 2, 1937, at 1; William O'Neal, *Motor Strikers Defy Court: 'Expect to Die Resisting,' Men Tell Governor*, CHI. DAILY TRIB., Feb. 3, 1937, at 1; *Ouster Edict Served on Auto Strikers: Ordered to Quit Flint Plant Today, One Group Threatens Resistance*, L.A. TIMES, Feb. 3, 1937, at 1.

⁸⁹ FINE, *supra* note 1, at 327.

immediately following the end of the Flint strike, the UAW conducted at least eighteen sit-down strikes at other GM facilities before the company and the union finally agreed to a company-wide contract in mid-March 1937.⁹⁰ In March, about 6000 UAW members occupied Chrysler's Detroit plants. Following a tense standoff that lasted into April, the company settled with the union, agreeing to the union's partial ("members only") representation of the company's 100,000 employees.⁹¹ During the same period, the UAW successfully organized a number of smaller automakers, some by sit-down strikes. As a result, overall dues-paying membership in the UAW increased from 88,000 in February 1937 to 400,000 in October of that year.⁹² By that time, of the major automobile manufacturers, only Ford remained unorganized.⁹³ Against the backdrop of years of bitter failure in the face of vicious opposition, the union's success in these few months was nothing short of phenomenal.

The impact of the strikes extended well beyond the automobile industry. "Within days of the settlement of the General Motors strike . . . the sit down technique literally spread from coast to coast."⁹⁴ While 1936 saw only a couple of dozen sit-down strikes, there were 477 that lasted at least one day in 1937, a figure that represented one in ten major strikes that year.⁹⁵ In March 1937, "[t]he sit-down movement reached its all-time high . . . when 170 such strikes involved 167,210 workers."⁹⁶ Just as remarkably, sit-down strikes that year involved more than 100,000 active participants and idled 400,000.⁹⁷ And they were not confined to any particular industry. As labor historian Sidney Fine notes, "The sit-downs involved every conceivable type of worker—kitchen and laundry workers in the Israel-Zion Hospital in Brooklyn, pencil makers, janitors, dog catchers, newspaper pressmen, sailors, tobacco workers, Woolworth girls, rug weavers, hotel and restaurant employees, pie bakers, watchmak-

⁹⁰ *Id.* at 323.

⁹¹ The Chrysler sit-down strikers left the plants prior to a final settlement, but with guarantees that the company would not resume production (and a promise from Governor Murphy that he would prevent the use of strikebreakers in any case). *Id.* at 328; STEVE JEFFERYS, *MANAGEMENT AND MANAGED: FIFTY YEARS AT CHRYSLER* 71-74 (1986); ZIEGER, *supra* note 1, at 52-53.

⁹² FINE, *supra* note 1, at 327.

⁹³ ZIEGER, *supra* note 1, at 122-24.

⁹⁴ Carlos A. Schwantes, "We've Got 'em on the Run, Brothers": *The 1937 Non-Automotive Sit Down Strikes in Detroit*, 56 MICH. HIST. 179, 180 (1972).

⁹⁵ FINE, *supra* note 1, at 331.

⁹⁶ *Id.* at 329.

⁹⁷ *Id.* at 331.

ers, garbage collectors, Western Union messengers, opticians, and lumbermen.”⁹⁸ As Fine also points out, the large majority of sit-down strikes in this period continued to be CIO-led and were aimed at overcoming industrial employers’ entrenched resistance to union organizing. Over 80 percent were successful or partly successful despite the fact that they tended to occur in industries with strong histories of employer anti-unionism and correspondingly weak unions.⁹⁹

One industry where the sit-down strike proved especially significant was maritime shipping. Seamen were no strangers to sit-down strikes, arguably having originated the tactic.¹⁰⁰ But in 1936 and 1937, they resorted to the strikes as never before, undertaking probably hundreds of individual shipboard strikes against shipping companies staunchly opposed to independent union representation.¹⁰¹ By the middle of 1936—well before the UAW occupied GM’s factories—the situation had reached, in the words of one media account, a “guerilla war at sea.”¹⁰² In March 1936, almost 400 members of the crew of the passenger steamer *California* struck that vessel as it approached San Francisco to protest the company’s wage policies, persecution of union supporters, and foot-dragging in the negotiation of a new contract.¹⁰³ The strikers remained aboard, preventing the vessel from completing its voyage and preventing its owner, Panama Pacific Lines, from simply dumping them in that distant port and hiring a scab crew.

Within days, the affair had become a major crisis, with the strikers’ impromptu leader, a crewman named Joe Curran (who would later become a national labor leader), negotiating with Secretary of Labor Frances Perkins, who in turn negotiated with the company and with Roosevelt and other members of his cabinet.¹⁰⁴ Perkins brokered a settlement that ended the strike, but the settlement proved meaningless after Curran and the other strikers were fired and blacklisted when the ship returned to its home port of New York.¹⁰⁵ But in the long run, the *California* strike inspired a veritable onslaught of shipboard sit-down strikes, led by Curran and other dissidents over the

⁹⁸ *Id.* See generally Schwantes, *supra* note 94, at 186–89.

⁹⁹ FINE, *supra* note 1, at 332.

¹⁰⁰ See generally White, *supra* note 3.

¹⁰¹ *Id.* at 316.

¹⁰² *Guerilla War at Sea Denounced: Blame in Strife Put on Unions*, L.A. TIMES, Apr. 10, 1936, at 1.

¹⁰³ White, *supra* note 3, at 313.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

objections of the moribund and company-dominated union that nominally represented them.¹⁰⁶ By late 1936, their efforts had led to the formation of an independent CIO union, the National Maritime Union (NMU). On the strength of its militant tactics, by the late spring of 1937, the NMU had become the dominant sailor's union on the East Coast and Great Lakes.¹⁰⁷

Sit-down strikes tipped the balance in other industries as well, as they inspired workers to take bold action and employers to fear the ultimate consequences of continuing to so vigorously oppose organizing efforts.¹⁰⁸ A revealing example of this is the influence of sit-down strikes in the steel industry. In March 1937, the CIO's success against GM helped its Steel Workers Organizing Committee (SWOC) win recognition from another industrial colossus, U.S. Steel; although won without direct resort to the sit-down strike, the agreement drew substantial benefit from the tactic, as the union's victory over GM impressed U.S. Steel's leadership considerably with the risks of continued resistance.¹⁰⁹ U.S. Steel's decision is especially notable considering "Big Steel's" opposition to union representation had been no less complete than GM's.

SWOC followed this victory over Big Steel with one over another large steel producer: Jones & Laughlin. Jones & Laughlin's violent anti-unionism had led to numerous unfair labor practices charges before the NLRB, making the company the lead party in the landmark Supreme Court case decided that spring.¹¹⁰ In May 1937, SWOC staged a massive and tumultuous strike at Jones & Laughlin's mills in Pittsburgh and Aliquippa, Pennsylvania.¹¹¹ The Aliquippa strike was particularly audacious because the town was largely owned and controlled by the company.¹¹² For its record of labor repression, the town was dubbed "Little Siberia" in labor circles.¹¹³ Dramatically inverting the usual sit-down tactic, the strikers virtually encircled the Aliquippa mill in a massive cordon, sealed off its gates, attacked cross-

¹⁰⁶ *Id.* at 314.

¹⁰⁷ *Id.* at 315-16.

¹⁰⁸ FINE, *supra* note 1, at 329-32.

¹⁰⁹ BERNSTEIN, *supra* note 11, at 467-69; FINE, *supra* note 1, at 329-30; ZIEGER, *supra* note 1, at 58-59.

¹¹⁰ ZIEGER, *supra* note 1, at 60-61. On the general counsel's impressions of the company and its anti-unionism more generally, see JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD* 9 (1981).

¹¹¹ ZIEGER, *supra* note 1, at 60-61.

¹¹² BERNSTEIN, *supra* note 11, at 475.

¹¹³ *Id.* at 474-77.

sovers, fought police, and forced a costly two-day closure.¹¹⁴ During the strike, the company agreed to an election, which SWOC won. The company ultimately recognized the union and signed a contract that was even more favorable than the agreement SWOC entered into with U.S. Steel.¹¹⁵

The sit-down strikes had a different impact on SWOC's battle for recognition at other large independent steel producers, the so-called "Little Steel" companies, which had declined to follow U.S. Steel's shift in labor policy.¹¹⁶ This group included Republic Steel, Bethlehem Steel, Youngstown Sheet & Tube, American Rolling Mills, National Steel and Inland Steel.¹¹⁷ Under the leadership of Republic Steel, the companies savagely—and, for a time, successfully—resisted SWOC's effort to organize their workers long after the Supreme Court upheld the constitutionality of the Wagner Act in *Jones & Laughlin*.¹¹⁸ In the summer of 1937, police, scabs, company guards and National Guardsmen killed at least sixteen (possibly eighteen) strikers and supporters in worker protests in the southern Great Lakes region.¹¹⁹ A measure of these employers' hostility emerged when the Board attempted to enforce the law against Republic Steel. The Board's prosecution of unfair labor practice charges brought to light an extraordinary array of outrageous anti-union practices, including espionage, bribery and corruption of law enforcement, and having strikers beaten up and shot.¹²⁰ Congressional investigations revealed quite a few more examples of such conduct.¹²¹

Although these and other practices initially discouraged efforts to organize these companies' workers by direct action, Republic Steel and other Little Steel companies eventually accepted the authority of

¹¹⁴ *Id.* at 477–78; ZIEGER, *supra* note 1, at 60–61; *C.I.O. Spreads Steel Strike; Seeks to Stir 200,000 Men to Join Walkout*, CHI. DAILY TRIB., May 14, 1937, at 1; *C.I.O. Steel Strike Shuts Two Plants of Jones-Laughlin: 27,000 Men Idled*, N.Y. TIMES, May 13, 1937, at 1; Louis Stark, *Peace Plan Drawn in Big Steel Strike; More Plants Close*, N.Y. TIMES, May 14, 1937, at 1.

¹¹⁵ BERNSTEIN, *supra* note 11, at 477–78; ZIEGER, *supra* note 1, at 60–61.

¹¹⁶ See BERNSTEIN, *supra* note 11, at 474.

¹¹⁷ *Id.*

¹¹⁸ 301 U.S. 1, 30 (1937).

¹¹⁹ ZIEGER, *supra* note 1, at 62–63.

¹²⁰ *In re Republic Steel Corp.*, 9 N.L.R.B. 219, 374, 379, 384 (1938), *enforced as modified*, 107 F.2d 472 (3d Cir. 1939), *modified*, 311 U.S. 7 (1940).

¹²¹ The use by Little Steel companies of violence and other illegal conduct to repress labor rights also received considerable attention from the so-called LaFollette Committee. S. REP. NO. 77-151, at 116–218 (1941).

the Wagner Act.¹²² SWOC filed scores of unfair labor practice complaints against the companies for discrimination, intimidation and coercion, unlawful discharges, espionage, and similar charges, which, in the wake of *Jones & Laughlin*, the Board was able to prosecute and enforce despite inevitable company appeals.¹²³ The case against Republic Steel alone resulted in an order to reinstate some 7000 employees.¹²⁴ At the same time, however, the Little Steel strike would, like the sit-down strikes, play an important role in framing the counter-attack on labor rights that would culminate in the Taft-Hartley Act.

The Little Steel companies' trajectory from initial contempt for labor rights to eventual acquiescence was actually quite typical among American businesses right up to and beyond the time of the sit-down strikes.¹²⁵ As Karl Klare notes, employer hostility to the Wagner Act in the 1930s was characterized by the expenditure of "vast resources in systematic and typically unlawful antiunion campaigns involving such tactics as company unionism, propaganda, espionage, surveillance, weapons stockpiling, lockouts, pooling agreements for the supply of strikebreakers, and terrorism."¹²⁶ In the first few years after the statute was passed even Board personnel struggling to enforce the law against these firms labored under threats of physical assault and legal persecution at the hands of hostile local officials and company guards.¹²⁷

As has been shown, some employers' hostility was overcome by the sit-down strikes themselves. But even among those employers that were not brought around by direct action, opposition to the Wagner Act ultimately rested on the assumption that the law was—and would soon be found by the Supreme Court to be—unconstitutional.¹²⁸ When the statute unexpectedly cleared this hurdle, these employers often yielded to the law's mandates—at least once they were ordered to do so by the Board.¹²⁹ And if they did not do so immediately, they did so eventually, like the Little Steel compa-

¹²² BERNSTEIN, *supra* note 11, at 727–31.

¹²³ *See id.*

¹²⁴ *Id.* at 727.

¹²⁵ Klare, *supra* note 2, at 285–86.

¹²⁶ *Id.* at 286–87.

¹²⁷ GROSS, *supra* note 110, at 12–15; HARRY A. MILLIS & EMILY C. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY *passim* (1950).

¹²⁸ Klare, *supra* note 2, at 286 n.67.

¹²⁹ GROSS, *supra* note 110, at 16–39

nies, when their appeals were exhausted.¹³⁰ This, along with the requirement that such companies recognize labor rights as a condition of participating in an expanding war economy, allowed labor to rely on the NLRB's unfair labor practice prosecutions and Board-sponsored elections to achieve basic organizing and collective bargaining goals that only a few years earlier seemed utterly out of reach. And the agency's handling of both types of cases rose dramatically.¹³¹

The initial result from this process of forging labor rights in basic industries was a huge increase in the CIO's membership rolls as well as its political and economic clout.¹³² It quickly emerged as a powerful rival to the more conservative, craft-oriented, and less militant AFL.¹³³ Continued aggressive organizing under an increasingly effective regime of labor rights would eventually combine with the resounding economic recovery brought about by the Second World War to yield truly spectacular advances in both membership and the prevalence of collective bargaining.¹³⁴ These developments would in turn help drive unprecedented increases in wages and economic security for the industrial working class, laying the foundation of an unparalleled period of post-War middle-class prosperity.¹³⁵ To be sure, prosperity and security would come with a price—reflected in increasing disenchantment and de-politicization of the working class.¹³⁶ Moreover, the process by which these changes came about was a gradual one that had to overcome continuing hostility to the law and the NLRB's authority among employers.¹³⁷ Eventually, the AFL would recapture the initiative from the CIO and, as will be shown, the law would become an important obstacle for militant unionism.¹³⁸ But in the meantime, the gains won during this period would provide the demographic and institutional foundation of a

¹³⁰ *Id.* at 28–30, 38–39.

¹³¹ In 1935, the Board decided only four unfair labor practices cases and in 1936, only seventy-three; but in 1939, it decided 809. Similarly, after handling only three representation cases in 1935, the Board handled over 200 in 1939. GROSS, *supra* note 110, at 188.

¹³² FINE, *supra* note 1, at 330.

¹³³ See GROSS, *supra* note 110, at 42–43.

¹³⁴ See ZIEGER, *supra* note 1, at 212–41 (discussing robust union activity in the post-war period and its impact).

¹³⁵ See *id.* at 313–14.

¹³⁶ See *id.* at 343–51 (discussing problems the CIO confronted as a result of the growing post-war economy).

¹³⁷ GROSS, *supra* note 110, at 5–23.

¹³⁸ *Id.* at 64–68.

kind of golden age of industrial unionism that would define the political economy of twentieth-century America.

It is important not to attribute such gains simply to the validation of the Act and the emergence of the NLRB out of the shadow of unconstitutionality, for the Wagner Act and the NLRB did not merely replace sit-down strikes and other forms of direct action as the preferred mode of effective labor activism. Rather, these institutions inherited and transformed the rights that workers had earned for themselves through direct action. As the forgoing review of the strikes makes abundantly clear, a number of powerful, industry-leading manufacturing companies like GM and U.S. Steel abandoned their virulently anti-union programs and yielded to the mandates of the Act because of the sit-down strikes.¹³⁹ It does not suffice to suggest that these or any other anti-union employers would simply have changed their position once the Supreme Court upheld the Act; were it not for the sit-down strikes, it is doubtful that the Act would have been upheld as constitutional.

As James Pope demonstrates, labor regarded the Supreme Court's decision in *Schechter Poultry* to invalidate the NIRA (including section 7(a)) as a challenge to the very concept of progressive economic reform that left the constitutionality of its successor, the Wagner Act, very much in doubt.¹⁴⁰ In this light, as Pope puts it, the sit-down strike "became a form of constitutional politics," a means by which workers sought to realize the rights that employers—as well as the Supreme Court—denied them.¹⁴¹ Remarkably, those who led and participated in the strikes understood them as such.¹⁴² After the Court upheld the Wagner Act in *Jones & Laughlin Steel*¹⁴³ (and its several companion cases¹⁴⁴), workers reacted in the same fashion: construing the judicial victory as legal validation of a victory already won in factories and mills across the land.¹⁴⁵

By this account, the sit-down strikes forced the Court's hand. If the Court had invalidated the Wagner Act amidst all these militant

¹³⁹ As Fine, for one, points out, the UAW's gains at GM occurred before the court had decided *Jones & Laughlin* and its companion cases. FINE, *supra* note 1, at 327.

¹⁴⁰ Pope, *supra* note 2, at 54–55, 70.

¹⁴¹ *Id.* at 78.

¹⁴² *Id.* at 78–80.

¹⁴³ 301 U.S. 1, 30 (1937).

¹⁴⁴ *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 75 (1937); *Associated Press v. NLRB*, 301 U.S. 103, 133 (1937); *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 147 (1937).

¹⁴⁵ Pope, *supra* note 2, at 89–90.

assertions of basic labor rights against defiant employers, CIO unionists and other labor militants would likely have responded by sustaining—perhaps even amplifying—their campaign of sit-downs. Such a scenario would not only have exposed the Court's impotence but would have also implicated the Court in causing the rising tide of social unrest, especially when two additional factors are considered.¹⁴⁶ First, President Roosevelt, who was then threatening to “pack” the Court with New Deal supporters, had shown little inclination to end the strikes by force.¹⁴⁷ Second, local and state officials had also proven, by and large, either equally disinclined to intervene or simply unable to do so successfully.¹⁴⁸ In this context, upholding the Act emerged as a decidedly more attractive option.¹⁴⁹

For Klare, the very meaning of the Wagner Act remained in doubt for months after its passage. The business community not only attempted to defeat the Act, but there were competing visions among those who supported it regarding how exactly the Act would govern labor relations.¹⁵⁰ Many of the Wagner Act's New Deal supporters were deeply ambivalent about its overall program and may have sacrificed some or all of its legal protections of labor rights to some other interests.¹⁵¹ Until this contest was settled there was, as the history of the strikes shows, no real labor law. Klare also stresses that the process of forging the Act's meaning was accomplished not only by the courts, the Board, and other elite institutions, but by labor it-

¹⁴⁶ *Id.* at 90–91; Pope, *supra* note 3, at 95–97.

¹⁴⁷ Pope, *supra* note 3, at 91–93.

¹⁴⁸ *Id.* at 87–91.

¹⁴⁹ Part of Pope's argument is, of course, dedicated to refuting competing accounts of the Court's “switch in time.” To the claim that this change in constitutional law resulted from “incremental” advances in jurisprudence, Pope responds by exposing the contradictions that remained in the Court's reasoning, particularly as between the Court's apparently earnest emphasis on Congress's authority under the Commerce Clause in *Jones & Laughlin* and its apparent indifference to this issue in several other Wagner Act cases decided at the same time. Pope, *supra* note 2, at 93–96. Similarly, he stresses that, if the impetus for the change in law was primarily to avoid Roosevelt's court-packing scheme, this could have been accomplished, with more apparent consistency than the court actually displayed, by upholding the Act in the *Jones & Laughlin* case (or, better yet, two other Wagner Act cases presenting even clearer issues of interstate commerce), but overturning its application in the other cases, which involved smaller employers with far fewer apparent effects in interstate commerce. *Id.* at 95; see also JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 225–30* (1974) (discussing theories to explain the Supreme Court's new outlook on labor legislation).

¹⁵⁰ See GROSS, *supra* note 110, at 22–23 (discussing the process of establishing the meaning of the Act).

¹⁵¹ See, e.g., FINE, *supra* note 1, at 29–31, 50; GROSS, *supra* note 149, at 141–47.

self—and, in this respect, not only by the movement's top leaders, but by rank-and-file workers and shop-floor activists.¹⁵² The central means by which labor managed to participate in this process was the sit-down strike, which presented the prospect of disorder and embodied an alternative vision of labor rights, thereby influencing the Court's ultimate decision to uphold the Wagner Act.¹⁵³ Pope explores this last theme at great length in an article that confronts the claim earnestly advanced by many sit-down strikers that, as workers, they enjoyed a limited property right in a workplace that embraced their right to strike there.¹⁵⁴

For both Klare and Pope, a great deal was lost in the Court's translation of labor rights won on picket lines and shop floors into formal, legal rights.¹⁵⁵ Pope is particularly keen to emphasize the consequences of the Court's (and Congress's) reliance on the Commerce Clause to ground the constitutionality of the Wagner Act.¹⁵⁶ For this orientation, he presents an alternative justification that was advanced by organized labor based on the Thirteenth Amendment,¹⁵⁷ which would have incorporated the labor law into a vibrant culture of industrial democracy and freedom far better than the Court's approach did. The Commerce Clause approach anticipated a bureaucratized program of industrial relations oriented to labor peace, but was conspicuously antithetical to these very things. It may therefore be seen as a betrayal of the very tradition of solidarity, activism, and struggle that brought about a system of meaningful labor rights in the first place.¹⁵⁸ Klare likewise emphasizes that the Court's approach in *Jones & Laughlin* and its companion cases was not anti-labor in its conception so much as it was in its failure to conceptualize the Act as a decisive departure from conventional liberal jurisprudence.¹⁵⁹ For Klare, this paved the way for the development of a regime of labor rights that was fatally rooted in reactionary notions of contract, private property, and authority.¹⁶⁰

¹⁵² See Klare, *supra* note 2, at 266.

¹⁵³ Pope, *supra* note 3, at 83–84.

¹⁵⁴ *Id.* at 47–48.

¹⁵⁵ See Klare, *supra* note 2, at 268–70; Pope, *supra* note 3, at 107–11.

¹⁵⁶ Pope, *supra* note 2, at 6–8.

¹⁵⁷ *Id.* at 4–5.

¹⁵⁸ *Id. passim.*

¹⁵⁹ Klare, *supra* note 2, at 298–300, 311–12.

¹⁶⁰ *Id.* at 311–12.

III. AND A FOUNDATION OF REACTION: THE SIT-DOWN STRIKES AND THE ASSAULT ON THE RIGHT TO STRIKE, 1937-47

While the sit-down strikes proved to be essential to the development of a functional system of labor rights, they also inspired reactionary responses from courts and politicians. These responses would eventually coalesce in an equally dramatic counterattack against the sit-down strikes, which would lay the foundation for an ever broader challenge to labor rights and the right to strike in particular. This Part traces the first part of this development as it played out from 1937 through 1947—from the Supreme Court's decisive rulings against sit-down strikes in *Fansteel* and *Southern Steamship*, to the initial impact of these cases on the administration of the labor law, and finally to the important role the strikes played in framing the radically anti-labor agenda of the Taft-Hartley Act.

A. *The Supreme Court and the Sit-Down Strikes*

Until 1939, most sit-down strikes were resolved between workers and employers at the point of action. Many of the strikes ended in victory for the strikers, some were abandoned, and a few ended with the forcible eviction of the strikers by local police and company forces.¹⁶¹ Seldom were the courts or the Board much involved. On quite a few occasions, courts issued injunctions against sit-down strikers, but these were rarely effective.¹⁶² Similarly, although a number of strikers, including leaders at Flint, were charged with crimes, the authorities usually dropped the charges sometime after the strikes ended.¹⁶³ As Pope makes clear, all of this left the legal status of the strikes unclear for a time.¹⁶⁴

The Court's decision in *Jones & Laughlin* presented an opportunity to erase this ambiguity. If the statute was constitutional and the Board's authority legitimate, then workers could no longer justify the sit-downs as extreme responses to extreme circumstances. Perhaps more importantly, after *Jones & Laughlin*, the courts could act against the sit-down strikers without it appearing as a one-sided attack on labor. In fact, the sit-down strikes by their very nature posed a funda-

¹⁶¹ See Pope, *supra* note 3, at 84-91.

¹⁶² For example, the Chrysler sit-down strikers were ordered to evacuate by a circuit court judge, but the injunction could not possibly be enforced by the sheriff. CHARLES K. HYDE, *RIDING THE ROLLER COASTER: A HISTORY OF THE CHRYSLER CORPORATION* 116 (2003).

¹⁶³ FINE, *supra* note 1, at 318.

¹⁶⁴ See Pope, *supra* note 3, at 62.

mental question: how far did the Wagner Act impinge employers' traditional property rights and workplace prerogatives? Ironically, because *Jones & Laughlin* upheld the Act, it left the courts free to decide this question.

Notwithstanding *Jones & Laughlin's* overall effect in increasing compliance with the Wagner Act, quite a few employers continued to flout the Act and the Board.¹⁶⁵ This intransigence inspired workers to continue to resort to sit-down strikes to force employers to comply with the law; such were the circumstances of both *Fansteel* and *Southern Steamship*, with the notable difference that the *Fansteel* strike (though not the litigation) occurred before *Jones & Laughlin* and the *Southern Steamship* strike occurred afterwards.¹⁶⁶ In both cases it was *Jones & Laughlin's* validation of the Act that cleared the way for the Supreme Court to rule on the legality of the strikes. And in both cases, the Court declared the sit-down strikes fundamentally unlawful.¹⁶⁷ In so doing, the Court subordinated the Wagner Act to a degree of conservative ideology of property and authority that negated the progressive potential of both the Wagner Act and the New Deal. This is a critique that Klare and others have levied effectively against the sit-down strike cases.¹⁶⁸ Not so well established, however, is how the Court's decisions in *Fansteel* and *Southern Steamship* facilitated attacks on the right to strike that would extend to tactics that bore little resemblance to the original sit-down strikes.

1. *NLRB v. Fansteel Metallurgical Corp.* and Its Aftermath

The dispute that led to *Fansteel* began in the summer of 1936, when SWOC undertook to organize Fansteel Metallurgical Corporation, a relatively small manufacturer and distributor of rare metals and alloys located in North Chicago, Illinois.¹⁶⁹ In September of that year, Lodge 66 of the union that hosted SWOC's organizing efforts, the Amalgamated Association of Iron, Steel and Tin Workers of

¹⁶⁵ See GROSS, *supra* note 110, at 6–8 (discussing the employers' persistent refusal to follow the law after *Jones & Laughlin*).

¹⁶⁶ See *S. S. Co. v. NLRB (Southern Steamship)*, 316 U.S. 31, 33 (1942) (noting that the strike occurred in July 1938); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 247 (1939) (noting that the strike occurred in February 1937). The Supreme Court decided *NLRB v. Jones & Laughlin* on April 12, 1937. 301 U.S. 1, 1.

¹⁶⁷ *Southern Steamship*, 316 U.S. at 46; *Fansteel*, 306 U.S. at 256.

¹⁶⁸ See, e.g., Klare, *supra* note 2, at 321, 324–25.

¹⁶⁹ *In re Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 932 (1938), *enforcement denied*, *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375 (7th Cir. 1938), *aff'd as modified*, 306 U.S. 240 (1939); Intermediate Report of the Trial Examiner at 1863, 1867–68, 1871, *Fansteel*, 306 U.S. 240 (No. 436).

North America-CIO, approached Fansteel with a request for recognition and bargaining.¹⁷⁰ Fansteel rejected the union's request and over the next several months proceeded to violate the statute in a range of ways designed to destroy the union: Fansteel proposed and eventually formed a company union; it refused to bargain with any "outside" union representative; it reassigned Lodge 66's president to isolate him from rank-and-file workers; it hired a labor spy to infiltrate the union; and it repeatedly refused to recognize or bargain with the union.¹⁷¹ On February 17, 1937, the union, which by that time commanded a large majority of support, again requested that Fansteel submit to bargaining.¹⁷² Again, the company refused.¹⁷³ The plant superintendent, A.J. Anselm, justified the company's refusal by questioning the constitutionality of the Wagner Act and surmising that the Supreme Court would hold it unconstitutional.¹⁷⁴ Shortly thereafter, the union "held a meeting and decided to hold the plant as a protest against [Fansteel's] refusal to enter into collective bargaining."¹⁷⁵ That afternoon, ninety-five or so members of the union then at work seized two buildings at the plant that housed critical production facilities.¹⁷⁶

The seizure, which immediately shut down Fansteel's production, was accomplished peacefully.¹⁷⁷ All supervisors, female employees, and workers opposed to the strike were permitted to leave.¹⁷⁸ That evening, the plant superintendent, accompanied by two police officers and company counsel, approached the buildings and demanded that the strikers leave; when they refused, the lawyer informed them that they were fired.¹⁷⁹ The next day, Fansteel secured

¹⁷⁰ Intermediate Report of the Trial Examiner, *supra* note 169, at 1868-69.

¹⁷¹ *In re Fansteel*, 5 N.L.R.B. at 939-43; Intermediate Report of the Trial Examiner, *supra* note 169, at 1870-80.

¹⁷² As the Board determined, while the union probably could not demonstrate majority support when it first demanded recognition in September 1936, it could demonstrate majority support by a wide margin by February 1937. *In re Fansteel*, 5 N.L.R.B. at 940; Intermediate Report of the Trial Examiner, *supra* note 169, at 1878.

¹⁷³ Intermediate Report of the Trial Examiner, *supra* note 169, at 1878-79.

¹⁷⁴ *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375, 377 (7th Cir. 1938), *aff'd as modified*, 306 U.S. 240.

¹⁷⁵ Intermediate Report of the Trial Examiner, *supra* note 169, at 1880.

¹⁷⁶ *In re Fansteel*, 5 N.L.R.B. at 942 (asserting that there were ninety-five strikers in the building); Intermediate Report of the Trial Examiner, *supra* note 169, at 1886 (placing the number of strikers at ninety-four).

¹⁷⁷ Intermediate Report of the Trial Examiner, *supra* note 169, at 1880.

¹⁷⁸ *See id.*

¹⁷⁹ *In re Fansteel*, 5 N.L.R.B. at 942; Intermediate Report of the Trial Examiner, *supra* note 169, at 1880.

an injunction from the Circuit Court of Lake County, Illinois, and a writ of attachment (for arrest of the strikers), which were read to the strikers that same day.¹⁸⁰ The strikers still refused to evacuate the plant.¹⁸¹ The following morning, February 19, "a large force of deputy sheriffs [about 100] attacked the building in an effort to dislodge the workers. They used gas bombs, clubs and a battering ram but were repulsed by the employees," who threw missiles and acid down at the police.¹⁸²

Receiving supplies from co-workers, the strikers continued to occupy the buildings for another week.¹⁸³ In the meantime, Fansteel rejected efforts by the U.S. Department of Labor and the Governor of Illinois to mediate the standoff.¹⁸⁴ On February 26, the company instigated an effort by a larger force of deputies to recapture the building.¹⁸⁵ By attacking in the early hours with more powerful weapons, the deputies were eventually able to gain control of the buildings and arrest most of the strikers (a few apparently made off in the chaos), although only after a "pitched battle."¹⁸⁶

As the Board confirmed, the strikers abstained from any malicious destruction of Fansteel's property during the strike; in fact, like other sit-down strikers, they even attempted to protect sensitive machinery while they held the buildings.¹⁸⁷ Nevertheless, fighting during the two attempts by police to retake the buildings, as well as the failure of the heating systems (for which the company was likely responsible), caused a fair amount of damage to the buildings and their contents.¹⁸⁸ Some four months after the strike, thirty-seven of the men who had participated in the strike were tried and convicted of

¹⁸⁰ *In re Fansteel*, 5 N.L.R.B. at 942; Intermediate Report of the Trial Examiner, *supra* note 169, at 1880.

¹⁸¹ Intermediate Report of the Trial Examiner, *supra* note 169, at 1880.

¹⁸² *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375, 378 (7th Cir. 1938), *aff'd as modified*, 306 U.S. 240 (1939); Intermediate Report of the Trial Examiner, *supra* note 169, at 1880.

¹⁸³ *In re Fansteel*, 5 N.L.R.B. at 942-43; Intermediate Report of the Trial Examiner, *supra* note 169, at 1880.

¹⁸⁴ *In re Fansteel*, 5 N.L.R.B. at 943.

¹⁸⁵ Intermediate Report of the Trial Examiner, *supra* note 169, at 1880.

¹⁸⁶ *In re Fansteel*, 5 N.L.R.B. at 943; see also *Launch Attack on Sitters: Gas Squadron Raids Plant at North Chicago*, CHI. DAILY TRIB., Feb. 26, 1937, at 1.

¹⁸⁷ See *In re Fansteel*, 5 N.L.R.B. at 942 (stating that the strikers "kept the machines oiled as best they could").

¹⁸⁸ *Id.* at 942-43; Intermediate Report of the Trial Examiner, *supra* note 169, at 1880. Fansteel later claimed that damages exceeded \$60,000. *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375, 378-79 (7th Cir. 1938), *aff'd as modified*, 306 U.S. 240 (1939).

criminal contempt before the Lake County Circuit Court that had enjoined the strike; twenty-four strikers were fined \$100 and sentenced to ten days in jail, eleven were fined \$150 and sentenced to 120 days in jail, and two were fined \$300 and sentenced to 180 days in jail.¹⁸⁹ The court reserved the most severe punishment for two union organizers who were not employees of the company: Oakley Mills was fined \$500 and sentenced to 180 days in jail and Meyer Adelman, who had been organizing at Fansteel since the previous summer and coordinated the strike, was fined \$1000 and sentenced to 240 days in jail.¹⁹⁰ All of these men would serve out their sentences.¹⁹¹

It was actually Adelman who, on behalf of Lodge 66, filed unfair labor practice charges against Fansteel. The initial unfair labor practices charges against Fansteel, which related entirely to the company's refusal to recognize and bargain with the union, were filed in September 1936.¹⁹² On May 21, 1937, Adelman filed amended charges, which pressed a number of other issues.¹⁹³ Some of these issues concerned Fansteel's conduct before and during the sit-down strike, while others related to its post-strike treatment of the workers.¹⁹⁴ In the meantime, the union continued a conventional strike against Fansteel, punctuated by several other unsuccessful attempts to get the company to recognize and bargain with the union.¹⁹⁵ For its part, Fansteel resumed operations after the sit-down strike with crossovers and replacement workers. Moreover, in April 1937, it finally constituted a full-fledged company union, the Rare Metal Workers of America, Local 1.¹⁹⁶

On May 26, 1937, the regional director of the NLRB issued a formal complaint charging Fansteel with numerous violations of the Act, including unlawfully refusing to recognize and bargain with

¹⁸⁹ *Fansteel Metallurgical Corp. v. Lodge 66 of the Amalgamated Ass'n of Steel, Iron & Tin Workers*, 14 N.E.2d 991, 993 (Ill. App. Ct. 1938).

¹⁹⁰ *Fansteel*, 14 N.E.2d at 993. The NLRB's opinion in the case misstates the number of strikers jailed, describing "most" as being so punished. *In re Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 943 (1938), *enforcement denied*, *Fansteel*, 98 F.2d 375, *aff'd as modified*, 306 U.S. 240 (1939).

¹⁹¹ 3 *in Fansteel Sitdown Strike End Jail Terms*, CHI. DAILY TRIB., Sept. 5, 1939, at 13.

¹⁹² Charge Before the NLRB at 23, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (No. 436).

¹⁹³ Amended Charge Before the NLRB at 32, *Fansteel*, 306 U.S. 240 (No. 436).

¹⁹⁴ *Id.* at 32-33.

¹⁹⁵ See *In re Fansteel*, 5 N.L.R.B. at 943-44 (1938); Intermediate Report of the Trial Examiner, *supra* note 169, at 1882.

¹⁹⁶ See *In re Fansteel*, 5 N.L.R.B. at 946-47; Intermediate Report of the Trial Examiner, *supra* note 169, at 1882, 1897-900.

Lodge 66, committing espionage against the union, sequestering the union president and forbidding him to speak to other workers, attempting to dominate Lodge 66, forming a company union, discharging the sit-down strikers and several who aided them “for the reason of their membership in the union and that they engaged in concerted activity for the purpose of collective bargaining and for other mutual aid and protection,” and later rehiring some of the strikers and their supporters on a discriminatory basis premised on their willingness to renounce the union or their rights under the statute.¹⁹⁷ Fansteel denied all of these accusations, stressing that its discharges of the sit-down strikers were justified by the illegal and violent nature of the strike.¹⁹⁸

In September 1937, the trial examiner assigned to the case released his ruling in the form of an Intermediate Report. Based on testimony from 116 witnesses and numerous documents, the report came only after the trial examiner overcame several dilatory tactics by Fansteel, including an attempt to enjoin the proceedings on the ground that the matter was then pending before the Illinois Circuit Court in the form of the criminal contempt proceedings.¹⁹⁹ The report methodically confirmed every unfair labor practice lodged against Fansteel by the regional director.²⁰⁰ The report directed that Fansteel recognize and bargain with Lodge 66, cease and desist from its efforts to form a company union, and offer reinstatement and back-pay to all but a handful of employees whose discharge the trial examiner considered justified by reasons not related to the strike.²⁰¹ On the key question of how to deal with the sit-down strikers, the trial examiner rejected Fansteel’s reference to the strike as justification for discharging the strikers, noting, first, that the strike had been provoked by Fansteel and, second, that any claim that strike participation gave Fansteel cause to discharge the strikers was negated by the fact that the company either reinstated or offered reinstatement to scores of strike participants—in each case with the implicit condition that they abandon the strike and renounce the union.²⁰²

Both Fansteel and the union appealed the trial examiner’s ruling to the Board. While the union’s exceptions were minor, Fans-

¹⁹⁷ Complaint at 31, *Fansteel*, 306 U.S. 240 (No. 436).

¹⁹⁸ Answer at 73, *Fansteel*, 306 U.S. 240 (No. 436).

¹⁹⁹ Intermediate Report of the Trial Examiner, *supra* note 169, at 1865–66.

²⁰⁰ *See id.* at 1900–02 (summarizing the trial examiner’s conclusions).

²⁰¹ *Id.* at 1902–05.

²⁰² *Id.* at 1882–96.

teel's were "voluminous."²⁰³ With one important exception, the Board upheld all of the trial examiner's determinations. The Board rejected the trial examiner's conclusion that the discharges of the sit-down strikers and the company's refusal to offer them unconditional reinstatement were, in themselves, violations of the anti-discrimination provision of the Wagner Act.²⁰⁴ In the Board's view, the sit-down strikers were never actually discharged during or after the strike.²⁰⁵ Moreover, while most of the strikers remained off the job, this was not because they had been discharged or denied reinstatement; rather, it was because they were still out on strike.²⁰⁶ Although the Board considered it likely that Fansteel would have denied reinstatement to the strikers had they applied "in a body," this had not yet occurred and therefore could not be the basis of a claim of unlawful discrimination.²⁰⁷

The Board agreed with the trial examiner that the pattern of unfair labor practices warranted a remedy that would "restore as fully as possible the situation that existed prior to the respondent's unlawful conduct."²⁰⁸ This meant, among other things, the collective reinstatement of the strikers. That they had engaged in the sit-down strike was no defense for Fansteel, the Board held, for two reasons. First, the Board emphasized that Fansteel "does not come before the Board with clean hands" because its "gross violations of the law . . . were the moving cause" of the sit-down strike.²⁰⁹ Anticipating an argument it would make before the Supreme Court, the Board went even further, suggesting that the statutory duty imposed on employers to recognize and bargain with a union, which Fansteel systematically flouted, was conceived precisely to prevent the kind of intense labor conflict that came about in this case.²¹⁰

²⁰³ *In re Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 932 (1938), *enforcement denied*, *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375 (1938), *aff'd as modified*, 306 U.S. 240 (1939).

²⁰⁴ *Id.* at 944.

²⁰⁵ *Id.* at 945-46.

²⁰⁶ *Id.* at 944-45.

²⁰⁷ *Id.* at 945.

²⁰⁸ *Id.* at 949.

²⁰⁹ *In re Fansteel*, 5 N.L.R.B. at 949.

²¹⁰ *See id.* (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937)). The other major point on which the Board disagreed with the trial examiner was whether Fansteel was obliged to recognize and bargain with the union in September 1936; the Board found that the union did not present evidence of majority support at this juncture. *Id.* at 940.

Second, the Board confronted the company's claim that the criminal nature of the strike deprived it of the power to order the strikers' reinstatement, regardless of whether they had been discharged or not.²¹¹ On this point, the Board's unwillingness to find that the strikers had been discharged reveals its significance. If the strikers had never actually been discharged for their participation in the sit-down strike, they remained unequivocal employees under the Act and potential beneficiaries of the Board's remedial authority—without the Board having to show that the discharges themselves were unlawful or engage the unsettled issue of whether a discharge would terminate employee status under the Act.²¹² Moreover, this reading of events forced the company to argue that this strike barred reinstatement as a remedy for other violations of the Act, not simply that it was adequate grounds to discharge. The Board focused on the issue of Fansteel's unclean hands, holding that the company should not escape legal consequences when its own unlawful conduct was so egregious that it provoked an illegal response from its employees.²¹³ In such a circumstance, the Board reasoned, its prerogative to fashion remedies to advance the aims of the Act clearly trumped Fansteel's *post hoc* rationalizations.²¹⁴ The Board went a step further on this issue, stressing that it did not automatically discount strikers' criminal behavior in deciding whether to order their reinstatement and citing several cases involving serious felonies in which it had, in fact, rejected that remedy.²¹⁵ The Board's purpose in mentioning this consideration was to show that it weighed all the equities and found reinstatement, among other, less controversial remedies, essential to effectuating the Act.

Fansteel appealed the Board's decision to the U.S. Court of Appeals for the Seventh Circuit. Although the court deferred to the Board's conclusion about Fansteel's use of a labor spy and its support for a company union, it overturned the Board on every other issue.²¹⁶ At the center of the court's reasoning was its unqualified view that sit-down strikes were illegal, that Fansteel discharged the strikers and their supporters because of this, and that the discharges were there-

²¹¹ See *id.* at 949–50.

²¹² See *id.* at 950.

²¹³ *Id.* at 949.

²¹⁴ See *id.* at 949–50.

²¹⁵ *In re Fansteel*, 5 N.L.R.B. at 949–50.

²¹⁶ *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375, 380–81 (7th Cir. 1938), *aff'd as modified*, 306 U.S. 240 (1939).

fore justified.²¹⁷ Accordingly, Fansteel could have no duty to bargain with the strikers on that day or any subsequent day, as the discharges left the union without majority support in Fansteel's workforce.²¹⁸ Moreover, the court held, the discharged workers thereby lost their status as employees under the Act and were no longer entitled to the rights it conveyed.²¹⁹

Though largely built around arguments for deference to the Board,²²⁰ the dissenting judge's opinion effectively laid bare the real policy questions before the court. First, referring to the majority's claim that a decision to uphold the Board would constitute "an approval of the unlawful acts of the employees,"²²¹ Judge Treanor retorted that "it is as meaningless as would be the contention that a reversal of the order of the Board constitutes an approval of the [employer's] unlawful defiance of the National Labor Relations Act [NLRA]."²²² Treanor also noted that while the sit-down strikers may have been in the wrong, "it is obvious that they did not make a greater mistake as to the law than did the petitioner and its advisors who believed that the petitioner could rightfully refuse to bargain collectively with the agent of the employees on the ground that the National Labor Relations Act was unconstitutional."²²³

The Supreme Court did not hear arguments in *Fansteel* until January 1939 and did not decide the case until February 27 of that year—two years and one day after the police recaptured the plant.²²⁴ As is normal in the progression of a case from an administrative agency to the Supreme Court, the Court's decision distilled both factual and legal questions to a minimal set of issues. In this instance though, the process served to prejudge the dispute. In the view of Chief Justice Charles Evans Hughes, who wrote the majority opinion, the case presented only one important question: whether the Board

²¹⁷ *Id.* at 380–82.

²¹⁸ *Id.* at 382.

²¹⁹ *Id.*

²²⁰ The dissenting judge contended simply that the Board's conclusions regarding the employer's violations of the Act were clearly supported by evidence and warranted deference by the court; that the Board was right to consider the strikers to remain employees under the Act, and thus lawful beneficiaries of its remedial authority; and, finally, that the remedies chosen by the Board were also appropriate means of effectuating the statute's policy aims. *Id.* at 383–89 (Treanor, J., dissenting).

²²¹ *Id.* at 388.

²²² *Fansteel*, 98 F.2d at 389 (Treanor, J., dissenting).

²²³ *Id.*

²²⁴ *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 240 (1939).

had the authority to order the reinstatement of the sit-down strikers.²²⁵ For Chief Justice Hughes, the issue was simply a matter of whether the Board would be allowed to endorse employees' criminal behavior at the expense of employers' property rights and business prerogatives.

Even more explicitly and tersely than the Court of Appeals, Chief Justice Hughes deferred to the Board's findings regarding unfair labor practices that occurred prior to the commencement of the sit-down strike.²²⁶ Turning to the central issue, Chief Justice Hughes then quickly showed his hand. Noting that the Board had changed its position on whether the employer's statements to the strikers constituted a genuine mass discharge, but without engaging the reasons for the shift, Chief Justice Hughes declared the "discharge was clearly proven."²²⁷ Moreover, he deemed the discharges thoroughly justified by the sit-down strike: "[I]t was a high-handed proceeding without shadow of legal right" that gave "good cause" for the strikers' discharge unless this was otherwise prevented by the Wagner Act.²²⁸

On this question, Chief Justice Hughes was equally strident. While he conceded that Fansteel had violated the labor law, he held "there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property."²²⁹ In Chief Justice Hughes' view, this fact gave Fansteel "its normal rights of redress," which includes "the right to discharge wrongdoers from its employ."²³⁰ To the Board's claim—supported by the broad wording of the relevant provisions—that the strikers nonetheless remained employees under the Wagner Act and were thereby entitled to benefit from the Board's remedial powers, Chief Justice Hughes said simply that "[w]e are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct."²³¹ Chief Justice Hughes provided a similar response to the Board's alternative claim that the provision

²²⁵ *Id.* at 247.

²²⁶ *See id.* at 251–52.

²²⁷ *Id.* at 252.

²²⁸ *Id.*

²²⁹ *Id.* at 253.

²³⁰ *Fansteel*, 306 U.S. at 254. Hughes did not address directly Judge Treanor's dissent, which suggested that perhaps the strikers' "outlaw" status should not automatically disqualify them from the protections of the law. *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375, 384 (7th Cir. 1938) (Treanor, J., dissenting), *aff'd as modified*, 306 U.S. 240 (1939).

²³¹ *Id.* at 255.

of the statute granting its remedial authority—section 10(c), which broadly accorded the Board the power to adopt remedies that effectuate the aims of the Act—allowed it to order the strikers’ reinstatement even if they were no longer statutory employees.²³² Purporting to affirm the Wagner Act’s fundamental purpose in advancing basic labor rights of self-organization and collective bargaining, Chief Justice Hughes resorted to formalism: “There is not a line in the statute to warrant the conclusion that it is in any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land.”²³³

This brusque, even imperious, rejection of the Board’s case was reflected even more clearly in the way the Court assessed the employer’s rehiring campaign after the sit-down strike. As the Board saw it, Fansteel’s practice of conditionally rehiring some of the strikers not only demonstrated the falsity of the employer’s assertion that it discharged the sit-down strikers (if this occurred at all) because of their misconduct during that episode, it also constituted another violation of the statute: an attempt by the employer to condition reemployment on renunciation of union support and the right to strike.²³⁴ Chief Justice Hughes dismissed this argument by simply taking for granted Fansteel’s claim—which had been explicitly refuted by the regional director, the trial examiner, and the Board—that it only offered reinstatement to employees whom the union had forced to participate in the strike.²³⁵ Beyond this, Chief Justice Hughes merely appealed to an employer’s supposedly inherent right to decide whom it employs.²³⁶

Chief Justice Hughes concluded his opinion by invoking similar reasoning to deny the Board the power to reinstate those employees who supported the sit-down strikers.²³⁷ The Court then rejected the Board’s attempt to order Fansteel to recognize and bargain with Local 66, holding that the valid discharge of the sit-down strikers had sufficiently changed the union’s circumstances to absolve Fansteel of any such obligation,²³⁸ and noting that the Board could order an elec-

²³² See *id.* at 257.

²³³ *Id.* at 257–58.

²³⁴ See *In re Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 944–46 (1938), *enforcement denied*, *Fansteel Metallurgical Corp. v NLRB*, 98 F.2d 375 (1938), *aff’d as modified*, 306 U.S. 240 (1939).

²³⁵ *Fansteel*, 306 U.S. at 259.

²³⁶ See *id.*

²³⁷ *Id.* at 259–61.

²³⁸ *Id.* at 261–62.

tion instead.²³⁹ Finally, in a meaningless concession to the Board and the union, Chief Justice Hughes upheld the Board's determination that the Rare Metal Workers Union was an unlawful company union.²⁴⁰

Chief Justice Hughes' opinion was not joined by all of his colleagues on the Court.²⁴¹ Justice Reed, joined by Justice Black, dissented on the question of reinstatement, taking the majority to task for inflexibly construing the "lawlessness" of the sit-down strikers as necessarily determinative of the limits of the Board's authority.²⁴² In Justice Reed's view, the Wagner Act very clearly charged the Board with effectuating its goal of industrial peace obtained via a functional system of labor rights.²⁴³ In this respect, the Board acted reasonably and appropriately in dealing with a dispute in which both sides "had erred grievously in their respective conduct."²⁴⁴ Under such circumstances, Justice Reed concluded, it was simply not appropriate for the Court to second-guess the Board's solution.²⁴⁵

Chief Justice Hughes's opinion in *Fansteel* is a resounding reaffirmation of the Court's adherence to traditional notions of private property, social order, and workplace authority after the tumult and uncertainty of the previous years. In *Fansteel*, Chief Justice Hughes, who in the preceding years had authored the lead opinions in both *Schechter Poultry* and *Jones & Laughlin*, made clear that the New Deal did not fundamentally alter the relationship between labor rights and property rights. Rather, as Pope describes it, *Fansteel* verified that "the employer could violate the workers' statutory rights without sacrificing its property rights, while the workers could not violate the employer's property rights without sacrificing their statutory rights—a return to the hierarchy of values that predated the Wagner Act."²⁴⁶ To this it might be added that the decision also subordinated the Act (and the Board as well) to a comprehensive ideology of order and authority that recognized the right of employers, but not workers, to

²³⁹ *Id.* at 262.

²⁴⁰ *Id.* at 262–63.

²⁴¹ Justice Harlan Fiske Stone concurred with Hughes in all but the Chief Justice's narrow reading of the term "employee" and his reliance on this reading to limit the Board's remedial authority. *Fansteel*, 306 U.S. at 263–65 (Stone, J., concurring in part).

²⁴² *Id.* at 265–68 (Reed, J., dissenting in part).

²⁴³ *Id.* at 266–67.

²⁴⁴ *Id.* at 267.

²⁴⁵ *See id.* at 265–68.

²⁴⁶ Pope, *supra* note 3, at 106.

resort to illegal acts of self help. Similarly, for Klare, *Fansteel* embodied the restoration of legal formalism in labor law jurisprudence, a perspective that would secure the elevation of often reactionary legal doctrines, such as Chief Justice Hughes's appeal to property rights, over a view of labor rights focused on the textured realities of labor relations.²⁴⁷ By all of these means, *Fansteel* helped frame a jurisprudence that broadly repudiated the Wagner Act's more reformist tendencies and, still more broadly, made clear the limits of the New Deal as a whole.²⁴⁸

In reaction to *Fansteel*, employers fired hundreds of workers.²⁴⁹ They also began to defend themselves against Board reinstatement orders by arguing that the workers in question had engaged in sit-down strikes.²⁵⁰ In more than a few cases, the Board found itself compelled by the black letter of *Fansteel* to deny reinstatement.²⁵¹ Nevertheless, under the leadership of Chairman J. Warren Madden, the Board continued to search for ways to reconcile *Fansteel* with the implementation of a meaningful system of labor rights in a climate of vigorous employer opposition.²⁵² Accordingly, in quite a number of cases, the Board rejected the employer's claim that a sit-down strike had occurred, finding the claim either pretextual or a circumstance

²⁴⁷ See Klare, *supra* note 2, at 323–34.

²⁴⁸ See *id.* at 325; Pope, *supra* note 3, at 106.

²⁴⁹ Most notably, two New Jersey companies, Archer Daniels Midland and Mergott, retroactively fired several hundred employees for their participation in sit-downs. 50 *More Lose Jobs on Sit-Down Rule*, N.Y. TIMES, Mar. 3, 1939, at 18.

²⁵⁰ See, e.g., *In re Ford Motor Co.*, 31 N.L.R.B. 994, 999 (1941); *In re United Dredging Co.*, 30 N.L.R.B. 739, 766–67, 787 (1941); *In re Ford Motor Co.*, 29 N.L.R.B. 873, 914 (1941); *In re Cudahy Packing Co.*, 29 N.L.R.B. 837, 867 (1941); *In re Metal Hose & Tubing Co.*, 23 N.L.R.B. 1121, 1138 (1940); *In re Condenser Corp. of Am.*, 22 N.L.R.B. 347, 431 (1940).

²⁵¹ See, e.g., *In re Ore S.S. Corp.*, 29 N.L.R.B. 954, 978 (1941); *In re Aladdin Indus., Inc.*, 22 N.L.R.B. 1195, 1220 (1940), *enforced as modified*, 125 F.2d 377 (7th Cir. 1942); *In re Berkerman Shoe Corp. of Kutzman*, 21 N.L.R.B. 1222, 1237 (1940); *In re Reading Batteries, Inc.*, 19 N.L.R.B. 249, 259 (1940).

²⁵² Madden, a conscientious moderate committed to the vigorous and earnest enforcement of the statute, was apparently shocked by the outrageous conduct so frequently brought to light by Board investigations. GROSS, *supra* note 110, at 12. The two other members of the post-*Jones & Laughlin* Board, Edwin Smith and Donald Wakefield Smith, both leaned to the left and favored the aggressive enforcement of the statute. *Id. passim*. Another important figure in shaping Board policy during this period was Nathan Witt, a leftist who served as the Board's secretary from 1937 to 1940. *Id.* at 13, 110–13, 135–36. The staff and membership of the Board in the late 1930s and early 1940s comprised a politically diverse array of people (including, for the time, an inordinate number of women professionals); in general, though, even the relative conservatives were people who believed in the Wagner Act and were committed to enforcing it vigorously and fairly. *Id. passim*.

outside the definition of *Fansteel*.²⁵³ In other cases, the Board continued to order reinstatement when the strikers left peacefully when instructed by the police or when the employer rehired some of the strikers in a discriminatory fashion.²⁵⁴ Nevertheless, this fundamentally realistic approach to the issue did not always receive the approval of courts, which occasionally declined to enforce reinstatement orders in such cases.²⁵⁵

Militant unionists achieved an important victory before the courts that ran counter to the spirit of *Fansteel* in late 1939 when the U.S. Court of Appeals for the Third Circuit upheld a Board decision ordering Republic Steel to reinstate strikers implicated in serious violence.²⁵⁶ In *Republic Steel*, a case arising out of the 1937 Little Steel strike, the Board refused to account for allegations of criminality or violence not backed by guilty pleas or convictions.²⁵⁷ Stressing the company's provocation of the strike and the fact that it was manifestly "guilty of brutal acts of violence" far more serious than those of the strikers, the Board ordered the reinstatement of strikers who had been convicted of crimes of violence, excepting only those convicted of serious felonies.²⁵⁸ Although it followed other courts and rejected the Board's attempts to reinstate some strikers who were guilty of serious misdemeanors, the Third Circuit's decision upheld the Board's reinstatement of the other strikers.²⁵⁹

While *Republic Steel* did not involve a sit-down strike, the court's decision to uphold the Board seemed to speak directly to the propriety of the contextual approach to sit-down strikes and related forms of protest that the Board was then trying to articulate in the

²⁵³ See, e.g., *In re Ford Motor Co.*, 31 N.L.R.B. at 1026-27, 1086-87, 1107; *In re United Dredging Co.*, 30 N.L.R.B. at 787-90; *In re Ford Motor Co.*, 29 N.L.R.B. at 914; *In re Cudahy Packing Co.*, 29 N.L.R.B. at 868; *In re Condenser Corp. of Am.*, 22 N.L.R.B. at 431; *In re Metal Hose & Tubing Co.*, 23 N.L.R.B. at 1138. On this critical tendency by the Board, see also *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318, 340-42 (1940) (upholding Board order of reinstatement against attempt by employer and court of appeals to invoke *Fansteel* where this issue not raised before the Board itself).

²⁵⁴ See, e.g., *In re Stewart Die Casting Corp.*, 14 N.L.R.B. 872, 879, 895-97 (1939), enforced as modified, 114 F.2d 849 (7th Cir. 1940); *In re Universal Film Exch., Inc.*, 13 N.L.R.B. 484, 489 (1939).

²⁵⁵ See, e.g., *McNeely & Price Co. v. NLRB*, 106 F.2d 878, 881 (3d Cir. 1939), modified *In re McNeely & Price Co.*, 6 N.L.R.B. 800 (1938).

²⁵⁶ *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 479-80 (3d Cir. 1939), modified, 311 U.S. 7 (1940).

²⁵⁷ *In re Republic Steel Corp.*, 9 N.L.R.B. 219, 390-91 (1938), enforced as modified, 107 F.2d 472 (3d Cir. 1939), modified, 311 U.S. 7 (1940).

²⁵⁸ *Id.* at 391.

²⁵⁹ *Republic Steel*, 107 F.2d at 477-78.

wake of *Fansteel*. Ironically, the nature of this relationship between *Republic Steel* and the Board's sit-down strike jurisprudence would be confirmed in due course, as a broader and more reactionary reading of *Fansteel* came to govern cases like *Republic Steel*.²⁶⁰ As will be seen, *Fansteel*'s restrictive reading of labor rights would eventually swallow *Republic Steel*.

Although *Fansteel* contributed to a reduction in the frequency of sit-down strikes—which by 1939 was already down compared with the preceding two years—the decision did not stop such strikes entirely.²⁶¹ Quickie sit-downs, usually arising as unplanned, wildcat strikes, continued to occur for years after *Fansteel*.²⁶² On quite a few occasions, such strikes resembled the signature sit-downs of a few years earlier in scale, if not duration. In early 1941, for example, CIO members joined independent unionists and used a sit-down strike to briefly close an International Harvester plant in East Moline, Illinois.²⁶³ Around the same time, SWOC unionists engaged in sit-downs at Bethlehem Steel in Lackawanna, New York,²⁶⁴ and U.S. Steel in Pittsburgh.²⁶⁵ In April of that year, a twelve hour sit-down strike at Ford's enormous River Rouge complex featured in a lengthy and determined campaign by UAW activists to counter the veritable reign of terror that the company had continued to use to suppress organizing efforts.²⁶⁶

These strikes inevitably reflected two often closely related dynamics: first, the conflicts that arose in newly (and often tenuously) recognized unions trying to establish their legitimacy and functionality; and second, the persistence of a more categorical opposition to labor rights across the economic landscape. While *Jones & Laughlin* portended a significant change in industrial relations and invigorated the Board's enforcement efforts, the decision did not convince all

²⁶⁰ Militant labor scored another victory when the Supreme Court, in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512–13 (1940), ruled that a sit-down strike did not constitute a violation of the Sherman Anti-Trust Act.

²⁶¹ Pope, *supra* note 3, at 107–11.

²⁶² *Id.*; James R. Zetka, Jr., *Work Organization and Wildcat Strikes in the U.S. Automobile Industry, 1946–1963*, 57 AM. SOC. REV. 214, 215 (1992).

²⁶³ *C.I.O. Union Joins Harvester Strike; Tie-Up May Spread*, N.Y. TIMES, Jan. 18, 1941, at 1; *Plant Closed in Harvester Labor Dispute*, CHI. DAILY TRIB., Jan. 17, 1941, at 29.

²⁶⁴ *Bethlehem Union Stirs Plant Clash*, N.Y. TIMES, Jan. 25, 1941, at 7; *300 on Sit Down Strike in C.I.O. Steel Dispute*, CHI. DAILY TRIB., Jan. 25, 1941, at 7; *100 Working on Defense Job Call Sitdown Strike*, CHI. DAILY TRIB., Feb. 8, 1941, at 3.

²⁶⁵ *Workers Return after Sit-Down Strike at Carnegie-Illinois Plant*, WALL ST. J., Sept. 17, 1941, at 2.

²⁶⁶ *Ford Defies CIO Strikers*, CHI. DAILY TRIB., Apr. 2, 1941, at 1.

employers to drop their resistance to the legal protection of basic labor rights. Newly unionized firms continued to test the power of unions to translate representation into meaningful gains in compensation and control over the workplace.²⁶⁷ Other companies, including many that had not yet accepted union representation at all, remained committed to testing the Board's ability to enforce the law's basic tenets, holding out hope that the statute would be amended or that the Board would, under the pressure of both employer intransigence and conservative political activism, retreat from the earnest view of labor rights that defined its first few years of existence.²⁶⁸

Fansteel actually fueled both modes of employer resistance. It undermined labor's ability to resort to the kinds of weapons—the sit-down strikes and related tactics—that had proved so integral to the realization of meaningful labor rights, and it signaled to the Board's opponents the Board's relatively tolerant approach to such tactics.²⁶⁹ Ironically, though, employer intransigence inspired continued resort to the sit-down strike, albeit in a somewhat less frequent and less spectacular fashion than before.²⁷⁰

2. *Southern Steamship Co. v. NLRB*

Southern Steamship emerged out of such continuing conflict. As mentioned, the maritime transport industry was an important arena of militant labor activism in the late 1930s.²⁷¹ As in automobiles, steel, and other basic industries, the targets of this militancy were employers intent on resisting workers' claims for basic labor rights notwithstanding the Wagner Act.²⁷² Like *Fansteel*, the Southern Steamship Company occupied a small niche in an industry dominated by large concerns; in the last years of the 1930s, the company operated seven cargo vessels, all on a regular route between Houston and a home base in Philadelphia.²⁷³ Until the end of 1937, Southern Steamship's "unlicensed seamen" were represented by the corrupt and ineffectual International Seaman's Union (ISU), which by 1937 was withering in

²⁶⁷ See GROSS, *supra* note 110, at 13–16.

²⁶⁸ See *id.* (discussing some specific examples of this).

²⁶⁹ See *id.* at 83–84.

²⁷⁰ See, e.g., *Threatens Labor Board; Thomas, Auto Union Head, Says Sitdowns May Be Used*, N.Y. TIMES, Sept. 29, 1941, at 19 (reporting "threat" by president of UAW to revert to sit-down strikes to counter Board's increasingly conservative approach).

²⁷¹ See *supra* text accompanying notes 101–107.

²⁷² See *supra* text accompanying notes 108–115.

²⁷³ *In re S. S. Co. (Southern Steamship)*, 23 N.L.R.B. 26, 27 (1940), *enforced*, 120 F.2d 505 (3d Cir. 1941), *rev'd*, 316 U.S. 31 (1942).

the face of an increasingly effective NMU campaign to bring these workers within the CIO fold.²⁷⁴ In October of that year, the ISU desperately tried to preempt the NMU's advances by petitioning the Board to hold elections at Southern Steamship and more than fifty other shipping lines.²⁷⁵ The NMU decisively won almost all of these elections, including the one at Southern Steamship, and in January 1938, it was certified as the bargaining representative for Southern Steamship's unlicensed personnel.²⁷⁶

Following the pattern in basic industries, though, for the better part of a year after Board certification, Southern Steamship refused in any way to recognize the NMU.²⁷⁷ The company filed specious objections with the Board contesting the results of the election, but its main strategy was simply to ignore or refuse every request by the union to initiate bargaining.²⁷⁸ Finally, on July 17, 1938, NMU members of the freighter, *City of Fort Worth*, met in a Houston union hall with union officials and agreed to strike that vessel to protest the company's intransigence.²⁷⁹ The next morning, as the ship was at dock being readied to sail, thirteen seamen gathered on deck and refused to perform any further duties until the company agreed to bargain with the union.²⁸⁰ When the captain read them their shipping articles (traditional individual contracts for shipboard service), proclaimed the strike illegal under the terms of these documents, and ordered them back to work, the strikers responded by pointing out that the law was on their side.²⁸¹ In so doing, the sailors were actually repeat-

²⁷⁴ White, *supra* note 3, at 315-17.

²⁷⁵ *Id.* at 318-19.

²⁷⁶ *Southern Steamship*, 23 N.L.R.B. at 27; White, *supra* note 3, at 315, 318-19.

²⁷⁷ *Southern Steamship*, 23 N.L.R.B. at 30-32.

²⁷⁸ *Id.*; Intermediate Report of the Trial Examiner at 703, 705-07, *S. S.S. Co. v. NLRB (Southern Steamship)*, 316 U.S. 31 (1942) (No. 320). Southern Steamship also refused to give NMU representatives boarding passes, without which they could not board the company's vessels on which their members resided. This would be one of several other grounds for finding the company in violation of the statute. *Southern Steamship*, 23 N.L.R.B. at 31.

²⁷⁹ *Southern Steamship*, 23 N.L.R.B. at 32-33; Intermediate Report of Trial Examiner, *supra* note 278, at 707-09.

²⁸⁰ The thirteen represented the majority of the nineteen unlicensed seamen on board. They had originally intended to shut off some of the ship's systems when they struck, but evidently dropped this plan. The only affirmative act of protest engaged in by the strikers occurred at the outset of the strike, when several of them refused to send steam to the deck machinery used to load cargo. Intermediate Report of the Trial Examiner, *supra* note 278, at 708-10.

²⁸¹ *Southern Steamship*, 23 N.L.R.B. at 33.

ing a contention that sit-down strikers had publically made in other cases, including the big Chrysler strike several years earlier.²⁸²

The standoff continued peacefully throughout the rest of the day.²⁸³ By that evening, lawyers for the company and the union reached a settlement according to which the strikers agreed to resume their duties and the company agreed to commence collective bargaining and refrain from disciplining the strikers.²⁸⁴ The *City of Fort Worth* sailed for Philadelphia that night at its usual sailing time and there were no further disruptions during the voyage.²⁸⁵ In fact, the trial examiner described the strikers' conduct during this passage as "exemplary."²⁸⁶ But when the ship made port several days later, the captain fired five of the strikers.²⁸⁷ In response, all but one of the other participants in the original strikes struck the ship in protest—this time in conventional fashion—and were themselves discharged.²⁸⁸

The day after the discharges, the NMU filed unfair labor practice charges against Southern Steamship, alleging that the company violated the Wagner Act by refusing to recognize and bargain with the union, interfering with the seamen's rights of self-organization and collective bargaining, and discharging and refusing to reinstate the strikers.²⁸⁹ The regional director then filed formal complaints advancing all these charges as violations of NLRA sections 8(1), (3), and (5).²⁹⁰ Early in 1939, a trial examiner ruled against Southern Steamship on every count and ordered, among other things, the reinstatement of the discharged strikers.²⁹¹ On the central issue of the legality of the strike, the trial examiner had to confront the claim that it was a sit-down strike and therefore unprotected under *Fansteel*. In rejecting this argument, the trial examiner emphasized that the strikers had not taken possession of the vessel or interfered with its operation: "[t]hey merely refused to work, and if they did anything with the ves-

²⁸² Russell B. Porteb, *Court Orders C.I.O. Strikers to Leave Chrysler Plants; Murphy Plans Enforcement*, N.Y. TIMES, Mar. 16 1937, at 1; *Union's Letter to Murphy*, N.Y. TIMES, Mar. 21, 1937, at 30.

²⁸³ See *Southern Steamship*, 23 N.L.R.B. at 32-34.

²⁸⁴ *Id.* at 34.

²⁸⁵ *Id.* at 34-35; Intermediate Report of Trial Examiner, *supra* note 278, at 710-11.

²⁸⁶ Intermediate Report of Trial Examiner, *supra* note 278, at 710-11.

²⁸⁷ *Southern Steamship*, 23 N.L.R.B. at 35-36; Intermediate Report of Trial Examiner, *supra* note 278, at 711.

²⁸⁸ *Southern Steamship*, 23 N.L.R.B. at 35.

²⁸⁹ Intermediate Report of the Trial Examiner, *supra* note 278, at 705, 707.

²⁹⁰ *Id.* at 703.

²⁹¹ *Id.* at 721-23.

sel it was in the interest of assuring its safety.”²⁹² Moreover, the trial examiner refuted the company’s claim that the strike was prohibited by maritime law, emphasizing that the Wagner Act “does not exempt maritime employment” and that mutiny law therefore “must be read together with the provisions of the Act, which preserves the right to strike.”²⁹³ The trial examiner concluded, “This must be especially so when, as in this case, the strikes had been indubitably precipitated by unfair labor practices.”²⁹⁴

Southern Steamship’s claim that the strike constituted a sit-down strike was also central to the Board’s review of the case.²⁹⁵ Despite the apparent cogency of the trial examiner’s analysis, the claim could not be dismissed out of hand. The strike did occur on the property of the employer and was at least in violation of the strikers’ shipping articles, if not an act of criminal mutiny. For the Board, the differences between this case and *Fansteel* were decisive, and the Board unanimously upheld the central findings of the trial examiner.²⁹⁶ The Board’s April 1940 decision noted not only that the alleged sit-down strike was clearly caused by Southern Steamship’s unlawful conduct, but also that the strike was peaceful, that it was never in defiance of an order to leave the ship, and that it never put the ship or its crew in any danger because it took place dockside.²⁹⁷ Once again adhering to the analysis of the trial examiner, the Board also pointed out that the strike could not be a sit-down strike in the sense of involving a trespass to the company’s property because the ship was the strikers’ home.²⁹⁸ Although the strike contravened the shipping articles, the Board found that these were, in effect, individual employment contracts that could not lawfully constrain the right to strike consistent with the Wagner and Norris-LaGuardia acts.²⁹⁹

In one notable respect, the Board’s decision in this case went beyond its decision in *Fansteel*. Here, the Board found that the company discharged some of the strikers solely because of their participation in the shipboard strike.³⁰⁰ The Board actually took a more blunt

²⁹² *Id.* at 714.

²⁹³ *Id.* at 714–15.

²⁹⁴ *Id.* at 715.

²⁹⁵ *In re S. S. Co. (Southern Steamship)*, 23 N.L.R.B. 26, 28, 36–38 (1940), *enforced*, 120 F.2d 505 (3d Cir. 1941), *rev’d*, 316 U.S. 31 (1942).

²⁹⁶ *See id.* at 28–29.

²⁹⁷ *Id.* at 37–38.

²⁹⁸ *Id.* at 38.

²⁹⁹ *Id.* at 38–39.

³⁰⁰ *Id.* at 38.

view than the trial examiner, who had taken pains to show that the company's discharges were illegal because they evidenced discrimination among the strikers.³⁰¹ Because the Board viewed the strike as lawful, and because there were no other valid grounds for discharge, the discharges of the strikers were in themselves violations of law.³⁰² The Board upheld virtually all of the remedies ordered by the trial examiner, including the order that the company reinstate the discharged seamen.³⁰³

Southern Steamship appealed the Board's decision to the Third Circuit. In 1941, an *en banc* panel of that court found, in a four-to-one vote, in favor of the Board on all key issues.³⁰⁴ At the center of the opinion was again the basic question of the strike's legality. While admitting that the issue was clouded by both *Fansteel* and the traditional application of mutiny law to prohibit shipboard strikes, the court nevertheless refused to declare the strike illegal on either ground.³⁰⁵ *Fansteel*, it noted, involved an outright seizure of the workplace, violent defiance of the authorities' attempts to oust the employees, and criminal contempt of a court order to evacuate the property—all elements absent from this case.³⁰⁶ Moreover, while mutiny law clearly prohibited shipboard strikes on a vessel at sea if such strikes were violent or involved an attempt to take possession of the ship or interfere with its operation, the law did not seem to apply to the case at hand because the circumstances were different in all these respects.³⁰⁷ In light of this ambiguity, the court reasoned, the labor law's protection of basic labor rights—which made no exceptions for shipboard labor—should prevail.³⁰⁸

The Supreme Court did not hear arguments in *Southern Steamship* until February 1942,³⁰⁹ roughly two months after America's entry to the Second World War.³¹⁰ At the center of *Southern Steamship's*

³⁰¹ Compare *Southern Steamship*, 23 N.L.R.B. at 37–38 with Intermediate Report of Trial Examiner, *supra* note 278, at 714–20.

³⁰² *Southern Steamship*, 23 N.L.R.B. at 34–43.

³⁰³ *Id.* at 44–45, 47–48; Intermediate Report of Trial Examiner, *supra* note 278, at 723–26.

³⁰⁴ *S. S. Co. v. NLRB (Southern Steamship)*, 120 F.2d 505 (3d Cir. 1941), *rev'd*, 316 U.S. 31 (1942).

³⁰⁵ *Id.* at 508–11.

³⁰⁶ *Id.* at 509.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *S. S. & Co. v. NLRB (Southern Steamship)*, 316 U.S. 31, 31 (1942).

³¹⁰ Frank L. Kluckhohn, *Unity in Congress; Only One Negative Vote as President Calls to War and Victory*, N.Y. TIMES, Dec. 9, 1941, at 1.

argument to the Court was the claim that its ship's officers held an inviolate authority, codified in the law of mutiny, to control workers aboard its vessels, and that the strikers illegally flouted this authority while the Board's decision infringed upon it.³¹¹ For their part, both the Board and the NMU were, like the Third Circuit, keen to distinguish the case from *Fansteel* and to demonstrate that the federal mutiny statute did not apply to circumstances such as these.³¹² Likewise, they stressed that if a strike such as the one in question were deemed unlawful under the Wagner Act, seamen would essentially lack an effective right to strike at all.³¹³ For where could they strike in meaningful fashion if not aboard ship?

The Court's repudiation of the Board and the union on these points would be every bit as complete as in *Fansteel*. Writing for a five-justice majority, Justice James Byrnes (who as a U.S. Senator proposed anti-sit-down strike legislation³¹⁴) opened his argument with an unqualified affirmation of the view that seamen are a dependent class of workers, forever subject to the authority of their "masters" aboard ship.³¹⁵ From this vantage point, it was clear to Justice Byrnes that the strikers had committed mutiny; by their conduct, the strikers "undertook to impose their will on the captain and officers."³¹⁶ As for the many grounds proffered by the Board and the union to question this conclusion and distinguish what happened aboard the *City of Fort Worth* from the more definite examples of mutiny, Justice Byrnes found these simply unworthy of attention.³¹⁷

Even more ominously for organized labor, Justice Byrnes rejected just as decisively the idea that the Board had any authority to square the interests and purposes of mutiny law with the Wagner Act.³¹⁸ The Board argued to the Court that, even if the *City of Fort Worth* strike could be characterized as a mutiny, it was hardly an egregious case of mutiny, and that in such circumstances the Board retained the authority under the Wagner Act to order the strikers' reinstatement.³¹⁹ Justice Byrnes rejected this position categorically. While conceding the Board's discretion to remedy unfair labor prac-

³¹¹ *Southern Steamship*, 316 U.S. at 39–40.

³¹² *Id.* at 40.

³¹³ *See id.* at 42–43.

³¹⁴ Pope, *supra* note 3, at 93.

³¹⁵ *Southern Steamship*, 316 U.S. at 38–39.

³¹⁶ *Id.* at 41.

³¹⁷ *Id. passim.*

³¹⁸ *Id.* at 41–48.

³¹⁹ *Id.* at 40.

tices, Justice Byrnes invoked *Fansteel* for the notion that “this discretion has its limits, and we have already begun to define them.”³²⁰ The Board, he continued, simply could not undertake to accommodate labor rights in a manner that “ignore[d] other and equally important Congressional objectives.”³²¹ That he conceived this proscription to cut in only one direction—to foreclose the enforcement of labor rights in order to accommodate the century-old mutiny law—was of no apparent concern to Justice Byrnes. Nor was he moved in any way by the argument that this position would leave seamen with no meaningful right to strike at all. In Justice Byrnes’ view, such workers had the option to turn to the courts.³²²

Justice Reed authored a brief dissent in *Southern Steamship*, which Justice Black, Justice Douglas, and Justice Murphy joined. Reiterating some of the points made in his *Fansteel* dissent, Justice Reed’s central argument in *Southern Steamship* was that the majority excessively constrained the Board’s remedial authority, leaving in place an “iron rule that a discharge of a striker by his employer for some particular, unlawful conduct in furtherance of a strike is sufficient to bar his reinstatement as a matter of law.”³²³ Justice Reed noted, as he had in *Fansteel*, that this left the Board unable to craft meaningful remedies for an employer’s flagrant violations of the Wagner Act.³²⁴ The critical difference in this case, as he pointed out, was that the *City of Fort Worth* strike was devoid of the features on which Chief Justice Hughes relied to make his argument in *Fansteel*, such as seizure of property, violence, resistance to the judicial authority and the efforts of law enforcement, and criminal prosecution.³²⁵

Above all else, *Southern Steamship* constituted an extension of *Fansteel*’s anti-strike jurisprudence. This is evident in two principal ways. First, and perhaps most plainly, *Southern Steamship* in effect expanded the definition of the sit-down strike to strikes that do not feature outright seizure of property, violence, defiance of legal process, or actual prosecution. Of course, that case did involve a peculiar legal circumstance (the application of federal mutiny law in the maritime context) and a determination by the Court that the strikers’ putative violation of the mutiny law mandated a limitation of the

³²⁰ *Id.* at 46.

³²¹ *Southern Steamship*, 316 U.S. at 47.

³²² *Id.* at 48–49.

³²³ *Id.* at 51 (Reed, J., dissenting).

³²⁴ *Id.* at 50.

³²⁵ *Id.* at 49–51.

Board's remedial authority. But there is nothing about the Court's opinion limiting its basic logic to maritime cases. As subsequent developments in the law (which we shall consider below) reveal, the broad definition of sit-down strikes is a definite part of *Southern Steamship's* enduring legacy. Workers who engage in such strikes forfeit any right to benefit from Board remedies with little further inquiry into their actual conduct during the protest.

The second and related consequence of *Southern Steamship*, which has proved just as significant, is its notion that the illegality of a strike as such—apart from its character as a sit-down strike—necessarily precludes reinstatement of workers involved in the strike, even when the employer causes the entire affair. *Southern Steamship* brought this out even more clearly than *Fansteel*, not only because the strike itself was so tame by comparison, but because of the Board's more focused effort in *Southern Steamship* to find an unfair labor practice in the discharges themselves. Doing so framed the issue squarely as whether an employer may fire workers who engage in an illegal strike without the firing itself constituting a violation of the labor law. The Court's answer was clear: workers who engage in such strikes may not benefit from the Board's remedial authority and are thus unprotected by the labor law. And again, whether this leaves such workers with no meaningful right to strike at all, or whether it allows employers to benefit from their own unlawful provocations, is, according to *Southern Steamship*, essentially irrelevant.

It remained for the courts and the Board in the aftermath of *Fansteel* and *Southern Steamship* to determine exactly what circumstances would bring these doctrines to bear. Clearly, classic sit-down strikes, as now more broadly defined by the Court, would fall into this category. So too would strikes, like *Southern Steamship*, that either offended federal law directly or that called for remedies requiring the Board, in that Court's view, to "ignore other and equally important Congressional objectives."³²⁶ But without laying out the relevant parameters, these cases pointed to other circumstances that would render a strike illegal and disentitle its participants to the protections of labor law. In particular, to the extent that the criminality of the strikes in *Fansteel* and *Southern Steamship* was part of the reason their participants lost the protections of labor law, then how far did this precept extend? Under what other circumstances, beyond sit-down strikes and maritime "mutinies," would the criminal nature of a strike render its participants outside the protections of labor law? Moreo-

³²⁶ *Id.* at 47 (majority opinion).

ver, to the extent that *Southern Steamship* also suggested that mere conflict with important federal policies justified a withdrawal of protections, would conflict with state law and policies have the same effect? Related to this is yet another question posed more directly in *Fansteel* but left unanswered in that case: if state authorities in that case could, without opposition from the Board or the courts, carry out the criminal prosecution of strikers obviously attempting to vindicate their rights under labor law, when would labor rights ever actually take precedence over the prerogative to criminal prosecution, whether state or federal? Over the half-century or so after these cases were decided, the courts, the Board, and Congress drew explicitly on *Fansteel* and *Southern Steamship* to answer this question and in the process make significant inroads on the right to strike.

B. Sit-Down Strikes and the Lead-up to the Taft-Hartley Act

After the Supreme Court decision in *Southern Steamship*, sit-down strikes continued to take place, albeit almost certainly in smaller numbers. The Chicago area offers a number of examples. In November 1942 some 500 leather workers in Chicago engaged in a "brief" sit-down before leaving the factory after being told by an officer on the police labor detail to "work or get out."³²⁷ The same Chicago officer, George Barnes, responded to a sit-down at a Ford facility in December 1943, and in June 1944 he led a detail that "ejected" 130 workers at a wallpaper factory who were striking to protest their employer's favoritism in their union's jurisdictional dispute with an AFL affiliate.³²⁸ The following April, CIO steel workers in Chicago and Gary, Indiana, launched numerous quickie sit-down strikes to shut down their employers' operations in protest of inadequate processing of grievances.³²⁹ That October, a sit-down at one of the same steel mills was ended when plant guards forced the strikers out.³³⁰ These sit-downs were but the most prominent of hundreds of wildcat and quickie strikes to affect area steel mills during the war years.³³¹

Similar protests occurred elsewhere. Some of these involved large numbers of workers. In June 1944, some 600 CIO textile workers in Passaic, New Jersey, engaged in a sit-down strike of several days

³²⁷ 500 in *Leather Plant Sit-Down, Then Walk Out*, CHI. DAILY TRIB., Nov. 18, 1942, at 2.

³²⁸ *Police Rout 130 Sit-Strikers; AFL Accuses CIO*, CHI. DAILY TRIB., June 2, 1944, at 22; *650 Quit Jobs Over 2 Jobs in Ford War Plant*, CHI. DAILY TRIB., Apr. 2, 1943, at 2.

³²⁹ *Sit-Downs Slow Flow of Steel 8 Times in Day*, CHI. DAILY TRIB., Apr. 26, 1943, at 8.

³³⁰ *Sitdown Strike Group Ejected at Steel Plant*, CHI. DAILY TRIB., Oct. 8, 1943, at 7.

³³¹ *Gary Sitdown Halts 190 Cars of War Metal*, CHI. DAILY TRIB., May 10, 1945, at 21.

duration.³³² A year later, more than 1000 steel workers mounted an overnight sit-down in Philadelphia.³³³ A few weeks later, Philadelphia hosted another sit-down, as 500 machinists struck the Link Belt Company.³³⁴ In September of 1945, a sit-down strike briefly shut down Jones & Laughlin's Pittsburgh area mill.³³⁵ Similarly, in March, 1946, some 900 employees of Diamond T Motor Car in Chicago undertook a sit-down strike to protest the company's layoff of union officers to accommodate returning veterans.³³⁶ The following April, "hundreds" of female cannery workers loyal to the CIO mounted a sit-down in Sacramento to protest attempts by a Teamsters local union to prematurely assert representation over them.³³⁷

Remarkably, strikes of this kind continued through 1947, even as Congress drafted and debated the Taft-Hartley Act. In February of that year, thirteen miners struck for sixty hours inside a Hazelton, Pennsylvania, coal mine to win a grievance against their employer.³³⁸ In June, quickie sit-downs were reported at automobile plants in Detroit.³³⁹ Also in June, NMU sailors engaged in a huge sit-down strike involving thousands of sailors on some 700 ships.³⁴⁰ That fall, just after the enactment of Taft-Hartley, another sit-down was reported in Brooklyn, New York, where CIO warehouse workers used the strategy to try to impede their employer's effort to replace them with AFL members.³⁴¹ The Brooklyn strike is particularly notable as the strikers held the factory for several days before surrendering.³⁴²

Although even less comprehensive than newspaper accounts, Board decisions from this period also confirm a number of sit-down

³³² *600 on Sit-Down Strike*, N.Y. TIMES, June 6, 1944, at 10.

³³³ *Defy Law by Strike: Steelworkers Vote to Tie Up 3 Philadelphia Plants*, N.Y. TIMES, Sept. 30, 1945, at 4; *1,600 in SKF Sit-Down*, N.Y. TIMES, Sept. 29, 1945, at 2.

³³⁴ *1,250 Strikers Swell Philadelphia Tie-Ups*, N.Y. TIMES, Nov. 4, 1945, at 12.

³³⁵ *Other Developments in Labor Relations: Strike of 60 Rail Workers Forces Jones & Laughlin to Halt Operations*, WALL ST. J., Sept. 8, 1945, at 2.

³³⁶ *George Hartmann, 900 in Sitdown Fight Rehiring Policy on Vets*, CHI. DAILY TRIB., Mar. 2, 1946, at 9.

³³⁷ *CIO Groups Parade at Struck Canneries*, N.Y. TIMES, Apr. 30, 1946, at 15.

³³⁸ *13 Win Docked Pay, End Mine Sitdown*, N.Y. TIMES, Feb. 16, 1947, at 38.

³³⁹ *Detroit Walkouts Make 20,000 Idle*, N.Y. TIMES, June 12, 1947, at 20.

³⁴⁰ *CIO Maritime Strike Ties Up 700 Ships, Curran Says; Men on Board*, WALL ST. J., June 17, 1947, at 2.

³⁴¹ *No Workers Report at Container Plant After Fight with CIO Pickets in Brooklyn*, N.Y. TIMES, Oct. 22, 1947, at 23; *Picket Line Broken at Strike-Shut Plant*, N.Y. TIMES, Nov. 6, 1947, at 31.

³⁴² *80 on Sitdown Strike; Wives Pass Food in*, CHI. DAILY TRIB., Oct. 15, 1947, at 12.

strikes,³⁴³ including an eight-day sit-down strike in 1944 by communications workers in Elyria, Ohio.³⁴⁴ The persistence of sit-down strikes in this period is likewise verified by their occasional mention in court decisions during this period, albeit usually not as the chief issue in dispute.³⁴⁵

As in the period between *Fansteel* and *Southern Steamship*, a primary cause of sit-down strikes in the period after *Southern Steamship* was the continued resistance of many employers to their most basic obligations under the Wagner Act.³⁴⁶ The strikes were also launched as a means of prosecuting grievances and other, more run-of-the mill conflicts that arose regularly in the course of union representation.³⁴⁷ Alongside these causes were jurisdictional conflicts between AFL and CIO unions, whose bitter rivalry very often implicated employers biased in favor of AFL affiliates.³⁴⁸ In all these contexts, though, the central factor in the unions' resort to the sit-downs strikes remained the advantages that the tactic afforded in countering employers' strike-negating prerogative to continue production during a strike, which the Supreme Court had already endorsed in the 1938 decision, *Mackay Radio & Telegraph Co. v. NLRB*.³⁴⁹

Another reason the strikes remained relatively common was the Board's continued adherence to a realistic view that *Fansteel* and *Southern Steamship* did not repeal the right to strike or reduce its lawful form to a mere symbol; instead, the Board sought to chart a compromise between the holding of these cases and the basic rights of labor as protected by the statute. The Board had always taken a dim view of excessively violent and blatantly unlawful behavior by strikers, expressing this view, as we have seen, in its litigation of the sit-down strike cases themselves; after *Southern Steamship*, its scrutiny of such

³⁴³ In many of these cases, the sit-down strike was tangential to the issues before the Board. See, e.g., *In re Heisler Mfg. Co.*, 71 N.L.R.B. 1114, 1143 (1946); *In re Bergmann's Inc.*, 71 N.L.R.B. 1020, 1032 n.15 (1946).

³⁴⁴ See, e.g., *In re Elyria Tel. Co.*, 63 N.L.R.B. 432, 436 (1945).

³⁴⁵ See, e.g., *NLRB v. J.L. Brandeis & Sons*, 145 F.2d 556, 558 (8th Cir. 1944) (using a 1943 sit-down strike of elevator operators as background in an NLRB enforcement action against an employer).

³⁴⁶ See, e.g., *Police Rout 130 Sit-Strikers; AFL Accuses CIO*, *supra* note 328; *Sit-downs Slow Flow of Steel 8 Times in Day*, *supra* note 329.

³⁴⁷ See, e.g., *Hartmann*, *supra* note 336; *Gary Sitdown Halts 190 Cars of War Metal*, *supra* note 331.

³⁴⁸ See FINE, *supra* note 1, at 73-79; *Police Rout 130 Sit Strikers; AFL Accuses CIO*, *supra* note 328.

³⁴⁹ 304 U.S. 333, 345 (1938).

behavior was even more exacting.³⁵⁰ Nevertheless, as in the wake of *Fansteel*, the Board declined automatically to deny workers the protections of the labor law simply because something resembling a sit-down strike was alleged by the employer or the press or played a minor role amidst a complicated labor dispute. Instead, the Board looked to the nature of the action and paid special attention to whether “employees took possession of the plant, withheld it against the wishes of the respondent [employer], or had to be forcibly ejected.”³⁵¹

Of particular significance to this position was *NLRB v. American Manufacturing Company*, in which the U.S. Court of Appeals for the Second Circuit validated the Board’s view that not all strike activity on company property necessarily constituted an illegal sit-down strike.³⁵² Through the 1940s, the Board cited *American Manufacturing* several times to support similar administrative rulings.³⁵³ Significantly, the Board’s approach to sit-down strikes accompanied its efforts in the late 1930s and 1940s to distinguish acts of picket-line violence or other strike-related “misconduct” that justified discharge from those that did not and would admit reinstatement.³⁵⁴ A key feature of this policy, which was reflected in its decision in *Republic Steel* and would for a time frame the development of law in this area, was the Board’s unwillingness either to investigate or to presume criminal culpability—and therefore ineligibility for reinstatement—where an employee had not been found guilty by criminal trial or plea.³⁵⁵

In fact, even as sit-down strikes and other sensational acts of labor militancy became rarer, mass-picketing and more mundane forms of strike-related violence and criminality remained common features of labor conflict. In quite a few cases in the 1940s, strikers organized huge protests of over 1000 picketers, who harangued and intimidated company managers and would-be crossovers and re-

³⁵⁰ See, e.g., *In re Mid-Continent Petroleum Corp.*, 54 N.L.R.B. 912, 930–32 (1944).

³⁵¹ *In re Nat’l Container Corp.*, 57 N.L.R.B. 565, 585 (1944); see also *In re Draper Corp.*, 52 N.L.R.B. 1477, 1493 (1943) (considering the same factors).

³⁵² 106 F.2d 61, 68 (2d Cir. 1939).

³⁵³ See, e.g., *In re Draper*, 52 N.L.R.B. at 1493; *In re W. Cartridge Co.*, 48 N.L.R.B. 434, 454 (1943).

³⁵⁴ See, e.g., *In re Ind. Desk Co.*, 56 N.L.R.B. 76, 96 (1944); *In re Berkshire Knitting Mills*, 17 N.L.R.B. 239, 291–92 (1939); *In re Republic Steel Corp.*, 9 N.L.R.B. 219, 387–88 (1938), *enforced as modified*, 107 F.2d 472 (3d Cir. 1939), *modified*, 311 U.S. 7 (1940).

³⁵⁵ Walter Daykin, *Treatment of Violence in Labor Disputes*, 26 IOWA L. REV. 772, 777–78 (1941). For examples, see *In re Swift & Co.*, 10 N.L.R.B. 991, 1010 (1939); *In re Republic Steel*, 9 N.L.R.B. at 387–88 (1938).

placement workers.³⁵⁶ Not infrequently, protests of this kind culminated in court injunctions, violent confrontations, and mass arrests.³⁵⁷ A notable example is the 1946 strike at tractor and machine maker Allis-Chalmers (centered at its complex in West Allis, Wisconsin) that featured thousands of picketers, numerous violent clashes, and hundreds of arrests.³⁵⁸ The strike would assume a prominent place in subsequent congressional efforts to amend the labor law—even though the many arrests in this case gave more witness to how free courts and prosecutors already were to enjoin and prosecute workers who embraced mass picketing and other confrontational methods.³⁵⁹ As we shall see, even as the Board struggled to develop an approach that would preserve basic labor rights amidst such tumult (which, as with sit-down strikes, was often instigated by employers in the first place) without seeming to suggest the Board's approval of union-sponsored violence and disorder, these tactics quickly joined the sit-down strikes as the focus of conservative criticism of the Board's supposed contempt for court decisions.³⁶⁰

Though quite justifiable as a sound exercise in the realistic and pragmatic use of its administrative authority, the Board's approach to

³⁵⁶ See, e.g., *8,000 Men Walk Out*, N.Y. TIMES, July 30, 1941, at 1; *5,000 Pickets to Mass Today at Columbia*, *Strikers Report*, L.A. TIMES, Nov. 15, 1946, at 1; *1,000 in Picket Line in Midtown Strike*, N.Y. TIMES, Feb. 20, 1942, at 12; *Pickets Are Routed by Police in Yonkers; Demonstration at Grant Street Broken Up*, N.Y. TIMES, Dec. 7, 1941, at 52; A.H. Raskin, *200,000 Quit in 16 States; Mass Picketing is Started*, N.Y. TIMES, Jan. 16, 1946, at 1.

³⁵⁷ See, e.g., *Film Studio Strike Settled; 400 Arrested on Final Day*, L.A. TIMES, Oct. 25, 1945, at 1; *4 Hurt in Detroit Strike*, N.Y. TIMES, Sept. 19, 1947, at 2; George Hartmann, *Sheriff Offers Evanston Aid in Curbing Pickets*, CHI. DAILY TRIB., Apr. 9, 1946, at 12; *Limit of 21 Pickets at Plant Ordered in Writ Against Union*, CHI. DAILY TRIB., Oct. 22, 1946, at 2; *New CIO Mob Battles Police at Allis Plant*, CHI. DAILY TRIB., Nov. 26, 1946, at 1; *Pickets Are Routed by Police in Yonkers; Demonstration at Grant Street Broken Up*, *supra* note 356; A.H. Raskin, *Clash in GE Strike Brings 19 Arrests*, N.Y. TIMES, Feb. 22, 1946, at 17; *700 Film Strike Pickets Arrested; Police Disperse 1,500 at Columbia; New Demonstration Ordered Today*, L.A. TIMES, Nov. 16, 1946, at 1 [hereinafter *700 Film Strike Pickets Arrested*]; *Violence Flares at Yale & Towne*, N.Y. TIMES, Mar. 23, 1946, at 1; *Will Resume Picketing; Kentucky Telephone Strikers Act Despite Arrest of 151*, N.Y. TIMES, Apr. 27, 1947, at 4; *W.U. Asks Court Aid as Police Battle Pickets*, CHI. DAILY TRIB., Jan. 26, 1946, at 3.

³⁵⁸ *CIO Mobs Blockade Plant; Hurl Barrage of Rocks Thru Allis Windows*, CHI. DAILY TRIB., Oct. 29, 1946, at 1; *New CIO Mob Battles Police at Allis Plant*, *supra* note 357; *Rioting CIO Mob Battles Police at Allis Plant; 4 Hurt and 46 Arrested in New Demonstration*, CHI. DAILY TRIB., Dec. 5, 1946, at 6; *75 Injured in Allis Rioting; 1,200 Battle Police; Autos Tipped, Burned*, CHI. DAILY TRIB., Dec. 10, 1946, at 1. The conflict with Allis-Chalmers in 1946 was the culmination of a concerted strategy of company resistance to left-leaning UAW organizers' efforts to unionize the plant. ZIEGER, *supra* note 1, at 126-28.

³⁵⁹ See *infra* note 397.

³⁶⁰ GROSS, *supra* note 110, *passim*.

such cases proved unacceptable in conservative circles and to the courts. Notwithstanding the Second Circuit's approval in *American Manufacturing* and similar decisions in other circuits,³⁶¹ many courts rejected the Board's textured view of sit-down strikes and related conduct.³⁶² Even more significantly, the Board's realism quickly attracted the hostile attention of congressional conservatives, for whom it informed a broader effort to transform both the politics of the Board and the substance of the Wagner Act.³⁶³

This effort would soon change the Board entirely, as the conservatives convinced President Roosevelt to replace three members (Donald Wakefield Smith in 1939, Chairman Madden in 1940, and Edwin Smith in 1941) who had been extremely important to developing the Board's early program.³⁶⁴ Although these men were replaced by relatively moderate members, this drive to transform the Board would continue until, by the time of Taft-Hartley, conservatives dominated the Board.³⁶⁵ Significantly, these changes in membership were but the most notable expression of a far more comprehensive effort to purge the whole agency of people identified by business groups or conservatives in the labor movement as too supportive of industrial unionism, political progressivism, or a robust view of labor rights more generally.³⁶⁶

In 1939, the House of Representatives convened a special committee to investigate the NLRB.³⁶⁷ Chaired by Howard K. Smith, a reactionary from Virginia, the "Smith Committee" represented the first important congressional attack on the Board and the Wagner Act, which, despite disquiet with the direction of labor politics, had up to that point remained largely invulnerable amidst the tumultuous and complex politics of the Second New Deal.³⁶⁸ The committee embarked on a sweeping investigation of the Board's policies, personnel,

³⁶¹ See, e.g., *NLRB v. Stackpole Carbon Co.*, 105 F.2d 167, 176-77 (3d Cir. 1939) (distinguishing *Fansteel* and upholding Board-ordered reinstatement where violence was minimal, mutually instigated, and attenuated from strike).

³⁶² See, e.g., *In re Draper Corp.*, 145 F.2d 199, 204-05 (4th Cir. 1944); *In re Clinchfield Coal Corp.*, 145 F.2d 66, 72-73 (4th Cir. 1944); *Wilson & Co. v. NLRB*, 120 F.2d 913, 925 (7th Cir. 1941); *Peninsular & Occidental S.S. Co. v. NLRB*, 98 F.2d 411, 415 (5th Cir. 1938); *Standard Lime & Stone Co. v. NLRB*, 97 F.2d 531, 536 (4th Cir. 1938).

³⁶³ GROSS, *supra* note 110, at 79, 85-93, 100-08.

³⁶⁴ *Id.* at 78-79, 211-13, 238-39.

³⁶⁵ *Id.* at 232-40.

³⁶⁶ *Id.* at 131-50.

³⁶⁷ *Id.* at 151.

³⁶⁸ *Id.* at 151-59.

and ideological orientation; its purported areas of focus fell into four main categories of supposed impropriety: "Anti-American affiliations and associations of Board personnel"; "extra-legal actions" by the Board; improper "interpretations of the act" by Board members; and improper enforcement of the act by Board personnel.³⁶⁹ Besides the obvious aim of undermining the Board's legitimacy and forcing changes in its composition, the committee's work was also geared to generating a package of proposed amendments to the Act and a record to support their passage.³⁷⁰

The Smith Committee enjoyed almost unlimited access to Board files, gathered thousands of questionnaires, and interviewed under oath and in open hearings scores of Board personnel, experts in law and industrial relations, employers, and union officials.³⁷¹ Although occasionally concerned with actual instances of abuse or impropriety, the committee's efforts mainly involved mining the Board's cases and records for complex situations and exigent circumstances that could be manipulated to cast the agency and its staff as biased or incompetent.³⁷² At perhaps its worst, the committee's efforts devolved into an attempt to sully the Board for having (for the time) an inordinately high number of professional women on its staff.³⁷³

The Board's approach to sit-down strikes was an area of special concern to the committee. The transcripts and records of the committee's hearings, which run to nearly 8000 pages, are peppered with references to and inquiries about *Fansteel* as well as *Republic Steel*.³⁷⁴ The Smith Committee's final report—which historian James Gross aptly characterizes as a thoroughly "one-sided and often distorted appraisal"³⁷⁵—condemned the Board's position in *Fansteel* as "unto-ward," "strange," and thoroughly illegitimate.³⁷⁶ Worse, the report claimed, the Board seemed not to have abandoned this "reprehensible policy," as evidenced by the fact that it attempted to distinguish *Fansteel* in another case, *McNeely & Price*, in which the employer had not actually discharged the sit-down strikers but instead discriminated among them, and which was still being litigated when *Fansteel* was de-

³⁶⁹ H.R. REP. NO. 76-3109, at 5, 62, 96 (1940).

³⁷⁰ GROSS, *supra* note 110, at 187.

³⁷¹ *Id.* at 156–60, 164–71.

³⁷² *Id.* at 173–75, 193.

³⁷³ *Id.* at 181–83.

³⁷⁴ *Hearings Before Spec. Comm. to Investigate the National Labor Relations Board*, 76th Cong. 675, 1647, 2512–15, 3412–13, 4890–91, 4983–84, 7283 (1940).

³⁷⁵ GROSS, *supra* note 110, at 203.

³⁷⁶ H.R. REP. NO. 76-3109, at 81 (1941).

cided.³⁷⁷ Perhaps most significantly, the committee's criticisms of the Board seem to have had less to do with the intransigent and supposedly duplicitous quality of the Board's decision making, or the fear that it would defiantly protect sit-down strikes of the classic sort, than with its efforts to justify, on any grounds, the reinstatement of strikers who engaged in any kind of conduct (including violent or illegal conduct) that fundamentally challenged employers' traditional hegemony in the workplace.

This appeal to *Fansteel* to rationalize a broader attack on the right to strike was clearly borne out in the suite of amendments to the Wagner Act that the committee recommended, which among other things would have revised section 2(3) of the Act to disqualify from reinstatement anyone "who engaged in violence or unlawful destruction or seizure of property in connection with any labor dispute or unfair labor practice."³⁷⁸ So broad was this language that in a different context it caused William Green of the AFL to qualify his erstwhile support for the committee's work, as Green correctly perceived that such language would jeopardize the right to strike in any contentious setting.³⁷⁹

At nearly the same time that the Smith Committee embarked on its investigations of the Board, so too did the Senate Committee on Education and Labor in the course of considering a suite of bills to amend the Act that were roughly akin to the Smith bill. Although quite a bit less sensational and one-sided than the House hearings, and ultimately less influential to the course of labor law and policy, the Senate hearings did go to great lengths to criticize the Board, in that senators repeatedly challenged Board members and staff to explain the agency's approach to sit-down strikes, particularly during their height in 1937 and 1938.³⁸⁰ Opponents of the Board (and the

³⁷⁷ A panel of the Third Circuit strongly rebuked the Board for attempting, in answering the company's appeal, to distinguish the facts in *McNeely* from *Fansteel*. *McNeely & Price Co. v. NLRB*, 106 F.2d 878, 878-79 (3d Cir. 1939). Other circuits took a very different view of this issue. See, e.g., *Stewart Die Casting Corp. v. NLRB*, 114 F.2d 849, 858 (7th Cir. 1940).

³⁷⁸ GROSS, *supra* note 110, at 199. The statute would also have dramatically altered the structure of the NLRB, changed the way the Board determined bargaining units and conducted elections, limited the scope of the duty to bargain, provided for more exacting judicial review of Board decisions, protected employers' right to make anti-union statements, and rewritten the preamble of the Act, replacing its pro-unionization language with more "neutral" text. *Id.* at 196-99.

³⁷⁹ *Id.* at 207.

³⁸⁰ *Hearings Before S. Comm. on Education and Labor on Legis. to Amend the National Labor Relations Act*, 76th Cong. 15, 63, 117-18, 425, 481-82, 1600-01, 2300, 2455-72 (1939) [hereinafter *Hearings on NLRA Amendments*].

CIO) from industry, labor, and Congress were allowed to repeatedly accuse the Board of ignoring the Court's decision in *Fansteel*.³⁸¹ More ominously, this criticism also entailed a charge that the Board was apt to continue to ignore *Fansteel* by taking a critical, case-by-case approach to reinstatement in cases involving strike-related violence—and that the Act should therefore be amended to categorically ban reinstatement in such cases.³⁸² The next year, the committee considered still more legislation to amend the Act and transform the Board, thus revisiting the surrounding sit-down strikes and the Board's reaction to them in light of Supreme Court precedent.³⁸³

However disreputable its methods, the Smith Committee's efforts to undermine the Board and generate support to transform the agency and the Wagner Act paid off in spades, as both the public and the Congress became significantly more receptive to such legislation.³⁸⁴ In the summer of 1940, the House passed the Smith Committee's bill by a wide majority (258 to 129).³⁸⁵ The Smith bill died, however, when the Senate Education and Labor Committee refused to act on it.³⁸⁶ Nevertheless, the death of this bill did not end the effort to amend the Wagner Act, nor did it prevent conservatives from seeking a more comprehensive roll-back of the right to strike and of labor rights more broadly. Indeed, in these respects, the Smith Committee's efforts were only the beginning.

C. *The Sit-Down Strikes and the Taft-Hartley Act*

Through the early 1940s, opponents of the Wagner Act continued to propose legislation to repeal or transform the statute; in the ten years between *Jones & Laughlin* and Taft-Hartley, around 200 bills were introduced in Congress with that aim.³⁸⁷ At the center of this legislative agenda remained the goals that were first cultivated by the Smith Committee: changing the basic substance of the Act itself to narrow the definition of employer unfair labor practices, adding union unfair labor practices, and altering the structure of the NLRB and the manner in which it handled both union elections and unfair la-

³⁸¹ *Id.* at 1072–74, 2455–72, 2474, 2030.

³⁸² *See Id.* at 63, 86–87, 198–215, 296, 520, 1498–500, 1507–08, 2128, 2138–39, 2474.

³⁸³ *See Hearings Before the S. Comm. on Education and Labor on H.R. 9195*, 76th Cong. 100, 178, 219, 221, 246–48 (1940).

³⁸⁴ GROSS, *supra* note 110, at 187.

³⁸⁵ *Id.* at 210.

³⁸⁶ *Id.* at 210–11.

³⁸⁷ MILLIS & BROWN, *supra* note 127, at 333.

bor practice complaints against employers.³⁸⁸ While none of these bills was enacted, the Smith bill itself would form the template for the Taft-Hartley Act, which would dramatically transform American labor law and labor relations.³⁸⁹

It is common to explain Taft-Hartley as a reaction to the dramatic expansion of union power that occurred in the wake of the Wagner Act and as a response to the sense that this power was being abused and needed regulation.³⁹⁰ This account has some appeal in view of the huge gains in union membership during this period, as well as the enormous strike waves that occurred during and after the Second World War, and it is probably at least partially accurate. But the fact that Taft-Hartley so faithfully adhered to the agenda developed by the Smith Committee shows very clearly that the statute was rooted in the current of organized anti-unionism that underlay the great wave of sit-down strikes of 1937 and 1938 and that persisted through the 1940s. Further evidence of this connection appears in the fact that the very same coalition of business groups, conservative unionists, and reactionary politicians who spearheaded the earlier attempts at “reform” also played the lead role in enacting Taft-Hartley.³⁹¹ This coalition was in no way satisfied by the rightward shift of the Board and its policies in the period during and after the Smith Committee investigations, nor was it content with the enactment of numerous state laws during this period that limited the right to strike (including barring sit-down strikes) and otherwise “equalized” the rights of labor and capital, which in many cases were directed specifically at regulating sit-down strikes and punishing strikers for strike-related violence.³⁹²

Supporters of Taft-Hartley relentlessly constructed images of the Board and the Wagner Act as complicit in a perverted and out-of-control system of labor relations desperately in need of reform. To this end, they invoked *Fansteel* and *Southern Steamship* not simply for what these cases seemed to say about sit-down strikes, but as mandates against strike-related violence, wildcat strikes, and mass picketing, as well as grounds for indicting the Board’s purported indulgence of such conduct. This claim was built, in part, on another series of investigations of the Board itself by House and Senate committees, in-

³⁸⁸ GROSS, *supra* note 110, at 252–53.

³⁸⁹ *Id.* at 253.

³⁹⁰ See, e.g., MILLIS & BROWN, *supra* note 127, at 272.

³⁹¹ *Id.* at 346–62.

³⁹² *Id.* at 320–21, 323–25, 327; Harry A. Millis & Harold A. Katz, *A Decade of State Labor Legislation*, 15 U. CHI. L. REV. 282, 283, 290, 301–04 (1947).

cluding pointed questioning of the Board's conservative chairman, Paul Herzog, regarding the Board's fidelity to *Southern Steamship*.³⁹³ Even more cutting was the report of the House Committee on Education and Labor on the lead bill in that chamber, which grudgingly confessed that *Fansteel* and *Southern Steamship* had some effect on Board policy. But this, the report asserted, was "very recent, inspired, it seems, by the public demand for fair labor regulation."³⁹⁴ The report continued:

In cases involving violence in strikes, the Board has seemed reluctant to follow the decisions of the courts. It is inclined to reinstate, with back pay, strikers whom employers discharge for what the Board seems to regard as minor crimes, such as interfering with the United States mail, obstructing railroad right-of-way, discharging firearms, rioting, carrying concealed weapons, malicious destruction of property, and assault and battery.³⁹⁵

This interpretation of *Fansteel* and *Southern Steamship* to justify broader attacks on the right to strike was also backed by extensive and well cultivated testimony on strike violence, mass picketing, wild-cat strikes, and claims that existing laws and processes were inadequate to deal with these problems. The House committee stands out in this regard, as it repeatedly allowed company executives and managers, congressmen, conservative unionists, and the occasional worker to present such conduct as common features of post-Wagner Act labor relations.³⁹⁶ The 1946 Allis-Chalmers strike was singled out, along with a couple of other disputes, and mined for shocking information of this sort.³⁹⁷ Similarly extensive testimony was adduced on mass picketing that occurred in a strike that same year at Detroit Steel Products, which included picketing of a company manager's home.³⁹⁸ For good measure, the House committee inserted into its record a great number of evocative photographs of strike violence and mass picketing from these and other strikes.³⁹⁹ Hearings before

³⁹³ See *Hearings Before the H. Comm. on Education & Labor on Bills to Amend and Repeal the National Labor Relations Act*, 80th Cong. 3108-09 (1947) [hereinafter *House Hearings on Taft-Hartley*].

³⁹⁴ H.R. REP. NO. 80-245, at 27 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 318 (1948).

³⁹⁵ *Id.*

³⁹⁶ *House Hearings on Taft-Hartley*, *supra* note 393, at 4, 29-32, 109, 424, 984, 2144-50, 2170, 2530.

³⁹⁷ *Id.* at 1359-74; see also *id.* at 263-332 (discussing 1946 Pennsylvania brewers strike).

³⁹⁸ *Id.* at 445-74.

³⁹⁹ *Id.* at 222, 461-63, 1436-42.

the Senate Labor and Public Welfare committee developed a similar, albeit somewhat less sensational, record.⁴⁰⁰

Congress drew on these records to justify dramatic proposals to change the statute. Most striking among these was section 12 of the bill favored by the House, H.R. 3020, which would have created an array of “unlawful concerted activities,” defined in large part to include violent or threatening strike activity; “any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer’s operations conducted by remaining on the employer’s premises;” or any wildcat or quickie-type sit-down strike.⁴⁰¹ Such conduct would have been made enjoined by federal courts, notwithstanding the Norris-LaGuardia Act.⁴⁰² Workers found to have committed any such conduct would have lost the protections of the statute and faced individual damage liability.⁴⁰³

While this broadside attack on the right to strike did not survive harmonization with the lead Senate bill,⁴⁰⁴ other sanctions on conduct by unions and their agents and limits on Board remedial authority, which were also included in early versions of the Senate legislation, did appear in the final act.⁴⁰⁵ Particularly notable in this regard is a provision eventually enacted as section 8(b)(1)(A), which deemed it an unfair labor practice for a union or its agents to “restrain or coerce” employees in their exercise of the right (accorded by amendments to section 7) to refrain from union membership; as well as limits imposed by amendments to section 10(c) on the Board’s power to reinstate or grant back pay awards to workers fired “for cause.”⁴⁰⁶ Although not as explicit or as extreme as the provisions on unlawful concerted activity in the House bill, the section 8(b)(1)(A) and 10(c) provisions were also clearly intended to work together to redress the Board’s supposed infidelity to the spirit of *Fansteel* and *Southern Steamship*. Section 8(b)(1)(A)’s ambiguous terms on coer-

⁴⁰⁰ See *Hearings Before S. Comm. on Labor and Public Welfare*, 80th Cong. 44–50, 945–46, 966–67, 1716–18, 1732 (1947).

⁴⁰¹ H.R. 3020, 80th Cong. (1st Sess. 1947), reprinted in 1 NLRB, *supra* note 394, at 158, 205.

⁴⁰² *Id.* at 206.

⁴⁰³ *Id.*

⁴⁰⁴ H.R. REP. NO. 80-510, at 1, 58–59 (1947) (Conf. Rep.), reprinted in 1 NLRB, *supra* note 394, at 505, 562–63.

⁴⁰⁵ *Id.*

⁴⁰⁶ H.R. REP. NO. 80-245, at 1, 27, 42, 52–53, 58 (1947), reprinted in 1 NLRB, *supra* note 394, at 292, 318, 333, 343–44, 349.

cion and restraint were fully intended to prohibit all manner of conduct, including not only sit-down strikes but mass picketing and picket-line violence more broadly.⁴⁰⁷ Although the final version of the Act did not explicitly provide for punishing a violation of section 8(b)(1)(A) by disqualifying the responsible worker or workers from reinstatement, and only imposed liability on unions and their agents, the bill's authors made clear their intention that section 10(c) be read together with section 8(b)(1)(A) to have precisely that effect.⁴⁰⁸ At the same time, the amended section 10(c)'s limitations on reinstatement and back pay were not confined to conduct constituting unfair labor practices; instead, the provision was intended more broadly to bar such remedies in any case involving sit-down strikes, strikes featuring violence or criminality, or mass picketing.⁴⁰⁹ Whatever the mechanism, the proponents of these changes candidly anticipated that the thrust of these limits on Board remedies would be to deny the offending workers the basic rights otherwise accorded them in sections 7 and 13. In fact, for good measure, the drafters subtly transformed the right to strike language in section 13, qualifying the right as granted by the Wagner Act with the terms, "except as specifically provided for herein."⁴¹⁰

The amendments were perceived in the same light by Taft-Hartley's opponents in Congress, who criticized the section 8(b)(1)(A) provision in terms directed at similar provisions proposed by the Smith Committee, such as requiring the Board to "take over local police functions" best left to traditional, local processes of law.⁴¹¹ In similar resonance with earlier debates, opponents criticized section 10(c) as preventing the Board from making equitable decisions in cases that involved mutual misconduct or even employer provocation.⁴¹²

⁴⁰⁷ MILLIS & BROWN, *supra* note 127, at 445-47.

⁴⁰⁸ H.R. REP. NO. 80-510, at 1, 38-39, 42 (Conf. Rep.), *reprinted in* 1 NLRB, *supra* note 394, at 505, 542-43, 546; *see also* S. REP. NO. 80-105, at 50 (1947), *reprinted in* 1 NLRB, *supra* note 394, at 456 (providing supplemental views).

⁴⁰⁹ *See* H.R. REP. NO. 80-245, at 1, 42, *reprinted in* 1 NLRB, *supra* note 394, at 292, 333; H.R. REP. NO. 80-510, at 1, 38-39, 55 (Conf. Rep.), *reprinted in* 1 NLRB, *supra* note 394, at 505, 542-43, 559.

⁴¹⁰ *See* 29 U.S.C. § 163 (2006).

⁴¹¹ *See* H.R. REP. NO. 80-245, at 1, 64, 82-83, *reprinted in* 1 NLRB, *supra* note 394, at 292, 355, 373-74.

⁴¹² H.R. REP. NO. 80-245, at 1, 64, 91-92, *reprinted in* 1 NLRB, *supra* note 394, at 292, 355, 382-83; S. REP. NO. 80-105, at 1, 21-22, *reprinted in* 1 NLRB, *supra* note 394, at 463, 483-84.

IV. MILITANCY PROHIBITED: THE SIT-DOWN STRIKES' LEGACY IN MODERN LABOR LAW AND LABOR RELATIONS

The framework of legal opposition to the sit-down strikes that emerged in the years between the Fansteel strike and the passage of Taft-Hartley has had a lasting effect on American labor relations, centered on a dramatic curtailment of the right to strike. The aim of this Part is to show how this program coalesced.

The process can be understood in terms of several overlapping developments. First, the Taft-Hartley amendments translated the legal and political opposition to the sit-down strikes of the 1930s and 1940s into a body of Board jurisprudence that has substantially and permanently limited the right of reinstatement in the context of picket-line violence and other forms of strike-related misconduct.⁴¹³ As a result, unions have been barred from bringing to bear effective forms of protest. Second, *Fansteel* and *Southern Steamship* have armed the courts with a jurisprudence well suited to police aggressively the boundaries of acceptable strike behavior, in particular by holding watch over Board efforts to reinstate strikers notwithstanding some degree of misconduct on their part.⁴¹⁴ Third, the response of the Board and the courts to the sit-down strikes has helped to frame a particular notion of preemption law that has authorized state and local governments to assume prominent, and often reactionary, roles in the regulation of strike misconduct.⁴¹⁵ Closely related to this is the doctrine derived from *Southern Steamship* that labor rights must yield to other regimes of federal policy whenever they might come into conflict. While not typically relevant to strikes and related protests, this rule too has significantly limited other labor rights and stands as a telling symbol of the degradation of labor law.

A. *The Board, Taft-Hartley, and the Diminution of Reinstatement Rights*

The discussion in Part III makes clear that the most important long-term legacy of the sit-down strikes is their role in securing the passage of Taft-Hartley. The statute of course was passed over President Truman's veto by a wide majority,⁴¹⁶ representing the culmination of years of anti-labor politics rooted in the resistance to any functional regime of labor rights that would actually achieve anything like

⁴¹³ See *infra* Part IV.A.

⁴¹⁴ See *infra* Part IV.B.

⁴¹⁵ See *infra* Part IV.C.

⁴¹⁶ See GROSS, *supra* note 110, at 259.

a legally mandated (or mediated) balance of power in the relationship between labor and capital. Taft-Hartley's supporters were well aware that confessing to this agenda would hardly have advanced their cause. Indeed, in the past, supporters of the Wagner Act and the original Board had successfully opposed similar legislation in part by characterizing proposed reforms as unwarranted, and perhaps pretextual, encroachments on basic labor rights.⁴¹⁷ But the claim that amending the Wagner Act was necessary to prevent the kind of lawlessness so thoroughly associated with the sit-down strikes subverted this criticism. It may well be that an anti-labor statute broadly akin to Taft-Hartley would have been enacted in any case. But it is also clear that the sit-down strikes made the enactment of such a profoundly anti-labor law much easier than it would otherwise have been. The specific appeal to the sit-down strikes during the legislative process likely made it possible for Taft-Hartley's supporters to mount a more aggressive assault on labor rights than would otherwise have been feasible and, critically, to focus this assault more directly on the right to strike.

Key personnel with the Board under President Truman, including its conservative chairman, Paul Herzog, opposed Taft-Hartley and initially signaled they could not in good conscience abide its mandates.⁴¹⁸ Even before Board membership was reconstituted under President Eisenhower—a development that finally led the Board in a decisively anti-labor direction⁴¹⁹—the agency embraced the limitations that Taft-Hartley had placed, via section 8(a)(1)(A) and the amendments to sections 10(c) and 13, on its authority to protect the right to strike. Since Taft-Hartley, the Board has largely adhered to these statutory mandates, making clear that reinstatement is improper when workers engage in serious acts of violence or destruction, including physically assaulting replacement workers and crossovers or company officials,⁴²⁰ and throwing missiles at replacement workers and crossovers or their cars.⁴²¹ Neither criminal conviction nor formal criminal charges are required for reinstatement to be denied; on

⁴¹⁷ *Hearings on NLRA Amendments*, *supra* note 380, at 475, 489–90, 520, 523–24, 4215, 4320–22.

⁴¹⁸ JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994*, at 1–13 (1995).

⁴¹⁹ *Id.* at 114–17.

⁴²⁰ *See, e.g.*, *NLRB v. Kelco Corp.*, 178 F.2d 578, 582–83 (4th Cir. 1949); *Bartlett-Collins Co.*, 230 N.L.R.B. 144, 171–73, 176 (1977).

⁴²¹ *See, e.g.*, *Bryan Infants Wear Co.*, 235 N.L.R.B. 1305, 1307–08 (1978); *Int'l Harvester Co.*, 226 N.L.R.B. 166, 166–69 (1976); *Beaver Bros. Baking Co.*, 171 N.L.R.B. 700, 718 (1968).

occasion, the Board has even applied this position on violence and the like so strictly as to deny reinstatement to workers innocent of any misconduct, simply because of what other unknown persons might have done.⁴²² The Board likewise denies reinstatement where strikers verbally threaten replacement workers, crossovers, or other company employees, or where workers menace such persons through symbolic methods, such as by possessing a weapon on the picket line.⁴²³ The Board also denies reinstatement where workers stage mass pickets that coerce replacement workers and crossovers or that impede access to the employer's establishment.⁴²⁴ Of course, if any such misconduct is attributable to the union or its agents, it will also constitute grounds for a section 8(b)(1)(A) violation, and thus become the subject of a prospectively worded cease and desist order.⁴²⁵

To be sure, the Board has continued to make some effort to balance these policies against the law's ostensible protection of the right of workers to strike free of excessive coercion and discrimination by their employers, holding that "minor acts of misconduct" would not necessarily abrogate its prerogative to reinstate workers;⁴²⁶ that provocation is sometimes a relevant consideration in misconduct cases;⁴²⁷ that workers otherwise guilty of misconduct might yet be entitled to reinstatement if their employer has condoned the behavior in question;⁴²⁸ and that under its so-called "Thayer Doctrine," the Board may order the reinstatement of strikers guilty of misconduct where the employer itself has committed serious violations of the labor law and reinstatement would best advance the purposes of the law.⁴²⁹ Similar-

⁴²² See, e.g., *BVD Co.*, 110 N.L.R.B. 1412, 1415-17 (1954).

⁴²³ See, e.g., *Va. Holding Corp.*, 293 N.L.R.B. 182, 188, 210 (1989); *Gem Urethane Corp.*, 284 N.L.R.B. 1349, 1353-54 (1987).

⁴²⁴ See, e.g., *Metro. Dist. Council of Phila. & Vicinity*, 281 N.L.R.B. 493, 497-98 (1986); *Local 1291, Int'l Longshoremen's Ass'n*, 266 N.L.R.B. 1204, 1204-07 (1983); *Shopmen's Local Union No. 455*, 243 N.L.R.B. 340, 340-41 (1979); *Metal Polishers Int'l Union, Local No. 67*, 200 N.L.R.B. 335, 335-37 (1972).

⁴²⁵ See, e.g., *Int'l Union of Elec., Radio & Mach. Workers*, 134 N.L.R.B. 1713, 1713, 1724-26 (1961); *In re Int'l Longshoremen's & Warehousemen's Union*, 79 N.L.R.B. 1487, 1507, 1517-18 (1948). Likewise, evidence of a section 8(a)(1) violation may be used by an employer to defend against reinstatement. See, e.g., *Gem Urethane Corp.*, 284 N.L.R.B. 1349, 1352-53 (1987).

⁴²⁶ See *Coronet Casuals Inc.*, 207 N.L.R.B. 304, 305 (1973).

⁴²⁷ See, e.g., *Ornamental Iron Work Co.*, 295 N.L.R.B. 473, 473 n.1 (1989); *Mosher Steel Co.*, 226 N.L.R.B. 1163, 1169 (1976).

⁴²⁸ See *NLRB v. Colonial Press, Inc.*, 509 F.2d 850, 854-57 (8th Cir. 1975); *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 103 (7th Cir. 1971); *Fed. Prescription Serv.*, 203 N.L.R.B. 975, 975-76 (1973).

⁴²⁹ *NLRB v. Thayer Co.*, 213 F.2d 748, 752-55 (1st Cir. 1953).

ly, while the Board has adhered to the spirit of Taft-Hartley in denying the protections of the labor law to mass picketers, it has done so not simply by counting the picketers but rather by inquiring whether such picketing was truly violent or coercive, or has actually blocked access.⁴³⁰

The nature of these qualifications to the law of misconduct, however, should not be exaggerated. They reflect less a fundamental opposition to the Taft-Hartley amendments than modest efforts by the Board to accommodate the law of misconduct to the complicated and often tumultuous realities of modern labor relations. Notably absent in such cases is the kind of aggressively realistic prioritization of basic labor rights that often characterized the Board's approach to such cases in the late 1930s and (to a degree) early 1940s. Nevertheless, even these modest attempts to accommodate the concept of misconduct to the larger purposes of the statute have proved unacceptable to conservative politicians and academics and objectionable to some courts.⁴³¹ In 1984, such hostility combined with changes in Board personnel and politics to prompt a re-articulation of the Board's approach to misconduct cases. In *Clear Pine Moulding, Inc.*, the Board appeared to renounce the Thayer Doctrine, particularly the idea of balancing the severity of the employer's violations of the statute against the striker's misconduct.⁴³² Instead, appealing explicitly to the legislative history of Taft-Hartley and the debate surrounding *Fansteel*, the Board re-emphasized that reinstatement would be prohibited whenever a striker's misconduct approximates a violation of section 8(b)(1)—that is, whenever it "reasonably tend[s] to coerce or intimidate employees [including replacement workers or crossovers]

⁴³⁰ See, e.g., *United Steelworkers*, 137 N.L.R.B. 95, 98 (1962); *Local Union No. 5895, United Steelworkers*, 132 N.L.R.B. 127, 128-30 (1961); *In re Local No. 1150, United Elec., Radio & Mach. Workers*, 84 N.L.R.B. 972, 973-79 (1949). The Board is apparently constrained in this regard by the Supreme Court. See, e.g., *UAW v. Russell*, 356 U.S. 634, 639-40 & n.4 (1958).

⁴³¹ See, e.g., *Chevron U.S.A. Inc. v. NLRB*, 672 F.2d 359, 359-62 (3d Cir. 1982); *NLRB v. Moore Bus. Forms, Inc.*, 574 F.2d 835, 843-44 (5th Cir. 1978); *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 527-28 (3d Cir. 1977); *Closing the Legal Loophole for Union Violence: Hearing on S.230 Before the S. Comm. on the Judiciary*, 105th Cong. 1-3, 5-6, 7-13 (1997) (statements of Sen. Orrin Hatch and Sen. Strom Thurmond, and opening testimony of former Att'y Gen. of the United States Edwin Meese); *Labor Violence: Hearing Before the S. Comm. on Labor and Human Resources*, 99th Cong. 1-9 (1985) (opening statements of senators regarding labor violence); ARMAND J. THIEBOLT, JR. & THOMAS R. HAGGARD, *UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES, AND THE NLRB passim* (1983).

⁴³² See *Clear Pine Moulding, Inc.*, 268 N.L.R.B. 1044, 1047 n.25 (1984).

in the exercise of rights protected under the Act.”⁴³³ The Board also held that even mere words, unaccompanied by threatening conduct, could meet this test.⁴³⁴ Furthermore, the Board also emphasized that this limit on reinstatement rights should apply from an objective perspective—that is, without regard to whether any employees were actually coerced or intimidated.⁴³⁵

The Board has since retreated somewhat from *Clear Pine*, indicating that *Clear Pine* did not entirely abolish the Thayer Doctrine, that employer condonation would remain a valid consideration in misconduct cases, and that not every instance of misconduct would prohibit reinstatement.⁴³⁶ But as with other apparently significant shifts in the Board’s law of reinstatement, these moves should not be accorded greater significance than they deserve. For *Clear Pine* itself is best viewed from the outset as less about shifting doctrine than reemphasizing the Board’s fidelity to the overall program of *Fansteel* (and, less directly, *Southern Steamship*) as embodied in the Taft-Hartley amendments. Notwithstanding such apparent vacillations, the Board’s position on reinstatement has remained broadly consistent in the post-Taft-Hartley period—and consistently adherent to that statute’s basic agenda. Simply put, the reactionary vision that emerged in the era of the sit-down strike has been thoroughly realized in a body of labor law that denies reinstatement to workers whose protest tactics are substantially offensive to property rights and conservative notions of social order.

B. *Fansteel, Southern Steamship and the Judicial Denigration of Labor Rights*

In the decades since Taft-Hartley, courts have regularly drawn directly on *Fansteel* and *Southern Steamship* to circumscribe the boundaries of the right to strike.⁴³⁷ The most frequent expression of this practice has been the courts’ use of these cases to rebuke Board at-

⁴³³ *Id.* at 1047 (citing *W.C. McQuaide, Inc.*, 552 F.2d at 527).

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ See, e.g., *Detroit Newspaper Agency*, 340 N.L.R.B. 1019, 1024 (2003); *Briar Crest Nursing Home*, 333 N.L.R.B. 935, 938 (2001); *Mohawk Liqueur Co.*, 300 N.L.R.B. 1075, 1075 n.3 (1990); *Chesapeake Plywood, Inc.*, 294 N.L.R.B. 201, 201 (1989).

⁴³⁷ See *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1003–05 (8th Cir. 1965) (listing cases where courts have tied *Fansteel* or *Southern Steamship* to construction of sections 8(b)(1)(A), 10(c), or 13).

tempts to reinstate strikers—as occurred in the lead-up to *Clear Pine*.⁴³⁸ Notably, the courts have resorted to the sit-down strike cases in this fashion, not for the purpose of correcting gross deviations by the Board from the letter of the Taft-Hartley amendments or the clear holdings of *Fansteel* and *Southern Steamship*, but rather to rein in modest efforts of the Board to accommodate these doctrines with the basic purposes of the labor law.⁴³⁹ Especially worthy of mention in this regard are cases where the courts have appealed to these earlier cases to justify decisions that they apparently would not or could not base in the Taft-Hartley amendments.⁴⁴⁰

A notorious example of this is the 1947 (pre-Taft-Hartley) decision of the Seventh Circuit in *NLRB v. Perfect Circle Co.*, where the court held that *Fansteel* required that it overturn the Board's reinstatement of four strikers because they supposedly barred the plant manager from entering the plant.⁴⁴¹ The court's decision is particularly notable in light of the fact that the picketing in question was, without dispute, entirely peaceful and that the Board (and the trial examiner) had found that the strikers had no intention of blocking the manager's entry, were not hostile or threatening to him, and only partially and momentarily obstructed his movement.⁴⁴² For the majority, these determinations had to yield to the view that the employees' actions constituted "a forceable denial of the employer's right to go upon its property . . . equivalent [to] a seizure of the employer's property," and that this placed their conduct squarely within the rule of *Fansteel*.⁴⁴³ The court in fact quite reifies *Fansteel*, repeatedly quoting the decision's reactionary pronouncements on the interrelationship of labor rights and private property with an apparent understanding that simply doing so negates any need to muster principled reasons to overturn the Board.⁴⁴⁴

Similar cases have emerged since Taft-Hartley. For example, a panel of the U.S. Court of Appeals for the Sixth Circuit drew on *Fansteel* to overturn a Board order reinstating strikers who threw objects on the picket line where it was never clearly established what was thrown, "how hard" it was thrown, or who the target was; and where

⁴³⁸ See *infra* notes 441–53 and accompanying text.

⁴³⁹ See *id.*

⁴⁴⁰ See *id.*

⁴⁴¹ *NLRB v. Perfect Circle Co.*, 162 F.2d 566, 572 (7th Cir. 1947).

⁴⁴² *Id.* at 568–69.

⁴⁴³ *Id.* at 572.

⁴⁴⁴ *Id.* at 568, 572–74.

no real damage or injury was inflicted.⁴⁴⁵ In the court's view, *Fansteel* precluded the Board's attempt to consider such subtleties.⁴⁴⁶ In similar fashion, the Second Circuit overturned a Board attempt to protect the right of striking doctors to inform their employer's potential patient-customers of their view of the quality of the hospital's services.⁴⁴⁷ Other courts have cited *Fansteel* and *Southern Steamship* when rejecting the Board's attempt to reinstate workers where the employee (a driver and union organizer) was discharged in clear violation of the statute but also could not qualify for company insurance coverage;⁴⁴⁸ where the Board invoked the condonation doctrine to reinstate workers fired for participating in a strike calculated to cause damage to the employer's plant;⁴⁴⁹ where the Board cited provocation to reinstate strikers who had deterred a crossover by brandishing a rock and briefly blocked access to the employer's plant;⁴⁵⁰ where the Board, after placing such conduct in the context of typical picket-line dynamics, ordered the reinstatement of strikers who used "unseemly language" and assaulted a strikebreaker in a rather trivial fashion;⁴⁵¹ where the Board ordered the reinstatement, on grounds of condonation, of strikers who blocked access to the employer's business;⁴⁵² and where the Board ordered the reinstatement of strikers because the employer had rehired other strikers guilty of similar misconduct.⁴⁵³

To be sure, not all courts have second-guessed the Board in this manner, and some courts have even sided with the Board in recognizing some limits in the degree to which *Fansteel* and *Southern Steamship* govern misconduct cases.⁴⁵⁴ Nevertheless, an overall trend is clearly evident, whereby the courts have drawn on *Fansteel* and *Southern*

⁴⁴⁵ See *Schreiber Mfg., Inc. v. NLRB*, 725 F.2d 413, 415 (6th Cir. 1984).

⁴⁴⁶ *Id.* at 413-15.

⁴⁴⁷ *Montefiore Hosp. and Med. Ctr. v. NLRB*, 621 F.2d 510, 516-17 (2d Cir. 1980).

⁴⁴⁸ *Neb. Bulk Transp., Inc. v. NLRB*, 608 F.2d 311, 317 (8th Cir. 1979).

⁴⁴⁹ *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955).

⁴⁵⁰ *NLRB v. Trumbull Asphalt Co. of Del.*, 327 F.2d 841, 844-46 (8th Cir. 1964).

⁴⁵¹ *NLRB v. Longview Furniture Co.*, 206 F.2d 274, 275-76 (4th Cir. 1953).

⁴⁵² *NLRB v. Clearfield Cheese Co.*, 213 F.2d 70, 74-75 (3d Cir. 1954).

⁴⁵³ *Id.* at 70.

⁴⁵⁴ See, e.g., *Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 843 (8th Cir. 1979); *Donovan v. NLRB*, 520 F.2d 1316, 1323-24 (2d Cir. 1975). Needless to say, these cases have been regularly cited for the similar purpose of upholding the Board's refusal to reinstate strikers for misconduct. See, e.g., *Nat'l Conference of Firemen v. NLRB*, 145 F.3d 380, 384 (D.C. Cir. 1998); *Gen. Teamsters Local No. 162 v. NLRB*, 782 F.2d 839, 841 (9th Cir. 1986); *Rd. Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11, 18 n.6 (D.C. Cir. 1982).

Steamship, above all, to guard against any attempt of the Board to revert to a kind of realistic administration of labor law.

A similar legacy of the sit-down strikes for modern labor law and labor relations derives directly from *Southern Steamship*. The Supreme Court's decision in that case declared the Board's attempt to reinstate the striking seamen unlawful because the Board's construction of the labor law would have, in the court's view, impermissibly subordinated the federal mutiny law to the Wagner Act and to the Board's own construction of both statutes.⁴⁵⁵ But rather than offering some framework for reconciling this and related cases of conflict between the Board's authority under labor law and other federal policies, the Court opined instead that in such cases, the Board's authority under the labor law must yield.⁴⁵⁶

This rule has been used to place real limits on the Board's remedial powers. Most notable is the Supreme Court's 2002 decision in *Hoffman Plastic Compounds v. NLRB*, where the Court declared that the Board lacked the authority under any circumstances to order reinstatement or back pay remedies to the benefit of undocumented workers.⁴⁵⁷ Drawing explicitly on *Southern Steamship* (and more generally *Fansteel*), the Court reasoned that any other approach would necessarily undermine the enforcement of the immigration laws.⁴⁵⁸ *Hoffman Plastic* has been roundly criticized not only for placing undocumented workers outside the protections of the labor law, but also for undermining both the immigration and labor laws by giving employers more reason to hire undocumented workers because they cannot hold the employer to its obligations under the labor law.⁴⁵⁹ It is difficult to gauge the overall effect of *Southern Steamship* (and *Hoffman Plastic*) on how the Board administers the Act in other contexts, given that the decision, above all, instructs the Board to decline to assert its jurisdiction in the first place. Nevertheless, the issue has emerged in Board decisions, perhaps most notably in a 2006 decision in which it declined to reinstate twenty-three fish processors who had been fired for engaging in a strike aboard ship.⁴⁶⁰ To reach this conclusion, the Board majority declared the processors to be "seamen"

⁴⁵⁵ See *supra* Part III.A.2.

⁴⁵⁶ See *S. S. Co. v. NLRB (Southern Steamship)*, 316 U.S. 31, 48 (1938).

⁴⁵⁷ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 138 (2002).

⁴⁵⁸ *Id.* at 142-52.

⁴⁵⁹ 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, 4 & n.15 (2003).

⁴⁶⁰ See generally *Phoenix Processor Ltd. P'ship*, 348 N.L.R.B. 28 (2006).

within the meaning of *Southern Steamship*, depriving them of the right to strike by that decision, despite the fact that the processors had signed no shipping articles, had nothing to do with sailing the vessel, were at-will employees (who enjoyed none of the protections unique to seamen), and were never clearly ordered to return to work.⁴⁶¹

C. *An Opened Door to State and Local Regulation of Labor Relations*

Another important legacy of the sit-down strikes for modern labor law concerns preemption and state criminal prosecution. In the appeal of their contempt convictions, the Fansteel strikers argued before the Illinois Court of Appeals that their prosecution for criminal contempt was preempted by federal labor law; specifically, their claim was that the dispute, which led to the strike, the injunction, and the contempt proceedings, arose directly out of Fansteel's ongoing violation of the Wagner Act, as well as an apparent claim that because the Wagner Act vested exclusive jurisdiction of labor disputes with the Board, the Illinois court could not assert jurisdiction consistent with the Supremacy Clause of the U.S. Constitution.⁴⁶²

This contention raised serious questions, which the Illinois Court of Appeals could not simply dismiss. For although the Norris-LaGuardia Act left intact the power of state courts to issue injunctions in labor disputes, the extent of the Wagner Act's preemptive effect was not yet so clear. Moreover, unlike Norris-LaGuardia, which sought simply to limit federal judicial involvement in labor disputes, the Wagner Act undertook to regulate labor relations by the positive assertion of administrative jurisdiction; and the employer had indeed flouted such jurisdiction in the case at hand. Predictably the Illinois court rejected the argument, declaring, first, that Congress could not have contemplated such a preemptive effect and that Congress must have expected that states would retain "their police power to protect property rights or punish illegal acts committed in the course of labor disputes."⁴⁶³ Second, the court surmised that if Congress had given the Wagner Act such preemptive effect, doing so would have rendered the statute unconstitutional—presumably on federalism grounds.⁴⁶⁴

⁴⁶¹ *Id.* at 29–31.

⁴⁶² *Fansteel Metallurgical Corp. v. Lodge 66 of the Amalgamated Ass'n of Iron, Steel & Tin Workers*, 14 N.E.2d 991, 993–94 (Ill. App. Ct. 1938).

⁴⁶³ *Id.* at 994–95.

⁴⁶⁴ *Id.* at 994.

Significantly, the Board showed no interest at all in supporting SWOC's position, either before the Illinois courts or in the way the Board litigated its unfair labor practice case up to the Supreme Court. The Board's position in *Fansteel* and *Southern Steamship*, as well as in the testimony of its top personnel before the Smith Committee and other congressional investigations, was actually opposed to preemption.⁴⁶⁵ In each of these contexts, the Board argued very specifically that its claim of authority to order reinstatement in cases of sit-down strikes or other occasions of violence was actually all the more legitimate—and all the more trustworthy as unthreatening to order and property—in light of what it assumed to be the unfettered prerogative of local, state, and federal officials to prosecute strikers for criminal acts notwithstanding the Wagner Act.⁴⁶⁶ Perhaps the most explicit—and prescient—example of this position can be found in the Board's 1938 decision in *Electric Boat Company*, where the Board justified the reinstatement of sit-down strikers on the ground that it considered "local authorities" the proper arbiters of the "seriousness" of the underlying conduct; if local authorities refused to take the misconduct seriously enough to warrant arrest or prosecution, then, the Board concluded, there could be no reason for it to deny reinstatement.⁴⁶⁷ Congressional opponents of the Taft-Hartley amendments would apply a similar kind of reasoning to reinstatement law and attempts to statutorily outlaw sit-down strikes.⁴⁶⁸

This accommodating attitude to the enforcement of state criminal law in the context of labor disputes cleared the way for this practice to emerge as a major exception to the broader principle that such intrusions into federal jurisdiction are unconstitutional. The first clear articulation of this notion would come in the 1942 Supreme Court decision *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*.⁴⁶⁹ The case actually did not involve the criminal law, but rather the enforcement of state unfair labor practice provisions against a local union for a variety of alleged actions, including mass picketing, threats to crossovers, and damage to the em-

⁴⁶⁵ See *Hearings Before the S. Comm. on Labor and Public Welfare*, 80th Cong. 3108-09 (1947); H.R. REP. NO. 80-245, at 82-83 (1937), reprinted in 1 NLRB, *supra* note 394, at 355, 373-74; Brief for the NLRB at 55-56, *Fansteel Metallurgical Corp. v. NLRB*, 306 U.S. 240 (1939) (No. 436); Brief for the NLRB at 58, *S. S. Co. v. NLRB (Southern Steamship)*, 316 U.S. 31 (1942) (No. 320).

⁴⁶⁶ See sources cited *supra* note 465.

⁴⁶⁷ *In re Elec. Boat Co.*, 7 N.L.R.B. 572, 593 (1938).

⁴⁶⁸ See, e.g., Byron B. Harlan, *Commentary*, 16 CONG. DIG. 156, 156-57 (1937).

⁴⁶⁹ 315 U.S. 740 (1942).

ployer's property.⁴⁷⁰ While the parties to the labor dispute were clearly within the jurisdictional reach of the Wagner Act, the Court saw no manifest conflict between federal and state jurisdiction.⁴⁷¹ Moreover, the Court cited a passage from a Senate Committee Report which denied that the Wagner Act would function as an assertion of police power in its own right; the report noted further that existing judicial and law enforcement institutions, including local police, were adequate to deal with "fraud, violence or threats of violence."⁴⁷² Of course such language is open to different interpretations, including being read to say merely that Congress wished to underscore the limited kind of power the Wagner Act would give the Board in labor disputes. For the Court, though, the passage expressed a more convenient point: that Congress meant to leave to state and local governments considerable authority to deal with labor disputes, particularly where the jurisdiction "was exercising its historical powers over such traditional local matters as public safety and order and the use of streets and highways."⁴⁷³

This argument, which directly informed the Court's decision to uphold Wisconsin's assertion of jurisdiction, seemed to legitimize the state's role in the *Fansteel* strike and other sit-down strikes where the police evacuated, or tried to evacuate, the strikers. Not coincidentally, the *Fansteel* decision itself played a role in the litigation of *Allen-Bradley Local 1111*, as the Supreme Court briefs of both the Wisconsin Employment Relations Board and the Allen-Bradley Company argued that just as *Fansteel* limited the labor rights of strikers engaged in illegal conduct under the federal labor law, it also legitimized a similar determination by a state labor agency.⁴⁷⁴ Indeed, with some cogency the company's brief pointed out that if a state could arrest and prosecute strikers, such as occurred in *Fansteel*, then it should also be able to subject strikers to the less severe sanctions imposed by its labor board.⁴⁷⁵

In the decade or so after *Allen-Bradley Local No. 1111*, the Court decided a series of cases in which it expanded the prerogative of state

⁴⁷⁰ *Id.* at 742–44.

⁴⁷¹ *Id.* at 748–49.

⁴⁷² *Id.* at 748 n.7; S. REP. NO. 74-573, at 16 (1935), reprinted in 2 NLRB, *supra* note 394, at 2300, 2315–16.

⁴⁷³ *Allen-Bradley Local No. 1111*, 315 U.S. at 749.

⁴⁷⁴ Brief of Respondent Allen-Bradley Co. at 38–40, *Allen-Bradley Local*, 315 U.S. 740 (No. 252); Brief of Respondent Wisconsin Employment Relations Board at 14, 107–08, *Allen-Bradley Local*, 315 U.S. 740 (No. 252).

⁴⁷⁵ Brief of Respondent Allen-Bradley Company, *supra* note 474, at 38–39.

intervention in labor disputes to the point that states were permitted even to enforce their own unfair labor practice provisions in cases of picket-line violence.⁴⁷⁶ Unsurprisingly, both *Fansteel* and *Southern Steamship* figured prominently in *UAW, Local 232 v. Wisconsin Employment Relations Board*,⁴⁷⁷ which in many ways was the most dramatic example from this line of cases. There the Court cited its sit-down strike decisions for the proposition that federal law could not preempt Wisconsin's regulation of intermittent, arbitrary strikes because, among other reasons, the Board could not lawfully regulate such strikes.⁴⁷⁸ In 1976, in a move that signaled a more skeptical view of particularized forms of state regulation of aspects of labor disputes already governed by the federal law, the Court overruled this decision.⁴⁷⁹

Nevertheless, since *Allen-Bradley Local No. 1111*, preemption law has also evolved along a different axis, which has opened even greater opportunities for state and local governments to define the right to strike. The Supreme Court has confirmed the idea that *Allen-Bradley Local No. 1111* gives state and local governments broad license to enforce their basic criminal laws in the context of labor disputes, an idea perhaps most decisively articulated in one of the Court's more important decision on labor preemption, *San Diego Building and Trades Council v. Garmon*.⁴⁸⁰ In *Garmon*, which established the basic framework for analyzing labor preemption questions, the Court reiterated the notion seen in *Allen-Bradley Local No. 1111* that "where the regulated conduct touch[es] conduct so deeply rooted in local feeling and responsibility," preemption could never be inferred;⁴⁸¹ and the Court likewise affirmed that states have essentially unfettered au-

⁴⁷⁶ *Allen-Bradley Local No. 1111* suggested that states could regulate labor relations by adopting their own labor codes and accompanying administrative structures, so long as doing so did not excessively impinge on the federal regime. Several times in the 1940s and 1950s, the Court considered how far the states could go in this regard. For example, in 1956 the Court upheld the authority of the Wisconsin board to enjoin violent labor protest, notwithstanding that such conduct was clearly subject to section 8(b)(1)(A). The Court reasoned that Wisconsin's authority to enjoin such conduct was merely a correlate of its "unquestioned" interest in "preventing violence and property damage" by means of its criminal laws. *UAW v. Wis. Employment Relations Bd.*, 351 U.S. 266, 274-75 (1956).

⁴⁷⁷ 336 U.S. 245 (1949).

⁴⁷⁸ *Id.* at 256-57 (1949).

⁴⁷⁹ *Lodge 76, Int'l Ass'n of Mach. & Aerospace Workers v. Wis. Employment Relations Bd.*, 427 U.S. 132, 154 (1976).

⁴⁸⁰ 359 U.S. 236 (1959).

⁴⁸¹ *Id.* at 244.

thority to “act[] through laws of broad general application.”⁴⁸² *Garmon* presented those permissible assertions of state authority as limited exceptions to a broader rule preempting the enforcement of state laws, even if general in nature, that impinge on the statute’s scheme for defining and enforcing basic labor rights.⁴⁸³ This approach has repeatedly confirmed the authority of state and local governments to enforce their laws precisely as they had in *Fansteel*. Significantly, the Court has approved of such jurisdiction even where the conduct in question constitutes an unfair labor practice under the federal labor law—and would seem to be preempted according to the conventional analysis laid out in *Garmon*—provided only that such conduct involves “mass picketing, violence, and overt threats of violence.”⁴⁸⁴ Elsewhere, the Court has allowed states to prosecute for trespass strikers engaged in peaceful, orderly picketing, even where labor law arguably both protected and prohibited the picketing—and again would seem preempted by the usual application of *Garmon*.⁴⁸⁵

These cases actually only begin to suggest how commonplace the arrest and prosecution of strikers has been since 1937. No comprehensive accounting of such events has ever been conducted. But a review of newspaper records and other published accounts confirms—even in recent times—the arrest of thousands of workers on charges of assault, trespass, blocking public thoroughfares, and so forth.⁴⁸⁶ Often this has involved mass arrests, sometimes of hundreds

⁴⁸² *Id.*

⁴⁸³ *Id.* at 243–46.

⁴⁸⁴ *UAW v. Wis. Employment Relations Bd.*, 351 U.S. 266, 274 (1956).

⁴⁸⁵ *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 198 (1978).

⁴⁸⁶ For recent examples of arrest for assault and similar charges, see Associated Press, *RMI Titanium, Striking Workers Reach Deal on Wages, Pensions*, AKRON BEACON J., Apr. 10, 1999, at D8; Peter Y. Hong, *Jesse Jackson Leads Striking Janitors’ Protest*, L.A. TIMES, Apr. 7, 2000, at 1; Christopher Keating, *Two Arrested Pratt Strikers Released With Warning*, HARTFORD COURANT, Dec. 5, 2001, at B3; Michelle L. Klampe, *Union OKs Contract at Auburn Foundry*, FORT WAYNE SENTINEL, Nov. 22, 1999, at 1A; Terry Prestin, *Consumers Feel Service Delays from Strike at Bell Atlantic*, N.Y. TIMES, Aug. 11, 1998, at B1; Kristin Stefanova, *End of Strike at Verizon Not at Hand; Workers Seek Temporary Jobs*, WASH. TIMES, Aug. 10, 2000, at B8; Ian Swanson, *Worker Who Crossed Picket Line Tells of Retribution*, GRAND FORKS HERALD, June 5, 1999, at 2; Candus Thompson, *Anger Builds Among Brick Workers*, BALT. SUN, Aug. 17, 1999, at 1A. For examples involving blocking streets and similar charges, see Associated Press, *Casino Striker Injured at Picket Line*, BUCKS COUNTY COURIER TIMES, Oct. 14, 2004, at 4C; Steven Greenhouse, *Deal Ends Strike by Fairfield County Janitors*, N.Y. TIMES, Nov. 16, 2000, at B10; *Protesters Charged After Blocking Street*, PROVIDENCE J. BULL., Dec. 2, 2005, at B01; David Reyes, *15 Arrested During Rally for Supermarket Strikers*, L.A. TIMES, Jan. 18, 2004, at 6; Madelaine Vitale, *Local 54 to Plead Guilty in Atlantic City Sit-In*, PRESS ATLANTIC CITY, March 8,

of workers at once. In the early years of the Wagner Act, such arrests were commonplace.⁴⁸⁷ Notably, though, mass arrests in labor disputes continue even in recent times, as was the case in the Hormel meat-packers strike in the mid-1980s,⁴⁸⁸ the Pittston Coal strike of 1989 and 1990,⁴⁸⁹ the *New York Newsday* strike of 1990 and 1991,⁴⁹⁰ and the Detroit newspaper strike in the mid-and late 1990s.⁴⁹¹ The Pittston strike alone resulted in as many as 4000 arrests of union members and their supporters.⁴⁹²

Where not arrested and prosecuted in conventional fashion, strikers and their allies have faced criminal charges in the fashion of the Fansteel strikers, such as charges of contempt of state court injunctions. While the Norris-LaGuardia Act always applied only to the federal courts, in the 1930s many states adopted so-called "Little Norris-LaGuardia Acts," which have limited their courts' equitable jurisdiction over labor disputes.⁴⁹³ Nevertheless, even these statutes never limited the power of courts to enjoin strikes that are deemed violent, destructive, or otherwise criminal in nature, or that feature mass picketing; further, state courts have tended to construe their license to issue injunctions under such circumstances quite broadly.⁴⁹⁴ As

2005, at A1. For an example of trespass charges, see Angela Coulombis, *Display of Solidarity for Striking Wawa Workers*, PHILA. INQUIRER, Oct. 11, 1999, at B01;.

⁴⁸⁷ Such mass arrests were commonplace in the early years of the Wagner Act. An apt example already mentioned is the 1946 Allis-Chalmers strike. See sources cited *supra* notes 357-58. A strike against Columbia Pictures that same year also resulted in mass arrests. See *700 Film Strike Pickets Arrested*, *supra* note 358; *219 Arrested in Columbia Studio Strike*, L.A. TIMES, Oct. 15, 1946, at 1. Hundreds of these protesters were eventually put on trial. See *Studio Mass Trial Underway*, L.A. TIMES, Dec. 17, 1943, at 1.

⁴⁸⁸ See Conrad deFiebre, *Hormel Protesters Arrested After Blockade*, MINNEAPOLIS STAR TRIB., Mar. 21, 1986, at 1A (reporting twenty-two jailed); David Hage, *Police, Hormel Protesters Clash*, MINNEAPOLIS STAR TRIB., Apr. 12, 1986, at 1A.

⁴⁸⁹ See Associated Press, *Pickets Arrested for Blocking Pittston Mine*, LEXINGTON HERALD-LEADER, Oct. 26, 1989, at A8; Kenneth C. Crowe, *Coal Strike's New Arrests*, NEWSDAY, Aug. 24, 1989, at 47; Bill McKelway, *Judge Declines to Say What Will Resolve Fines*, RICHMOND TIMES DISPATCH, Feb. 14, 1990, at B1; Ron Urban, *Coal Strike Resists Settlement*, CHARLOTTE OBSERVER, July 15, 1989, at 1A.

⁴⁹⁰ See David Gonzalez & James C. McKinley, Jr., *Violence and the News Strike: Anger, Blame and Distrust*, N.Y. TIMES, Mar. 2, 1991, at 1.

⁴⁹¹ See James Bennet, *After 7 Weeks Detroit Newspaper Strike Takes a Violent Turn*, N.Y. TIMES, Sept. 6, 1995, at A21; *65 Arrested in Detroit Strike*, GRAND RAPIDS PRESS, Mar. 29, 1991, at C7.

⁴⁹² MAIER B. FOX, UNITED WE STAND: THE UNITED MINE WORKERS OF AMERICA, 1890-1990, at 530 (1990).

⁴⁹³ Note, *Current Legislative and Judicial Restrictions on State Labor Injunction Acts*, 53 YALE L.J. 553, 553-54 (1944).

⁴⁹⁴ Benjamin Aaron, *Labor Injunctions in the State Courts—Part I: A Survey*, 50 VA. L. REV. 951, 977-78 (1964); Benjamin Aaron, *Labor Injunctions in the State Courts—Part*

with traditional criminal jurisdiction, the courts have consistently found that the federal labor statute does not typically preempt the assertion of such jurisdiction.⁴⁹⁵

These rules have given courts broad license to enjoin strikes, including the ability to prevent strikers from deterring the use of replacements and crossovers by means of violence, mass picketing, or other conduct that might deter replacements and crossovers.⁴⁹⁶ Strikers who defy these injunctions expose themselves to both criminal and civil contempt sanctions.⁴⁹⁷

However it occurs, the effects of bringing criminal sanctions to bear in labor disputes go far beyond the punishment of individual offenders. Arrests, even if they do not result in serious fines or jail time, have disruptive effects that can undermine a union's entire protest campaign, particularly when large numbers of strikers are arrested, when arrests focus on union leaders, or when arrests at an especially critical stage. Moreover, the enforcement of the criminal law inevitably has a deterrent effect on other unionists who recognize the potentially enormous personal costs of militant protest, especially when those costs include a strong probability of unemployment.

II: A Critique, 50 VA. L. REV. 1147, 1147 (1964); James B. Atleson, *The Legal Community and the Transformation of Disputes: The Settlement of Injunction Actions*, 23 LAW & SOC'Y REV. 41, 41-42 (1989); Eileen Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction*, 11 HOFSTRA LAB. & EMP. L.J. 97, 113-40 (1993).

⁴⁹⁵ See *United Auto., Aircraft & Agric. Implement Workers v. Wis. Empl. Rel. Bd.*, 351 U.S. 266 (1956).

⁴⁹⁶ *United Mine Workers, Local 1972 v. Decker Coal Co.*, 774 P.2d 1274 (Wyo. 1989); *Ormet Aluminum Mill Prods. Corp. v. United Steelworkers*, No. 05-MO-1, 2006 WL 2045811 (Ohio Ct. App. July 20, 2006); *Smitty's Super Markets, Inc. v. Retail Store Employees Local 322*, 637 S.W.2d 148, 156-57 (Mo. Ct. App. 1982); *Gen. Elec. Co. v. Peterson*, 61 N.Y.S.2d 813 (N.Y. Sup. Ct. 1946); Greg Bozell, *Locked Out in Illinois: "How Can They Do That to a Community?"*, THE PROGRESSIVE, Dec. 1, 2005, at 27; *Judge Grants Injunction Limiting Number of Pickets*, CINCINNATI POST, Oct. 25, 2006, at C10; David Robb, *Court Guards ABC News Shoots*, HOLLYWOOD REP., Nov. 19, 1998, at 1.

⁴⁹⁷ See, e.g., *Midland Steel Prods. Co. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers, Local 486*, 573 N.E.2d 98 (Ohio 1991) (sentencing strikers to thirty days plus fines for criminal contempt); *Kaiser Aluminium & Chem. Corp. v. United Steelworkers*, 785 So. 2d 238 (La. Ct. App. 2001) (sentencing union members to forty-eight hours for criminal contempt); *Mosler, Inc. v. United Auto., Aerospace & Agric. Implement Workers, Local 1862*, 633 N.E.2d 1193 (Ohio Ct. App. 1993) (overturning union officer's sentence of five days in jail for assault in violation of injunction); *Nat'l Metalcrafters v. Local 449, United Automobile, Aerospace & Agric. Implement Workers*, 465 N.E.2d. 1001 (Ill. App. Ct. 1984) (sentencing union member to sixty days for criminal contempt); Ron Clayton, *Judge Fines Labor Union, Leader for Violence at Polk Picket Line*, KNOXVILLE NEWS SENTINEL, May 30, 1997, at A4 (local union president sentenced to 10 days and \$10,000 fine for picket-line violence in contempt; sentenced conditionally suspended).

The role of the sit-down strikes in facilitating this state of affairs might initially seem attenuated. Neither *Fansteel* nor *Southern Steamship* established any direct precedent authorizing the assertion of state and local criminal justice authority in labor disputes. Instead, these cases (and the Board) took for granted the legitimacy of such practice. One does not have to believe that state and local governments should *never* be involved in labor disputes to see that such unfettered involvement exacts adverse consequences on labor rights. In some ways, the Board could not have conceived a better occasion to make this argument than in *Fansteel*. It could have emphasized before the courts how seriously the local police and the Lake County court had actually aggravated the dispute by their involvement and further marginalized the Board itself from its effort to administer the statute, and it could have demanded, on that ground, that the police and local courts be required to abstain until the Board had done its work under the Act. This is, in fact, exactly the argument that the union made in its unsuccessful attempt to appeal the strikers' contempt convictions to the Supreme Court.⁴⁹⁸ Of course, this argument probably would not have prevailed, given the ultimate disposition of the courts in these cases. Had the Board pressed the argument, however, it might have provoked a political debate about the proper role of the police and courts in post-Wagner Act labor disputes. More critically, the Board might thereby have legitimized the further litigation of an important question: how can the authority of local police and courts be reconciled with the basic labor rights protected by the statute? The Board could have potentially situated itself as a legitimate arbiter of this question.

As it was, the Board took a very different course; it tried to bolster its own authority by conceding the authority of local and state governments and then attempting to situate itself as an adjunct to such authority. In so doing, it not only took for granted the unfettered legitimacy of police and court involvement in labor disputes, but it also conceded to those who opposed the Board's attempt to establish a robust system of labor rights as a backhanded means of challenging this effort. What has happened since is that, as the Board's authority and legitimacy in labor disputes have declined, the overall power and prestige of police and other law enforcement institutions (if not also courts) have increased. It is in this context that the police and courts have reemerged as virtually unquestioned arbiters of labor

⁴⁹⁸ See *Fansteel Metallurgical Corp. v. Lodge 66 of the Amalgamated Ass'n of Iron, Steel & Tin Workers*, 14 N.E.2d 991, 993-94 (Ill. App. Ct. 1938), *cert. denied*, 306 U.S. 642 (1939).

rights in the context of strikes, entitled to bring their authority to bear ahead of the Board itself.

V. CONCLUSION: CHARTING THE BOUNDARIES OF LIBERAL LABOR LAW

More than seventy years after the sit-down strikes helped inaugurate a functional system of labor rights, their legacy consists of a reactionary program that casts militant forms of labor protest outside the domain of protected labor conduct and confines the right to strike to a narrow range of utterly passive tactics. Of course, this program has not been completely successful; sit-down strikes continued to occur for years after Taft-Hartley.⁴⁹⁹ Even more common, as the preceding section suggests, have been the other forms of protest prohibited in the wake of the sit-down strikes, including quickie sit-downs, mass picketing, countless acts of misconduct, and, occasionally, even organized strike violence.⁵⁰⁰ But these are definitely exceptions. In recent years, sit-down strikes have been so uncommon that the recent occurrence of a very modest sit-down at a small plant in Chicago provoked surprise and befuddlement in the national media.⁵⁰¹ Even lesser forms of militant protest, like mass picketing, have become relatively uncommon in the face of possible job loss and criminal prosecution.

For decades after the changes framed by conservative reaction to the sit-down strikes were fully realized in the Taft-Hartley amendments, the amendments had little obvious effect on labor relations. Union membership continued to expand towards a high (measured in percentage of workers) not reached until the mid-1950s. But appearances are often deceiving, as this anti-militancy program has actually had important and lasting consequences—in two interrelated ways. First, there is good reason to believe that this program helped alter the character of the labor movement over the long term. Most important in this regard is the eventual collapse of the CIO as an independent labor federation. Although many things influenced its

⁴⁹⁹ *American Safety Razor Seeks Injunction to End Sit-Down Strike*, WALL ST. J. Oct. 5, 1954, at 3 (reporting that 650 workers were directly involved); *N.Y. Shipbuilding Shuts Camden Yard, Charges Union Seized Plant*, WALL ST. J., Nov. 12, 1954, at 2; *Permutit Co. Hit by Sit-Down Strike of 100 Employees*, WALL ST. J., Jan. 6, 1954, at 1; *Harvester to Furlough About 9,000 at Three Plants by Monday*, WALL ST. J., Aug. 6, 1952, at 2 (reporting that over 100 workers were involved). All of the news stories reported sit-down strikes of at least twenty-four hours.

⁵⁰⁰ See, e.g., Zetka, *supra* note 262, at 215 (tallying “more than 400 wildcat strikes” in automobile production between 1946 and 1963).

⁵⁰¹ See, e.g., Michael Luo & Karen Ann Cullotta, *Even Workers Surprised by Success of Factory Sit-In*, N.Y. TIMES, Dec. 12, 2008, at A9.

eventual re-merger with the AFL, one factor undoubtedly was the CIO's inability to bring its greater acumen with militant tactics to bear in jurisdictional and organizational disputes. The prohibition of labor militancy probably also helped change the character of the American labor movement on a more fundamental level, simply by discouraging militancy. This judgment fits with critical literature that identifies the laws' progressive narrowing of the right to strike as a mechanism that has compromised labor's ability to maintain organizing momentum, build solidarity, and challenge employer hegemony within the workplace; instead, this literature argues, labor is left more and more to pursue narrow economic gains.⁵⁰² The legacy of the sit-down strike certainly accords with this thesis, in that the legal response to the strikes not only prohibited direct challenges to employer control evident in the sit-down strikes themselves, but facilitated a very literal narrowing of the domain of strike activity in a fashion that has all but prohibited the kind of mass action that unions need if they are to build genuine solidarity. Likewise, by grounding the prohibition of quickie sit-downs, the response to sit-down strikes deprived unions of lawful access to the ideal weapon for challenging employer control within the workplace.

A second and more immediate consequence of the sit-down strikes' anti-strike legacy is that it has deprived organized labor of tactics that are desperately needed to maintain labor's relevance in the twenty-first century. A resumption of open warfare between workers and management superseded the long *détente* between labor and capital inaugurated by the 1949 "Treaty of Detroit." It is, of course, a war of unequals, as employers use not only their inherent advantages as employers, but also their rights under the law to continue operating with crossovers and replacements. And many employers further bolster these advantages by routinely violating the labor law, harassing and discharging workers, and refusing to bargain. In other words, the landscape of industrial relations today resembles in many ways the situation that gave rise to the sit-down strikes in the first place. The difference now, of course, is that sit-down strikes, mass picketing, and other militant tactics that countered these practices in the 1930s are today thoroughly prohibited by the law. Moreover, now, unlike in the New Deal era, this policy appears not as a one-

⁵⁰² In addition to the work by Klare and Pope, cited throughout this Article, see Rick Hurd, *New Deal Labor Policy and the Containment of the Radical Union Activity*, 8 REV. RADICAL POL. ECON. 32 (1976); Holly J. McCammon, *Legal Limits on Labor Militancy: U.S. Labor Law and the Right to Strike Since the New Deal*, 37 SOC. PROBS. 206 (1990).

sided confirmation of the law's fundamental hostility to labor rights, but rather as a reasonable attempt to circumscribe the boundaries of labor protest.

In this light, the use of the sit-down strikes to frame a narrowing of the right to strike also reveals something unique and important about the state of labor rights in capitalist society. For, more than any other practice of labor militancy or any other area of labor reform, the sit-down strikes forced the courts, the Congress, and the Board to confront squarely the limits of labor rights. The reason for this concerns the right to strike, which the labor law not only purports to guarantee but situates as a union's primary weapon. In modern labor law the right to strike is the mainspring of the entire regime of labor rights, including the right to provoke meaningful collective bargaining.⁵⁰³ At the same time, however, the labor law also defers to the traditional property and contract rights of employers, including the right of employers to continue business operations during a strike with crossovers and replacement workers (who, in the case of economic strikes, may permanently displace strikers from their jobs).⁵⁰⁴ This reflects a rejection of the corporatist approach to labor relations common in varying degrees in most other countries with functional systems of labor law, by which basic labor rights are buttressed with a variety of legal limits on employers' traditional prerogatives to continue operation, bargain to impasse, withdraw recognition, and so forth.⁵⁰⁵

This fundamentally liberal approach to labor rights contradictorily venerates the right to strike while offering striking workers few means of realizing the right beyond the one epitomized in the sit-down strikes. For without the benefit of corporatist protections, labor rights, including the right to strike, are simply and quite lawfully negated by traditional employer prerogatives. An employer can break most strikes merely by exercising its right to resume operations, and a union essentially has no viable means of countering this. Workers seldom possess skills so rare that qualified replacement workers cannot be found in numbers sufficient at least to demoralize the strikers.

⁵⁰³ For a statement of this principle by the Supreme Court, see *NLRB v. Int'l Union of Marine, Shipbuilding and Shiprepairing Workers of America*, 361 U.S. 477, 483–85 (1960).

⁵⁰⁴ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938); JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 21–24 (1983).

⁵⁰⁵ For a concise description of the differences between these models, see Tamara Lothian, *The Political Consequences of Labor Regimes: The Contractual and Corporatist Modes Compared*, 7 *CARDOZO L. REV.* 1001, 1005–11 (1986). On the defining features of the American system, as articulated in the ideology of liberalism, see PETRO, *supra* note 9.

Equally improbable is that a union might rely on moral suasion and political education to deter crossovers and replacement workers. Such appeals, which already deviate from a mass-produced culture (and a semi-official ideology) that disparages acts of solidarity and sacrifice, and which must contend with employers' formidable advantages in propagandizing, can seldom overcome the more practical realities of genuine need among a hard-pressed working class—or, for that matter, the felt needs of workers in a consumer society.

The one thing that workers can do is flout the law in a bid to rewrite the rules of industrial relations and challenge the factors that make solidarity so deviant in the first place. In a full appreciation of this (and the jurisprudential forms that it often embraced), Pope's most recent work on the sit-down strikes aptly describes the 1930s strikes as exercises in "worker lawmaking."⁵⁰⁶ One can go a step further and discern the same project in other forms of strike-related misconduct. The worker who menaces a crossover, blocks a road, or hurls a brick at a carload of replacement workers is, in a very real sense, attempting to realize in full a right to strike that is otherwise only partially (fraudulently?) provided by the law itself. But of course such conduct is far more likely nowadays to land a striker in jail or cause her to lose her job than change the balance of power in a labor dispute.

Short of overthrowing capitalism and its legal order, the only apparent solution to this dilemma is to reform the labor law itself. The labor law might be redrafted such that it more thoroughly limits employer prerogatives in the arena of labor disputes. This has already been attempted, most notably by efforts to repeal the replacement worker doctrine⁵⁰⁷ and, more recently, by attempts to further constrain how employers respond to organizing campaigns and how they conduct themselves in collective bargaining.⁵⁰⁸ A more promising approach would involve revisiting *Fansteel* and *Southern Steamship* and their progeny. The legal controversies surrounding the sit-down strikes, it will be recalled, were never really about anything so bold as legalizing the right to sit-down strikes, or for that matter picket-line violence, strike-related crimes, or conduct of this kind, but rather

⁵⁰⁶ Pope, *supra* note 3.

⁵⁰⁷ The most recent efforts of real consequence occurred in 1992 and 1994 with attempts to pass various iterations of the Workplace Fairness Act. S. 55, 102nd Cong. (1992); H.R. 5, 103rd Cong. (1993); Striker Replacement Act, S. 55, 103rd Cong. (1994).

⁵⁰⁸ The lead bill, which is still pending before Congress at this writing, is the Employee Free Choice Act. S. 560, 111th Cong. (2009); H.R. 1409, 111th Cong. (2009).

centered on the limits of the Board's authority to administer the statute in a realistic and balanced way that successfully navigated the tumultuous realities of labor disputes. If the Board were allowed the authority it sought in those cases, perhaps it could achieve some meaningful balance of labor rights against traditional property rights, order, and authority.

These reforms are quite unlikely to come about and not certain to benefit labor even if they did. Each contemplates a retreat from the law's traditional, liberal approach to labor relations that is fraught with risks for workers and unions. Corporatist labor laws inevitably pair the aggressive protection of labor rights with equally aggressive limits on union militancy and political opposition. And it is almost certain in this sense that if such reforms were adopted, they would surely not rehabilitate—or even tolerate—the kind of strident militancy embodied in the sit-down strikes. Aside from having to overcome the obvious class allegiance of the modern state, sanctioning this kind of conduct would not only entail an unthinkable confession of the violence that inheres, un-remedied by law, in modern labor relations, but also represents a breach of the social compact that is fundamental to the corporatist concept.

I conclude this Article with a brief reflection on the fundamental tragedy of this whole affair. The sit-down strikes quite literally made possible the rise of industrial unionism and the reign of an effective regime of labor law. They arguably secured the legal foundations of the modern administrative state. In these respects, they helped build a system of labor relations and labor law that indelibly altered the political economy and social fabric of post-war America. The strikes helped overcome the entrenched resistance of reactionary employers, judges, politicians, and rival unions. The irony and the tragedy, of course, is that these same anti-union elements quickly and deftly seized on the strikes to frame a powerful anti-union agenda. We have seen how they used the jurisprudence that arose around the strikes themselves to craft their program, and how they likewise converted the sit-down strikes into an enduring and eminently effective symbol of supposed excesses of organized labor, the NLRB, and ultimately the labor law itself. In all this there is both a shining affirmation of the strength that labor can wield through resistance and rebellion and an even more salient confirmation of labor's fundamental subjugation in modern, capitalist society.

