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# IF IT'S HARDLY WORTH DOING, IT'S HARDLY WORTH DOING RIGHT: HOW THE NLRA'S GOALS ARE DEFEATED THROUGH INADEQUATE REMEDIES

## I. INTRODUCTION

In 1935, the National Labor Relations Act ("NLRA" or "Act") was signed into law with the purpose of promoting industrial peace and tranquility between employees and employers.<sup>1</sup> It sought to encourage cooperative and collective bargaining and to deter employer and union unfair labor practices.<sup>2</sup> Unfortunately, these important goals cannot currently be realized due to the inadequate remedies provided by the Act. This Comment seeks to expose the inadequacy of the NLRA to fulfill its mandate, while recommending remedy enhancements to allow the promises of the NLRA to be fulfilled. Undoubtedly, strengthening the available remedies under the NLRA will better protect labor; more importantly, it will also improve adherence to the NLRA itself. While the appropriate degree of protection to be afforded workers is a debatable issue, with valid arguments advanced by both labor and management, whether the NLRA's protections should be adequate to fulfill that ultimate balance is not. Section II describes the original intentions and procedural mechanisms of the NLRA. Section III discusses commonly ordered remedies and how they have each failed to fully effectuate the NLRA's purposes. Section IV recommends enhanced remedies to alleviate the Act's shortcomings.

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1. See National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000); *NLRB v. Peter Paul, Inc.*, 467 F.2d 700, 702 (9th Cir. 1972).

2. See *Peter Paul*, 467 F.2d at 702.

## II. THE NLRA

### A. *Purposes of the NLRA*

The NLRA was enacted to govern most labor relations between employers and employees that affect interstate commerce.<sup>3</sup> Its “principal objectives” are to “promote peace and tranquility between labor and management.”<sup>4</sup>

The Act guarantees “employees” the right to “form, join, or assist labor organizations”; to bargain collectively with their employer; and to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>5</sup> The term “employee” is generally defined to include “any employee” and has been interpreted to include undocumented aliens employed within the United States.<sup>6</sup> It is an unfair labor practice to discriminate regarding any condition of employment based on an employee’s membership or support of any labor organization.<sup>7</sup> Of most importance to the individual worker, an employee may not be fired or otherwise punished for seeking to better his or her working conditions through concerted activities.<sup>8</sup>

### B. *The Methods Provided By the NLRA to Achieve its Purposes*

#### 1. Equalized Bargaining Power Through Collective Bargaining

The legislative history of the NLRA shows that Congress recognized that there is no true freedom to contract between “a single workman, with only his job between his family and ruin” and “a tremendous organization having thousands of workers.”<sup>9</sup> The Act sought to create that freedom of contract, to maintain indus-

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3. See 29 U.S.C. §§ 151–69 (2000). The NLRA does not govern airlines, railroads, agriculture, and government employees. *Id.* § 152(2), (3).

4. *Peter Paul*, 467 F.2d at 702; see also *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 271 (1965).

5. 29 U.S.C. § 157 (2000).

6. *Id.* § 152(3); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (noting that the NLRB “has consistently held that undocumented aliens are ‘employees’ within the meaning of § 2(3) of the Act”).

7. 29 U.S.C. § 158(a)(1), (a)(3) (2000).

8. See *id.* § 158(a)(4).

9. 78 CONG. REC. 3679 (1934).

trial peace, and to eliminate industrial strife by encouraging collective bargaining.<sup>10</sup> It was thought that a “free opportunity for negotiation with accredited representatives” would “promote industrial peace”<sup>11</sup> and be the “keystone of the federal scheme.”<sup>12</sup>

## 2. Procedural Mechanisms of the NLRA

The procedural mechanisms of the NLRA are invoked where an unfair labor practice is committed and reported within six months. First, an unfair labor practice charge is filed with the local National Labor Relations field office, which investigates the charge and determines whether the NLRA has been violated.<sup>13</sup> If the charge has reasonable merit the regional office will encourage a voluntary settlement between the parties or file a formal complaint against the employer or labor organization; otherwise, the regional director will dismiss the charges, subject to appeal.<sup>14</sup> These complaints are adjudicated before an administrative law judge and may be appealed to the five-member National Labor Relations Board (“NLRB” or “Board”).<sup>15</sup> A Board decision may then be appealed to any federal court of appeals having jurisdiction, and ultimately may even reach the Supreme Court of the United States.<sup>16</sup>

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10. See *Electromation Inc.*, 309 N.L.R.B. 990, 994 n.18 (1992).

11. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

12. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). In addition to collective bargaining, the NLRA strives to remove “recognized sources of industrial strife” such as employer discrimination as to wages, hours, and other working conditions. 29 U.S.C. § 151 (2000).

13. NATIONAL LABOR RELATIONS BOARD, *THE NATIONAL LABOR RELATIONS BOARD AND YOU: REPRESENTATION CASES*, available at <http://www.nlr.gov/nlr/legal/brochures> (last visited Mar. 29, 2004) [hereinafter NLRB, REPRESENTATION CASES]; NATIONAL LABOR RELATIONS BOARD, *THE NLRB: WHAT IT IS, WHAT IT DOES*, available at <http://www.nlr.gov/nlr/legal/brochures> (last visited Mar. 29, 2004) [hereinafter NLRB, WHAT IT IS].

14. See NLRB, REPRESENTATION CASES, *supra* note 13.

15. See NATIONAL LABOR RELATIONS BOARD, *THE NATIONAL LABOR RELATIONS BOARD AND YOU: UNFAIR LABOR PRACTICES*, available at <http://www.nlr.gov/nlr/legal/brochures> (last visited Mar. 29, 2004) [hereinafter NLRB, UNFAIR LABOR PRACTICES].

16. See *id.* Although highly relevant to individual workers and employment tranquility generally, the NLRB is only charged with interpreting and enforcing the NLRA and does not govern the Fair Labor Standards Act, the Public Contracts Act, the Service Contract Act, the Davis-Bacon Act, or the Safety Standards Act. See *id.*

### 3. Available Remedies Under the NLRA

"It remains the historic purpose of the Act to promote industrial peace by providing the *means* for protecting the rights of employers, employees, and unions in their relations with each other."<sup>17</sup> To remain flexible enough to respond to changing conditions, Congress granted the NLRB "considerable discretion to fashion remedies that would enable it to carry out its task."<sup>18</sup> Specifically, section 10(c) of the NLRA gives the NLRB the mandate "to devise remedies that effectuate the policies of the Act, subject only to limited judicial review."<sup>19</sup>

The remedies currently utilized are solely restorative. Access and notice remedies are frequently ordered where an employer has committed an unfair labor practice or hampered an employee's free choice in seeking representation.<sup>20</sup> "Access remedies" allow unions to communicate with employees free from employer reprisals, whereas "notice remedies" inform "employees of their statutory rights and the legal limits on the [e]mployer's conduct" while assuring them that "further violations will not occur."<sup>21</sup>

"Make whole" remedies such as backpay, reinstatement, and conditional reinstatement are also available where an employee has been discriminatorily discharged.<sup>22</sup> These remedies seek to ensure that "the victims of unfair labor practices" are made whole and that the violators are "required to restore the status quo."<sup>23</sup>

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17. Leonard R. Page, NLRB Remedies: Where are They Going?, Address Before the University of Richmond School of Law (Apr. 10, 2000), available at <http://www.nlr.gov/nlr/press/releases/r2388.asp> (last visited Mar. 29, 2004) (emphasis added) [hereinafter Page, NLRB Remedies].

18. *Id.*

19. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898–99 (1984); see National Labor Relations Act, 29 U.S.C. § 160(c) (2000).

20. See *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981).

21. *Id.* at 399–400.

22. See Page, NLRB Remedies, *supra* note 17.

23. *The National Labor Relations Board: Recent Trends and Their Implications, Hearing Before the Subcom. on Employer-Employee Relations of the House Comm. on Educ. and the Workforce*, 106th Cong. 56 (2000) (written statement of Leonard R. Page, General Counsel, National Labor Relations Board), microformed on CIS NO. H341-8 (Cong. Info. Serv.) [hereinafter Page, *Recent Trends*].

### III. THE NLRA'S INADEQUATE AND INEFFECTIVE REMEDIES

Despite the number of remedies available under the NLRA, they have collectively proven ineffective at creating industrial tranquility. Former General Counsel Leonard Page observed that while the NLRA is over sixty-five years old, there are "rather outrageous and pervasive violations on a regular basis"<sup>24</sup> and that "for a mature statute the growing incidence of discipline for union activity is disturbing."<sup>25</sup> Yet, where the Board or the appellate courts have sought to fill the remedial void, the Supreme Court has consistently held that they have "plainly exceeded [their] limited authority under the Act."<sup>26</sup>

Leonard Page explained that "the need to obtain effective remedies is clearly exemplified in the cases that involve [unfair labor practices] committed in response to an employee organizing campaign."<sup>27</sup> However, despite the availability of reinstatement, backpay, cease and desist orders, union access, and posted notice remedies to counter these unfair labor practices, they remain largely ineffective.<sup>28</sup>

While Mr. Page may be seen as controversial to some, Chief Justice William H. Rehnquist and the Supreme Court of the United States have also recognized that the remedies of the NLRA are wholly inadequate to effectuate the purposes of the Act, and have repeatedly invited Congress to cure this deficiency.<sup>29</sup> For example, in the 1984 case of *Sure-Tan, Inc. v. NLRB*,<sup>30</sup> the Court noted that "[a]ny perceived deficiencies in the NLRA's existing remedial arsenal can only be addressed by con-

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24. *Id.* at 57.

25. Page, *NLRB Remedies*, *supra* note 17.

26. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904-05 (1984).

27. Page, *Recent Trends*, *supra* note 23, at 59.

28. *See id.* at 56-59; *see also* Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U.L. REV. 687, 739 n.284 (1997) ("Reinstatement and back pay are woefully inadequate remedies for a wrongful discharge."); Charles J. Morris, *A Blueprint For Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 518 (1994) ("The National Labor Relations Act . . . is broken and needs fixing."); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-91 (1983) (criticizing monetary backpay as an inadequate remedy).

29. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002); *see Sure-Tan, Inc.*, 467 U.S. at 904.

30. 467 U.S. 883 (1984).

gressional action.”<sup>31</sup> In 2002, Chief Justice Rehnquist reaffirmed this commitment to judicial restraint, despite the glaring need for the NLRA’s reform, in *Hoffman Plastic Compounds, Inc. v. NLRB*.<sup>32</sup> Despite these incessant invitations to reform the Act, the remedies available under the NLRA have never been expanded by Congress.

### A. *Cease and Desist Remedies*

In *Hoffman Plastic Compounds*, Chief Justice Rehnquist explained that the NLRB’s “[l]ack of authority to award backpay does not mean that the employer gets off scot-free. The Board [t]here ha[d] already imposed other significant sanctions . . . .”<sup>33</sup> The first of the “significant sanctions” that the Chief Justice referred to was a “cease and desist” order.<sup>34</sup> Under this order, the remedy for violating the NLRA is an order from the NLRB directing that the same law not be broken a second time. Failure to comply with the Board’s order may result in the Board *asking* the Judiciary to enforce that order and again directing the employer to cease and desist from violating the NLRA a third time. If certiorari is granted, the Supreme Court of the United States may then issue what the Chief Justice has dubbed a “significant sanction[]”—a cease and desist order.<sup>35</sup> This is reminiscent of the unarmed police officer’s order to “stop or I will say stop again.”

### B. *Notice Remedies*

The second of the “significant sanctions” that Chief Justice Rehnquist referred to in *Hoffman Plastic Compounds* was an order demanding the employer to post, for sixty days, a written notice in the workplace detailing the violation and the employer’s pledge to never recommit the offense.<sup>36</sup> This is a routine remedy when an employer has intimidated employees or otherwise com-

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31. *See id.* at 904.

32. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 152. (stating that the conclusion of *Sure-Tan* “is even truer today”).

33. *Id.*

34. *Id.*

35. *Id.*

36. *See id.*

mitted an unfair labor practice<sup>37</sup> and is intended to make each employee "individually aware of his statutory rights and that his exercise of such rights will be respected."<sup>38</sup> Despite these noble intentions, notice orders have not "made victims whole, restored the status quo or prevented further unfair labor practice[s]."<sup>39</sup> What is inherently offensive about this remedy is that it acknowledges that an employee's rights have been violated, but then offers a solution so inconsequential to both the employer and the employee as to be insulting to the employee and merely inconvenient to the employer.<sup>40</sup> The entire notion that a "notice" is capable of making an aggrieved employee whole or deterring a willfully violative employer from committing future offenses is at best comical. Further, calling this remedy a "significant sanction" dilutes the promises of the NLRA by paying them only pacifying lip service.

Imagine if the Environmental Protection Agency relied upon notice remedies and cease and desist orders rather than hefty and intimidating fines. "Pardon me corporate polluter, please stop dumping toxins into our drinking water or we will require you to conspicuously post a notice detailing how you violated the Clean Water Act. And if you refuse we will order you to cease and desist polluting and may even ask an appellate court to enforce our order—eventually!" One is left to wonder if there would even be water left in the nation's rivers by the time a court's contempt orders could be imposed.

The NLRB is well aware that notice remedies are often "insufficient to dissipate the effects of . . . extensive and flagrant unfair labor practices."<sup>41</sup> Where "the mere posting of notices" fails to serve the purposes of the Act, notices are ordered read to the employees by the employers themselves.<sup>42</sup> While this practice is designed to remove the "lingering atmosphere of fear," it lacks the teeth to truly reassure the employee that the employer will not

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37. See generally THE DEVELOPING LABOR LAW 1633–94 (Charles J. Morris et al. eds, 2d ed. 1983) (discussing the general principles and applications of NLRB orders and remedies).

38. Three Sisters Sportswear Co., 312 N.L.R.B. 853, 880 (1993).

39. Page, *Recent Trends*, supra note 23, at 56–57.

40. But see John W. Teeter, Jr., *Fair Notice: Assuring Victims of Unfair Labor Practices that Their Rights Will Be Respected*, 63 UMKC L. REV. 1, 2 (1994) (arguing that "employers should always be required to read notices aloud to their workers as a standard remedy for violations of the Act").

41. Loray Corp., 184 N.L.R.B. 557, 558 (1970).

42. *Id.*



repeat the unfair labor practice.<sup>43</sup> Further, the order to read a notice is often negatively described by employers—it was as if the NLRB “slapped our hands just like we were naughty little children.”<sup>44</sup> Many courts have justified their refusal to enforce these orders, despite “massive and deliberate violations of the Act,”<sup>45</sup> explaining that a “public reading . . . would . . . be humiliating and degrading to the employer” and “inevitably poison the future relations between company and union and be a source of continuing resentment.”<sup>46</sup> While the arguments for and against mandatory notice readings both have merit, the fact that available remedies are so sparse as to require this debate is distressing.<sup>47</sup>

### C. Reinstatement Remedies

Another common remedial order where an employee has been discriminatorily discharged is reinstatement.<sup>48</sup> This is thought to “best effectuate[ ] the purposes and policies of the Act because it restores the employee to the circumstances that existed prior to the . . . unlawful action, or that would be in effect had there been no unlawful action.”<sup>49</sup> However, “court proceedings actually result in reinstatement in only a small number of exceptional cases.”<sup>50</sup> Additionally, while “over the last thirty years, discharges for union activity have tripled,” most employees who have suffered discrimination decline reinstatement.<sup>51</sup> This can partially be explained by lengthy proceedings<sup>52</sup> and the fact that “employers pay no price for deliberate delays and frivolous appeals.”<sup>53</sup> Because of

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43. See *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981) (citation omitted).

44. *Scott's, Inc.*, 159 N.L.R.B. 1795, 1797–98 (1966).

45. *Id.* at 1807.

46. *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 383 F.2d 230, 233–34 (D.C. Cir. 1967).

47. See generally Teeter, *supra* note 40 (discussing the debate over whether notice orders should be required to be read aloud by employers).

48. *Id.* at 1.

49. Page, *NLRB Remedies*, *supra* note 17.

50. Michael Kittner & Thomas C. Kohler, *Conditioning Expectations: The Protection of the Employment Bond in German and American Law*, 21 COMP. LAB. L. & POL'Y J. 263, 328 (2000).

51. Leonard Page, *New Directions for the Next National Labor Relations Board*, 2001 L. REV. M.S.U.-D.C.L. 1063, 1066 (2001).

52. Kittner & Kohler, *supra* note 50, at 328.

53. *Worker's Freedom of Association: Obstacles to Forming a Union: Hearing Before the Senate Comm. on Health, Educ., Labor, and Pensions*, 107th Cong. 41 (2002) (state-

the Board's tremendous caseload, the numerous levels of appellate review provided by the Act, and the frequency of tactical delays, the procedural mechanisms of the NLRA are simply inept at providing timely relief.<sup>54</sup> Further, an employee's desire to work for an employer who has already committed an unfair labor practice once and showed a willingness to fight the Board's ordered remedy, is understandably low. However, many occupations utilize specialized skill sets that do not easily transfer to other occupations or other employers—necessitating this specific remedy to effectuate the policies of the NLRA despite its overall lackluster effectiveness.

More troubling than the inability of a reinstatement order to make the employee whole is the fact that it is unavailable as a remedy to some workers despite their inclusion as "employees" under the NLRA's so-called protections. For example, in *Sure-Tan*,<sup>55</sup> a United States employer illegally employed Mexican nationals in two small leather processing firms.<sup>56</sup> These workers later elected a union as their bargaining representative.<sup>57</sup> Sure-Tan's president, John Surak, interrogated the employees who engaged in the union organizing campaign as to their immigration status and reported the foreign nationals to the Immigration and Naturalization Service ("INS").<sup>58</sup> Additionally, he filed objections to the election, challenging the employees' right to vote for a union based on their immigration status.<sup>59</sup> The workers were subsequently deported; however, when the NLRB investigated the election objections it discovered that Surak had known about the illegal status months before the election and had contacted the

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ment of Kenneth Roth, Executive Director, Human Rights Watch), *microformed on* CIS No. 5431-15 (Cong. Info. Serv.) [hereinafter Roth, *Worker's Freedom*].

54. For example, "[t]he delay associated with remands can be an additional incentive to appeal. Remands almost always occasion significant delay . . . . Measured conservatively, this delay amounts to an average of sixteen months at the agency level alone and exceeds four years in 10% of the cases." Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1012 (1990); see generally Ray Marshall, *The American Industrial Relations System in a Time of Change*, 48 U. PITT. L. REV. 829, 839 (1987) (noting that while the NLRA outlaws many delay tactics, the penalties are so weak that the law is often ignored).

55. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

56. *Id.* at 886.

57. *Id.*

58. *Id.* at 886-87.

59. *Id.* at 887.

INS “solely because the employees supported the Union,” in direct retaliation, and with clear anti-union animus.<sup>60</sup>

Although reinstatement was initially ordered, the Court held that “reinstatement would be proper only if the discharged employees were legally present and free to be employed in the United States when they presented themselves for reinstatement.”<sup>61</sup> The Court acknowledged that

[i]f undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.<sup>62</sup>

Despite their inclusion under the NLRA as “employees,” reinstatement remained unavailable to the affected employees in light of the workers’ unlawful status and the fact that they were no longer in the country.<sup>63</sup>

Although the Board’s cease and desist order was enforced by the Supreme Court, the order afforded little deterrence to the employer and no meaningful remedy to the workers. Further, this ruling rendered future undocumented workers particularly vulnerable to an employer’s unfair labor practices and illuminated how the removal of even a single available remedy renders the Act incapable of fulfilling its purpose.<sup>64</sup>

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60. *Id.* at 887–88. The employer’s action was in violation of section 8(a)(1) and (3) which make it an “unfair labor practice” for an employer to interfere with employees in the exercise of the rights regarding any condition of employment or to “discourage membership in any labor organization.” *Id.* at 888 n.1; see also 29 U.S.C. §§ 157, 158(a)(1), (a)(3) (2000).

61. *Sure-Tan*, 467 U.S. at 889.

62. *Id.* at 892.

63. *Id.* at 903.

64. Interestingly, in *Sure-Tan* the Court discussed whether enforcement of the NLRA is consistent with the policies of the Immigration and Nationality Act (“INA”) without including any similar discussion as to the effect on the NLRA. See *id.* at 892–94. In fact, the primary goals of the NLRA—industrial peace and stability—were never even mentioned by the Court in reaching a decision that so clearly affected the ability of the NLRA to fulfill its mandate. See *id.* at 892.

#### D. *Compensatory Backpay Remedies*

Routinely coupled with orders of reinstatement are backpay awards, and again, they are largely inconsequential despite being one of the most powerful remedies in the NLRA's arsenal.<sup>65</sup>

The major weakness of backpay awards as a remedy for unfair labor practices is that they require the aggrieved employee to mitigate the damages through the employee's earnings from other employment.<sup>66</sup> Because the vast majority of workers are not in a position to sustain years of litigation without finding other employment, they rationally seek the best paying jobs they can find. Any earnings from this new employment are deducted from the backpay award, leaving the employer to pay only the backpay less these interim earnings.<sup>67</sup> Where an employee finds comparable or better work there is little incentive to even report the unfair labor practice and no meaningful economic deterrent to the employer even if the employee does. Kenneth Roth, the Executive Director of Human Rights Watch, testified that "[l]abor law is so weak that companies often treat the minor penalties as a routine cost of doing business, not a deterrent against violations."<sup>68</sup>

This problem was exposed in *Hoffman Plastic Compounds*, discussed above, where the Court held that the NLRB may never order the remedy of backpay where the victim of an unfair labor practice is an undocumented worker.<sup>69</sup> There, in May 1988, an undocumented worker named Jose Castro gave false documentation to Hoffman Plastic Compounds, Inc. to illegally gain employment with its California factory.<sup>70</sup> Shortly thereafter, the United Rubber, Cork, Linoleum, and Plastic Workers of America ("AFL-CIO") began a union-organizing campaign.<sup>71</sup> A month later, in retaliation for their efforts in the organizing campaign, Castro and

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65. *See id.* at 902.

66. *See id.* at 901.

67. *See id.*

68. Roth, *Worker's Freedom*, *supra* note 53, at 41.

69. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002) (holding that "awarding backpay to illegal aliens runs counter to policies underlying [the Immigration Reform and Control Act], policies the Board has no authority to enforce or administer. Therefore, as we have consistently held in like circumstances, the award lies beyond the bounds of the Board's remedial discretion.").

70. *Id.* at 140.

71. *Id.*

four of his co-workers were laid off.<sup>72</sup> A meritorious unfair labor practice charge was subsequently filed with the local field office on behalf of these workers.<sup>73</sup>

In January 1992, *four years* after the incident, the NLRB held that Hoffman had discriminated against Castro "to rid itself of known union supporters" in violation of the NLRA.<sup>74</sup> A cease and desist order was issued along with a sixty-day remedial notice.<sup>75</sup> Additionally, Hoffman was ordered to offer reinstatement and backpay to the affected employees.<sup>76</sup>

In June 1993, Castro testified at an Administrative Law Judge Compliance Hearing that he was an undocumented worker and had never legally been allowed to work within the United States.<sup>77</sup> The Administrative Law Judge ("ALJ") held that it could not order backpay because of *Sure-Tan*,<sup>78</sup> especially given Castro's use of fraudulent documents to gain employment in violation of the Immigration Reform and Control Act of 1986 ("IRCA").<sup>79</sup>

In September 1998, *ten years* after the unfair labor practice actually occurred, the NLRB reversed the ALJ's decision and ordered backpay.<sup>80</sup> The NLRB decided that "the most effective way to accommodate and further the immigration policies embodied in the [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."<sup>81</sup> Therefore, backpay was calculated from the time of the unfair labor practice to the time the employer learned of the immigration status.<sup>82</sup> The Board reasoned that once the employer was on notice that it could no longer employ the undocumented workers because of the undocumented immigration

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72. *Id.*

73. *Id.* at 140-41.

74. Hoffman Plastic Compounds, Inc., 306 N.L.R.B. 100, 100 (1992). Discrimination during an organizing campaign is a violation of section 8(a)(3) and an unfair labor practice under section 8(a)(1). See 29 U.S.C. § 158(a)(1), (3) (2000).

75. Hoffman Plastic Compounds, 306 N.L.R.B. at 107-08.

76. *Id.* at 107.

77. Hoffman Plastic Compounds, Inc., 314 N.L.R.B. 683, 685 (1994).

78. *Id.*

79. *Id.*

80. Hoffman Plastic Compounds, Inc., 326 N.L.R.B. 1060, 1060 (1998).

81. *Id.*

82. *Id.* at 1062.

status, the termination was mandated and any anti-union motivations became irrelevant.<sup>83</sup>

In 2002, *fourteen years* after the unfair labor practice occurred, the Supreme Court of the United States reversed the NLRB's decision, holding that undocumented workers cannot receive backpay under the NLRA—despite being “employees” with the protections of the NLRA—even when they are illegally fired or are otherwise the victim of an unfair labor practice.<sup>84</sup> Where undocumented workers gained employment through fraud and where they could never have lawfully earned the wages that backpay would provide as a remedy, backpay would not be allowed despite the protections afforded by the NLRA.<sup>85</sup>

The Court supported its refusal to afford these employees the protections due them under the NLRA by explaining that “combating the employment of illegal aliens [is] central to ‘the policy’ of IRCA and this policy must be considered in applying labor law.”<sup>86</sup> The Court further noted that in response to the Court's earlier decision in *Sure-Tan*, Congress had enacted IRCA which made it unlawful for an employer to knowingly hire an undocumented alien to work within the United States<sup>87</sup> and thereby “sought to stem the tide . . . of . . . undocumented alien[s]” by subjecting employers to both civil and criminal penalties.<sup>88</sup> IRCA also prohibited undocumented aliens from using falsified documentation to gain employment—exactly what Castro had done in *Hoffman Plastic Compounds*.<sup>89</sup> Together, it was now “impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.”<sup>90</sup> IRCA was a significant change because the immigration statute at issue in *Sure-Tan*—the INA—was seen as

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83. *Id.*

84. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

85. *See id.* at 151–52.

86. *Id.* at 147 (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, and n.8 (1991)).

87. 8 U.S.C. § 1324a(a)(2) (2000).

88. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 481 (1991); *see also* L. Tracy Harris, Note, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 72 MINN. L. REV. 900, 922 n.106 (1988) (quoting H.R. REP. NO. 99-682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5650 (“Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this . . . will deter aliens from entering illegally . . .”).

89. *See* 8 U.S.C. § 1324c(a) (2000).

90. *Hoffman Plastic Compounds*, 535 U.S. at 148.

only dealing with the employment of illegal aliens as a peripheral concern,<sup>91</sup> while the "IRCA 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'"<sup>92</sup> The level of congressional commitment to the policies underlying IRCA was also seemingly stronger than to those of the NLRA.<sup>93</sup> While the NLRA specifically precludes punitive remedies or other such sanctions to achieve industrial peace,<sup>94</sup> the IRCA employs the threat of "[s]trong employer sanctions" to "turn off the job magnet that encourages people to enter the United States illegally."<sup>95</sup> This includes fines of up to \$10,000 per incident for employers who "knowingly" hire undocumented workers.<sup>96</sup> Clearly, the availability of a \$10,000 fine stands in stark contrast to the NLRA's routine remedies of mitigated compensatory backpay and notice posting.

Following *Hoffman Plastic Compounds*, the lack of backpay as an available remedy creates a problem that is "even more severe for undocumented workers."<sup>97</sup> As the dissent in *Hoffman Plastic Compounds* noted, "[w]ithout the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal."<sup>98</sup> While compensatory backpay may remain a weak remedy, it is necessary because "it helps make labor law enforcement credible" and "makes clear that violating the labor laws will not pay."<sup>99</sup> Further, "in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity."<sup>100</sup> Unfortunately,

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91. See *De Canas v. Bica*, 424 U.S. 351, 359–60 (1976).

92. *Hoffman Plastic Compounds*, 535 U.S. at 147 (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, and n.8 (1991) (alteration in original)).

93. See 132 CONG. REC. H31,640–41 (daily ed. Jan. 21, 1986) (statement of Rep. Bryant).

94. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9–12 (1940).

95. 132 CONG. REC. H31,640 (daily ed. Jan. 21, 1986) (statement of Rep. Bryant). However, an undocumented alien does not actually violate IRCA where an employer knowingly hires him or her without the employee offering fraudulent documentation.

96. See 8 U.S.C. § 1324(a)(1), (e)(4) (2000).

97. Roth, *Worker's Freedom*, *supra* note 53, at 41.

98. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 154 (2002) (Breyer, J., dissenting).

99. *Id.* (Breyer, J., dissenting).

100. *Id.* (Breyer, J., dissenting).

even in the face of this “backpay weapon” employers have largely reached the same conclusion.<sup>101</sup>

What is disturbing about the decision in *Hoffman Plastic Compounds* is that while the employer did not knowingly violate immigration law, it did knowingly violate labor law.<sup>102</sup> Regardless, the Supreme Court’s decision essentially gave the employer a pass as to the NLRA violation based on the cited need to support the underlying policies of immigration law. Despite Chief Justice Rehnquist’s “significant sanctions,” the result is that the worker suffers while the employer is left unscathed despite its unlawful behavior. As Orrin Baird aptly observed, “a cease and desist order and a notice posting five years (and not enforced for twelve years) after the union’s organizing drive is pretty close to getting off scot-free!”<sup>103</sup>

### E. Contempt Sanctions

Contempt sanctions remain perhaps the most powerful weapon available to effectuate national labor policy.<sup>104</sup> However, they are issued by the courts, not the NLRB, and only become available after the procedural mechanisms of the NLRA are first exhausted.<sup>105</sup> Further, although court orders that enforce a Board order carry the threat of contempt, this sanction is easily avoided by an employer with the sophistication to comply with the letter of the NLRA while shirking the obvious purposes underlying it.<sup>106</sup> For example, because the term “good faith” is open to varying interpretations, the NLRB has instituted a per se test.<sup>107</sup> Until a subjective test is used, an employer may easily comply with the letter of the law but fail to negotiate in good faith.<sup>108</sup>

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101. See *id.* (Breyer, J., dissenting).

102. See *id.* at 140.

103. Orrin Baird, *Undocumented Workers and the NLRA: Hoffman Plastic Compounds and Beyond*, 19 LAB. LAW. 153, 159 (2003).

104. See *Hoffman Plastic Compounds*, 535 U.S. at 152 (“This threat of contempt sanctions . . . provides a significant deterrent against future violations of the [NLRA].”) (alterations in original) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 n.13 (1984)).

105. See *id.*

106. See Thomas B. Romer, “Negotiate in Good Faith as to What?” *An Analysis of the Good Faith Negotiation Clause of the Telecommunications Act of 1996*, 69 U. COLO. L. REV. 257, 282 (1998); see also 78 CONG. REC. S3679 (1934) (statement of Sen. Wagner).

107. See Romer, *supra* note 106, at 273.

108. See *id.* at 282.



## F. Attorneys' Fees

Awards of attorneys' fees are usually unavailable in labor cases under the "American Rule."<sup>109</sup> However, they are occasionally ordered in extraordinary circumstances and in such cases may provide a significant economic deterrent.<sup>110</sup> Unfortunately, the delay between the time an unfair labor practice is committed and when such an award is ultimately issued can easily exceed a decade.<sup>111</sup> Although the NLRA disallows many delay tactics, "the penalties are so weak and legalistic tactical delays so debilitating to the union that a growing number of employers" use them.<sup>112</sup>

## IV. RECOMMENDED CHANGES TO THE NLRA

### A. *The Need for Change*

The current enactment of the NLRA<sup>113</sup> is remarkably similar to the original Wagner Act of 1935<sup>114</sup> despite major changes in the industrial landscape of the United States. Although significant anti-labor changes were made by the 1947 Taft-Hartley amendments<sup>115</sup> to balance labor unions' rising strength, as well as other minor changes by the Landrum-Griffin Act of 1959,<sup>116</sup> the available remedies under the Act have not changed significantly since its inception. While "the Act has been faulted for its paltry and easily delayed remedies," legislative efforts to fix the problem have been largely unsuccessful.<sup>117</sup>

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109. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245, 247, 258-59 (1975) (discussing the American Rule and exceptions where there has been bad faith).

110. See *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 502 F.2d 349, 351-55 (D.C. Cir. 1974).

111. *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 100 (1970) (noting that the "delay of over eight years is not because the case is exceedingly complex, but appears to have occurred chiefly because of the skill of the company's negotiators in taking advantage of every opportunity for delay").

112. Marshall, *supra* note 54, at 839.

113. National Labor Relations Act, 29 U.S.C. §§ 151-69 (2000).

114. National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

115. Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 78-101, 61 Stat. 136 (1947).

116. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.).

117. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV.

This legislative inaction may be partially explained by the political dissonance between labor and management—the original evil that was sought to be cured by the NLRA. Because “the employment relation is one of the important human relationships”<sup>118</sup> it is understandable that organized labor and employers would strongly oppose any efforts supporting the other’s agenda. “Employers are fighting for flexibility and managerial prerogatives . . . while unions are fighting for their very existence in the face of aggressive managerial resistance and long-term attrition.”<sup>119</sup> While neither side normally commands the necessary majority of support needed to enact revisions to the NLRA, both sides are routinely capable of stalling legislation through filibusters and presidential vetoes.<sup>120</sup> The result is that the current enactment of the NLRA is opposed by labor and management and desperately in need of consequential reform.<sup>121</sup>

With industrial tranquility remaining out of reach and the debate “unusually polarized” the question is begged: What is the Nation’s current commitment to realizing the intentions of the NLRA?<sup>122</sup> Professor Cynthia L. Estlund has opined that “[t]he underenforcement of labor’s basic rights, and the political inertia in the face of that underenforcement, may reflect ambivalence about the wrongfulness of anti-union discrimination.”<sup>123</sup> It may simply not be the will of the people or of Congress to protect workers by providing meaningful remedies under the Act. This theory is supported by the lessons of both *Sure-Tan* and *Hoffman Plastic Compounds*—where the policies underlying national labor law meet resistance from other congressional efforts, the NLRA will be trumped.<sup>124</sup>

Regardless of the reasons that the most basic rights of workers have not been supported, the explanation for many employers’ continued violations of the NLRA are crystal clear—rational be-

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1527, 1537 (2002).

118. James Atleson, *Confronting Judicial Values: Rewriting the Law of Work in a Common Law System*, 45 BUFF. L. REV. 435, 436 (1997).

119. Estlund, *supra* note 117, at 1543.

120. *See id.* at 1540.

121. *See* David Masud, *Management Criticisms of NLRB Power*, 2001 L. REV. M.S.U.-D.C.L. 1069, 1070–71 (2001) (analyzing the NLRA’s inadequate remedies, how the NLRA is not complied with, and the role of employers).

122. Estlund, *supra* note 117, at 1542–43.

123. *Id.* at 1557.

124. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144–52 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–94 (1984).

havior. Unfair labor practices are “devastatingly effective in hobbling organizational campaigns” and employers will continue to “engage in serious and pervasive unfair labor practices” until it is no longer profitable for them to do so.<sup>125</sup> In essence, the current remedies available under the NLRA send a clear message to labor and management that protecting workers’ rights is not important. And if something’s hardly worth doing, it’s hardly worth doing right.

This appalling message creates a paper tiger out of the NLRA and defeats its purpose from the outset. Just as *Hoffman Plastic Compounds* showed, the “gap between undocumented workers’ rights and remedies creates a perverse incentive for unscrupulous employers to seek out these workers, undermining not just labor policy but immigration goals as well.”<sup>126</sup> The gap between the need for meaningful remedies and those available under the NLRA has also rendered the Act ineffective and encouraged unscrupulous employers to abuse their employees—documented or not.

## B. Broader Remedies

While the following suggested remedies are not without their own legitimate criticisms, they are necessary to fulfill the NLRA’s mission. Regardless of what protections are ultimately afforded to workers under the NLRA, the remedies provided by the Act must be sufficient enough to satisfy those purposes.

### 1. Consequential Damages

The first needed change to the NLRA is the addition of consequential damages as an available remedy where an employee has been discriminated against in violation of the Act. Elsewhere, one who breaches a contract is “entitled to a credit against liability for any consequential damages the plaintiff could have avoided or minimized by reasonable effort and expense, whether or not the

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125. Page, NLRB Remedies, *supra* note 17; see also PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 111–14 (Harvard Univ. Press 1990) (reviewing studies correlating an increase in unfair labor practices with the decline in union election successes).

126. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 348 (2001).

plaintiff actually avoided or minimized such damages.”<sup>127</sup> However, the NLRA has been interpreted to disallow these consequential damages based on a mistaken notion that since “the NLRA’s goal is the achieving of workplace peace . . . neither labor nor management should be too harshly penalized.”<sup>128</sup> Mistaken cries of “can’t we all just get along” simply fail to recognize that an unlawfully discharged worker will often lose far more than merely wages. For example, such a worker could suffer “charges stemming from the foreclosure on his mortgage, compensation for damage to his credit rating, and closing costs and related amounts necessary for him to secure a new home on similar terms to the one he had lost” all because of the discriminatory termination of his employment.<sup>129</sup> Compensation for losses actually realized due to an employer’s unfair labor practice is not an overly harsh penalty—it is an imperative remedy.<sup>130</sup>

If consequential damages were allowed, an aggrieved employee would truly be made whole and employers would be less inclined to violate the NLRA. Former General Counsel Leonard Page believes that “both the language and legislative history of Section 10(c) of the Act are broad enough” to authorize the Board to direct such “a remedy for all economic consequences that directly and foreseeably result from an employee’s unlawful discharge.”<sup>131</sup> Congress should ensure that there is no question that this was, and remains, its intention.

## 2. Compound Interest

Complementing consequential damages is the needed remedy of compound interest.<sup>132</sup> This remedy is necessary to allow backpay awards to be calculated cognizant of the “time value” of money.<sup>133</sup> While simple interest is included in backpay awards that exceed three months, “[t]he Board’s remedial orders do not

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127. 1 DAN B. DOBBS, *LAW OF REMEDIES* § 3.9 (2d ed. 1993).

128. Howard C. Eglit, *Damages Mitigation Doctrine in the Statutory Anti-Discrimination Context: Mitigating its Negative Impact*, 69 U. CIN. L. REV. 7, 10–11 (2000).

129. Page, *Recent Trends*, *supra* note 23, at 58.

130. See Page, *NLRB Remedies*, *supra* note 17.

131. *Id.*

132. *Id.*

133. See *id.*

provide for the compounding of interest on monetary awards."<sup>134</sup> This creates an economic incentive to prolong a case that could be settled because the actual value of any award that an employer may eventually be forced to pay out will decrease over time once the time value of that money is calculated. For example, a violative employer could invest the very funds that would be awarded to aggrieved employees pending appeal. Even if that employer was eventually forced to pay, the value of the award would have been mitigated by the return on investment.

### 3. Punitive Damages with a Private Right of Action

The role of deterrence is essential to effectively amending the NLRA and punitive damages, and a private right of action should be allowed where an employee is discriminated against based on anti-union animus.

Currently, while "the Board may exercise a broad discretion in fashioning remedies to require an employer to undo the effects of its own unlawful conduct and to effectuate the policies of the Act . . . the Board has no power simply to punish the employer."<sup>135</sup> While section 10(c) of the NLRA "permits the Board to require an employer who has committed an unfair labor practice"<sup>136</sup> to order reinstatement with backpay, it *only* allows those compensatory damages to be paid to aggrieved individuals and prohibits punitive damages.<sup>137</sup> This results in the current situation where notice posting and cease and desist orders are known to be an abysmal deterrent of employer unfair labor practices and yet "fully compensatory remedies, including attorneys' fees and exemplary damages in egregious cases" are unavailable.<sup>138</sup>

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134. *Id.*

135. *NLRB v. Bush Hog, Inc.*, 405 F.2d 755, 759 (5th Cir. 1968).

136. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 46 (1942).

137. The NLRA requires that where the Board finds that a person has committed an unfair labor practice, the Board "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay." 29 U.S.C. § 160(c) (2000); *see also* Stephen F. Befort, *Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 373 (2002) (explaining that "[t]he NLRA does not provide for fines, punitive damages, or any other 'penalty,' and the discharged employee is subject to a duty to mitigate losses by finding alternative work").

138. Estlund, *supra* note 117, at 1555.

By allowing punitive damages with a private right of action the NLRA would be enforced through individual lawsuits rather than the "overtaxed" NLRB.<sup>139</sup> Additionally, expensive litigation costs would serve as a deterrent to unfair labor practices and encourage employers to strive to avoid lawsuits. The employer would thereby be encouraged to create industrial peace and tranquility as a cost-saving measure in full alignment with the intentions underlying the NLRA.

Punitive damages should also be made available regardless of the employee's immigration status, alleviating the dilemma encountered in *Hoffman Plastic Compounds*.<sup>140</sup> There, the Court was faced with how to enforce a backpay remedy under the NLRA without tacitly condoning the undocumented worker's unlawful employment.<sup>141</sup> The Court noted, "[s]ince the Board's inception, we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment."<sup>142</sup> While recognizing the rub between the NLRA and IRCA, the majority explained that the NLRB had not "been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important [c]ongressional objectives."<sup>143</sup> The majority rationally feared that awarding backpay would "trivialize[] . . . immigration laws" and "condone[] and encourage[] future violations."<sup>144</sup> The dissent strongly contested this, pointing out that backpay does not "'run[] counter to' or 'trench[] upon' national immigration policy"<sup>145</sup> because "aliens enter the country 'in the hope of getting a job,' not gaining 'the protection of our labor laws.'"<sup>146</sup> While the dissent's argument as to undocumented aliens' intentions is undoubtedly true, it fails to recognize that the Court would be in the unenviable position of rewarding the perpetrator of a fraud were it to award backpay—an unacceptable

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139. See *id.*

140. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); see also *supra* notes 69–92 and accompanying text.

141. See *Hoffman Plastic Compounds*, 535 U.S. at 149–52.

142. *Id.* at 143.

143. *Id.* (alteration in original) (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

144. *Id.* at 150.

145. *Id.* at 153 (Breyer, J., dissenting) (quoting *id.* at 147, 149). Justices Stevens, Souter, and Ginsberg joined in Justice Breyer's dissent. *Id.*

146. *Id.* at 155 (Breyer, J., dissenting) (quoting *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988)).

outcome despite the Court's duty to support the policies underlying the NLRA.

The availability of punitive damages would have solved this problem by allowing damages to be imposed without awarding them to Castro. These funds could also be used to compensate third parties who are subjected to unfair labor practices but are never compensated because their former employer goes out of business or is otherwise unable to pay. Alternatively, these funds could be used to help fund NLRB investigations into unfair labor practice charges, relieving taxpayers of this burden.

By imposing punitive damages regardless of the employee's legal status the employer would no longer be immunized by an employee's unclean hands. With the reality that "some of the jobs being generated in America's growing economy are jobs American citizens are not filling,"<sup>147</sup> the need to remove an incentive for mistreating undocumented aliens and Americans alike is compelling.

## V. CONCLUSION

Former Republican Senator of Massachusetts Edward W. Brooke once said that "a right without a remedy is like a bell without a clapper—hollow and empty."<sup>148</sup> Unfortunately, this is precisely what the promises of the NLRA have become. The NLRA must not be allowed to "hold out promises to the employee, harass and impoverish the employer, enrich the lawyers, and clog the legal machinery."<sup>149</sup>

While labor activists have criticized the Supreme Court for its decision in *Hoffman Plastic Compounds*,<sup>150</sup> the Court was absolutely correct in acknowledging that "any 'perceived deficienc[y] in the NLRA's existing remedial arsenal' must be 'addressed by

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147. President George W. Bush, Remarks by the President on Immigration Policy (Jan. 7, 2004), at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html> (last visited Mar. 29, 2004).

148. George E. Curry, *Fair Housing Next on Civil Rights Map*, CHI. TRIB., Mar. 28, 1988, at 4M.

149. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 275 (2002) (quoting Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 18 (1988)).

150. See Baird, *supra* note 103, at 159.

congressional action,' not the courts."<sup>151</sup> In short, judicial restraint is a duty, not an option.<sup>152</sup> Congress must ensure that its intentions are realized by giving the NLRA the necessary tools to do its job and avoid the "legal snare" of creating "[a] right without a remedy."<sup>153</sup> To be sure, judicial restraint will only be practiced by the Court and respected by society when Congress lives up to its end of the bargain.

The old adage that "if something's worth doing, it's worth doing right" should guide the needed legislative reform. Protecting employees' rights and encouraging industrial peace and tranquility is just as important now as it was in 1935. It is worth doing right and worth doing now.

*Robert M. Worster, III*

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151. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (alteration in original) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 (1984)).

152. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 128 (1958) (Frankfurter, J., dissenting) ("The awesome power of this Court to invalidate . . . legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint.").

153. *Amoco Prod. Co. v. Columbia Gas Transmission Corp.*, 455 So. 2d 1260, 1264 n.2 (La. Ct. App. 1984).



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