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THE NLRB'S DEFERRAL POLICY
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A UNION PERSPECTIVE

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Currently, the National Labor Relations Board (NLRB or Board) refuses to pursue unfair labor practice complaints under the National Labor Relations Act1 (NLRA) whenever the underlying dispute can be addressed instead by a grievance-arbitration process negotiated by the union and employer parties to a collective-bargaining agreement.2 This broad deferral policy attempts to balance the NLRB's duty to prevent unfair labor practices3 against the policy of the Labor


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2. See, e.g., Consolidated Freightways Corp., 288 N.L.R.B. 1252, 1256 (1988) ("[The Board's processes are available in the first instance to individual employees if private dispute-resolution mechanisms do not exist or, for one reason or another, are inadequate. Where such mechanisms exist and the other conditions for deferral are met, however, the Board will stay its hand and afford the private grievance-arbitration machinery the first opportunity to decide the issue.") (emphasis in original).
3. Section 10(a) of the NLRA provides that the Board is "empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." 29 U.S.C. § 160(a) (1988). The first section of the Act makes clear that prevention of unfair labor practices protects the nation's economy as well as workers' rights:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes . . . , and by restoring equality of bargaining power between employers and employees.

Id. § 151.
Management Relations Act (LMRA) to promote the "final adjustment [of disputes] by a method agreed upon by the parties."

The tortuous development of case law in this area has already generated a great deal of legal scholarship. Our purpose is not to rehash the history of these developments.

4. Id. §§ 141-187.
5. Section 203(d) of the LMRA provides:
   Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The [Federal Mediation and Conciliation] Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.


7. We note that the NLRB's flip-flops on deferral policy have often coincided with changes in guiding philosophy (and political affiliation) of the members of the Board. As one commentator noted:

   Shortly after President Reagan assumed office, changes in composition of the Board made prediction of [the Board's prearbitral deferral] course difficult. . . .

   . . . Shifting Board membership has caused [deferral doctrine] to undergo almost continual metamorphoses. The fluctuation is explained by the sharp
Nor will we dwell at length on the various attempts to parse out statutory language or tally the rather opaque legislative history on this subject. Those exercises, while of obvious value, have already been attempted and, in our view, have resulted in a stalemate. Both the statute and its legislative history provide broad support for two conflicting goals: creating specifically enumerated statutory protections while at the same time encouraging private resolution of workplace disputes.

The conflict between these goals is readily apparent. Private dispute-resolution mechanisms draw their legitimacy, and therefore their viability, from their ability to impose final and binding solutions upon the parties. To the extent that a reviewing agency can interrupt or upset the determinations of a private resolution process, the integrity of that private process is diminished and its usefulness is compromised. Yet, if the statutory rights deserve protection for their own sake, their enforcement must remain the Board’s province and should not be abandoned to private parties applying privately designed standards of conduct subject to only limited review. In practice, the NLRB’s deferral doctrine oscillates between these two poles.

From a union perspective, striking the appropriate balance between these conflicting policy goals is particularly difficult. On one hand, the fundamental purpose of unions is to enhance and safeguard the economic security and workplace dignity of working people. It is entirely inimical to that purpose to abandon statutory protections for employees whenever available. On the other hand, as the very nature of a labor union demonstrates, the principal weapon employed by unions in their fight for economic security and workplace dignity is collective action which, to be most successful, must create...
institutional structures to maintain and enforce the workplace standards developed through that collective action. Unions negotiate collective-bargaining agreements for that purpose. The integrity of those agreements is determined not only by the substantive standards that they establish, but also largely by the union's and employer's ability to resolve disputes regarding interpretation and application of those agreements through negotiation or, if necessary, through a dispute-resolution mechanism which is internal to the relationship. The alternative—reliance on external entities applying standards of conduct determined by legislation rather than collective bargaining—marginalizes the union and the labor agreement and, to some degree, eliminates the role of collective action. In short, unions are both proemployee and in favor of promoting the integrity of the arbitral process. Like courts, unions have a difficult time balancing these conflicting policies to determine under what circumstances Board enforcement should be deferred to the parties' chosen mechanism for resolving workplace disputes.

It is important to recognize at the outset that any policy of deferral or deference to arbitral awards runs the risk of diminishing the substantive statutory protections that Congress has fashioned for employees. At bottom, deferral means that the Board will tolerate arbitral remedies—and refuse to intercede—even when those arbitral remedies provide different, and less complete, relief than the Board would order were it reviewing the dispute de novo. Under current Board doctrine,12 therefore, employees covered by a collective-bargaining agreement will enjoy less statutory protection from employer misconduct than their nonunion counterparts.13 Because Congress specifically intended the NLRA to protect all employees and encourage the practice and procedure of collective bargaining,14 this result is particularly anomalous.

Fortunately, we will not spend our entire discussion agonizing over these conflicting goals and describing ad hoc solutions based on value judgments about their relative importance in particular instances. In our view, some principled distinctions

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12. See supra note 2 and accompanying text.
13. For example, under current doctrine the Board will not order additional relief even though the arbitral award is not "totally consistent with Board precedent." Olin Corp., 268 N.L.R.B. 573, 574 (1984); see also infra notes 43-46 and accompanying text (discussing Olin).
14. See NLRA § 10(a), 29 U.S.C. § 160(a) (1988); see also supra note 3 (quoting section 10(a)).
can be made, based on the type of statutory right at issue,\textsuperscript{15} the quality of arbitral resolution,\textsuperscript{16} and the ability of the arbitrator to apply standards similar to those set forth in the statute.\textsuperscript{17}

We believe that the NLRB, in its original development of deferral principles, correctly balanced the competing policies and correctly understood the various principled distinctions outlined above. Recently, however, the Board has abandoned those distinctions and now defers virtually all unfair labor practice charges whenever the negotiated grievance-arbitration process can possibly be applied to the dispute. In our view, the deferral doctrine has thus exceeded its proper bounds and should be reexamined.

In Part I, after very briefly visiting the origins of NLRB deferral doctrine, we will shamelessly skip nearly thirty years of "twists and turns"\textsuperscript{18} of case law development and summarize the current NLRB position in this area. In Part II we catalog some current union criticisms of the NLRB's nearly boundless application of deferral, and identify, from both practical and policy points of view, some of the more specific competing considerations. In Part III, we narrow the focus and address the implications of deferral policies for "union reform," pausing also to consider the applicability of these doctrines to private dispute-resolution mechanisms found in the constitutions of most labor unions.

\section{I. Deferral: Its Origins and Current Doctrine}

The NLRB's deferral policy actually consists of two related doctrines: one involving unfair labor practice charges filed prior to an arbitrator's ruling (but while a grievance is in progress), and one involving the scope of NLRB review after

\begin{enumerate}
\item \textit{See, e.g.,} Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974) (noting that "[arbitral procedures, while well suited to the resolution of contract disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII"); \textit{see also infra} notes 21-37, 66-96 and accompanying text; cf. Collyer Insulated Wire, 192 N.L.R.B. 837, 842 (1971) (noting that a dispute involving a claim of a NLRA § 8(a)(5) violation "is one eminently well suited to resolution by arbitration" because the contract lies "at the center of this dispute").
\item \textit{See, e.g.,} International Harvester Co., 138 N.L.R.B. 923, 927 (1962), \textit{enforced sub nom.} Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), \textit{cert. denied,} 377 U.S. 1003 (1964); \textit{see also infra} notes 38-46 and accompanying text.
\item International Harvester Co., 138 N.L.R.B. at 927.
\item Darr v. NLRB, 801 F.2d 1404, 1408 (D.C. Cir. 1986).
\end{enumerate}
arbitral resolution. Properly or not, the first of these doctrines borrows heavily from principles announced under the rubric of exhaustion of available remedies and the second has come to resemble doctrines of appellate review.

In the prearbitral setting, NLRB deferral doctrine was developed primarily in *Collyer Insulated Wire*. In *Collyer*, the charging party alleged that the employer violated the duty to bargain when—during the labor contract's term—the employer implemented various unilateral changes in terms and conditions of employment. The Board announced that,

19. We distinguish pre- and postarbitral deferrals mainly for heuristic purposes. Much of our argument does not depend on this distinction. In certain contexts, however, it will be particularly useful to bear this distinction in mind. See infra notes 55-59 and accompanying text (discussing NLRB review of arbitral rulings in the postarbitral context); note 99 and accompanying text (analogizing the analysis of the NLRB's deferral doctrine to the jurisdictional doctrine of ripeness in the prearbitral context).

20. The Board does not base its deferral policies on jurisdictional grounds but rather on more discretionary policy-oriented grounds. See infra notes 26-30 and accompanying text; see also, e.g., International Harvester Co., 138 N.L.R.B. 923, 925-27 (1962), enforced sub nom. Ramsey v. NLRB, 327 F.2d 784, 787 (7th Cir.), cert. denied, 377 U.S. 1003 (1964). The Supreme Court, in fact, has clearly held that Board jurisdiction is not ousted merely because the dispute may also be covered in some respect by the labor agreement or because the Board may be required to interpret the labor contract to resolve the unfair labor practice charge. NLRB v. C & C Plywood, 385 U.S. 421, 425-30 (1967).

21. 192 N.L.R.B. 837 (1971). Prior to *Collyer*, the Board had deferred sporadically in some cases. See, e.g., Dubo Mfg. Co., 142 N.L.R.B. 431 (1963). In fact, for many years *Dubo* continued to have life outside the more general—and constantly shifting—doctrines of deferral. In general, under *Dubo*, the Board would allow an individual to choose arbitral relief rather than pursue an unfair labor practice charge based on improper discharge or discipline. *Id.* at 432. The Board, under *Dubo*, would also monitor the progress of the grievance-arbitration process more aggressively than in the more common section 8(a)(5) deferral cases. *Id.* at 433. See, e.g., NLRB Gen. Couns. Mem. No. 79-36 (May 14, 1979). The subsequent cases of Olin Corp., 268 N.L.R.B. 573 (1984), and United Technologies Corp., 268 N.L.R.B. 557 (1984), however, seem to have rendered *Dubo* largely inapplicable.

22. *Collyer*, 192 N.L.R.B. at 837-38. Section 8(a)(5) of the NLRA provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5) (1988). In several early cases, the Board held that the duty to bargain largely survives execution of a collective-bargaining agreement. See, e.g., NLRB v. Highland Park Mfg. Co., 110 F.2d 632, 638 (4th Cir. 1940) (enforcing the Board's order and concluding that the labor agreement provides only a "framework within which the process of collective bargaining may be carried on"). The more current, contract-based position of the Board was announced in Jacobs Mfg. Co., 94 N.L.R.B. 1214, 1219 (1951), enforced, 196 F.2d 680 (2d Cir. 1952). The Second Circuit, in *Jacobs*, held that the duty to bargain during a contract attaches only to those subjects neither discussed nor resolved in reaching the contract. *Jacobs*, 196 F.2d at 680. The NLRA does, however, allow the parties to provide for midterm bargaining—with full rights to engage in strikes—by providing for a contract "re-opener" prior to the contract's
rather than view the charge through the prism of the statutory duty to bargain, it would await arbitral resolution to determine whether, according to the parties' chosen method of contract interpretation, the existing labor contract permitted the employer's conduct. Implicit in Collyer's holding is the principle that employer actions permitted by the labor agreement do not violate the duty to bargain; the parties have already bargained and the employer has already obtained the right to take the disputed action during the course of the contract. If, however, an arbitrator finds that the agreement does not permit the employer action, she will order appropriate relief and the Board need not intercede. Although the Collyer Board did not base its holding squarely on this reasoning, it stands, we believe, as the proper justification for the deferral of section 8(a)(5) duty to bargain charges.

The Collyer Board emphasized general principles such as the importance of private resolution of workplace disputes and the integrity of the arbitral process. By basing its decision on these grounds, rather than the more specific nature of the statutory duty to bargain itself, we believe that the Board laid the groundwork for the improper expansion of the deferral doctrine to areas outside the duty to bargain. For reasons not made clear in Collyer itself, however, the Board did demonstrate some caution when it originally developed the Collyer doctrine. Thus, the Collyer Board noted that deferral was appropriate there because "the contract and its meaning . . . lie at the center of the dispute." The Board also observed that the charging party did not claim that the employer was hostile to the exercise of statutorily protected rights by employees, the parties had enjoyed a long and stable collective-bargaining relationship, the arbitration clause was clearly broad enough to encompass the dispute, and the dispute was

expiration. 29 U.S.C. § 158(d) (1988); see NLRB v. Lion Oil Co., 352 U.S. 282, 292-93 (1957). The Board has had continual difficulty applying this doctrine. See infra notes 73-75 and accompanying text. In large measure, continuing application of Collyer has allowed the Board to avoid resolving its difficulties in determining the scope of the continuing duty to bargain during a contract's term.

23. Collyer, 192 N.L.R.B. at 842.
24. "[T]he [National Labor Relations] Act and its policies become involved only if it is determined that the agreement between the parties . . . did not sanction [the employer's] right to make the disputed changes . . . under the contractually prescribed procedure." Id.
25. But see infra notes 69-72 and accompanying text.
27. Id. at 842.
"eminently well suited" to arbitral resolution. The Collyer Board also retained jurisdiction to ensure that the arbitral or consensual resolution of the dispute comported with the standard for postarbitral deferral then in effect under Spielberg Manufacturing Co.

Following years of inconsistent doctrine in this area, the Board, in United Technologies Corp. abandoned most, if not all, of the limitations on prearbitral deferral expressed in Collyer. Most importantly, in the wake of United Technologies Corp., the Board no longer requires that the contract and its meaning be at "the center" of the dispute and no longer limits deferral to section 8(a)(5) duty to bargain charges. Instead, the Board now also defers unfair labor practice charges alleging the violation of specific statutory protections found in section 8(a)(3) by employers. In short, the Board now defers routinely whenever the "dispute" is subject in any respect to the contractual grievance procedure, even though the employee rights at issue may be the subject of specific statutory protections.

28. Id.
29. Id. at 843.
32. See id. at 559-60. Of course, the Board will defer only if the parties remain willing to arbitrate. Id. at 560. See also id. at 561 (Zimmerman, dissenting).
33. 268 N.L.R.B. at 560.
34. See id. at 559.
35. See id.; see also id. at 561 (Zimmerman, dissenting).
36. The term "dispute" is subject to various meanings, and it is important to understand what the term means in each context. When an individual is discharged, for example, that discharge may violate both contractual and statutory standards of employer conduct and will generally involve disputed facts as well. So, the "dispute" may be the dispute over the facts, the efforts to challenge the employer conduct in general, the effort to apply contractual standards of conduct to challenge the discharge, or the effort to apply statutory standards of conduct to challenge the discharge. To say that the "dispute" is subject to arbitral resolution could have any of these meanings. The Olin Board's current requirement that an arbitrator need only be presented with the facts relevant to the unfair labor practice issue—without any Board consideration of what standards of conduct the arbitrator applied—represents an improper expansion of the deferral doctrine because it ensures arbitral consideration only of the factual aspects of the "dispute." See infra notes 42-46 and accompanying text.
37. See, e.g., United Technologies Corp., 268 N.L.R.B. at 560 (holding that an alleged threat violative of NLRA § 8(a)(1) should be deferred because it is "clearly cognizable under the broad grievance-arbitration provisions . . . of the collective-bargaining agreement").
In the postaward setting, the Board has similarly expanded the deferral doctrine. In *Spielberg Manufacturing Co.*, the Board first announced that it would defer to arbitral decisions if the arbitration proceedings were "fair and regular, all parties had agreed to be bound [by the result], and the decision of the arbitration panel [was] not clearly repugnant to the purposes and policies of the Act." The Board added a fourth requirement several years later in *Raytheon Co.* There the Board held that it would not give effect to an arbitration agreement where the arbitrator "ignored the unfair labor practice . . . in issue before the Board." In addition, until recently, the Board required the party requesting deferral to demonstrate that these standards were satisfied.

Present Board doctrine, as expressed in *Olin Corp.*, has eviscerated each of these standards. All that remains of *Raytheon's* requirement that the arbitrator consider the specific unfair labor practice issue before the Board is the requirement that the contract interpretation issue be "factually parallel to the unfair labor practice issue and [that] the arbitrator was presented generally with the facts" that would have been relevant to the unfair labor practice determination. Absent is any effort to ensure that the arbitrator applied similar normative standards to judge the employer conduct at issue. In addition, the "clearly repugnant" requirement is now deemed satisfied whenever the arbitral award is

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39. *Id.* at 1082. Prior to *Spielberg*, the Board reviewed all unfair labor practice charges *de novo* despite the presence of an arbitral award involving the same dispute. See, e.g., *Rieke Metal Prods. Corp.*, 40 N.L.R.B. 867, 874 (1942).
40. 140 N.L.R.B. 883 (1963), rev'd on other grounds, 326 F.2d 471 (1st Cir. 1964).
41. *Id.* at 886. See also Comment, *Further Convolutions*, supra note 6, at 445. This requirement in particular has led to confusion because of the difficulties inherent in arbitral consideration of statutory standards, and arbitrators' hesitance to rely on public law, as opposed to the agreement which they are charged with interpreting, when measuring the propriety of employer conduct. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743-44 (1981) (noting that the arbitrator "may lack the competence to decide the ultimate legal issue whether an employee's right . . . under the statute has been violated," and may lack the "contractual authority" to apply statutory law).
42. *See*, e.g., *Yourga Trucking, Inc.*, 197 N.L.R.B. 928, 928 (1972) (discussing the pre-*Olin* requirement that the party seeking deferral demonstrate the adequacy of arbitral process and result). *But cf.* *John Sexton & Co.*, 213 N.L.R.B. 794, 795 (1974) (limiting the burden of the party seeking deferral to providing clear evidence of the specific arbitral issues and result and shifting the burden of showing the unfairness of the process and the inadequacy of the result to the party seeking to avoid deferral).
44. *Id.* at 574.
not "'palpably wrong' i.e., . . . not susceptible to an interpretation consistent with the Act."\textsuperscript{45} Finally, *Olin* places the burden of proof squarely on the party seeking Board relief; that party must "affirmatively demonstrat[e] the defects in the arbitral process or award"\textsuperscript{46} before the NLRB will even consider whether an unfair labor practice has been committed.

Fortunately, and in rather stark contrast with its otherwise extremely broad deferral policy, the NLRB still does not defer to a grievance procedure to resolve disputes concerning a union's right to information. The Board has held that "before a union is put to the effort of arbitrating . . . it has a statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued at all."\textsuperscript{47}

In addition, the Board continues to reject deferral arguments in cases involving interference with access to the Board itself;\textsuperscript{48} involving alleged improper employer assistance to unions;\textsuperscript{49} involving representational issues such as unit

\textsuperscript{45} Id. (footnote omitted).
\textsuperscript{46} Id.
\textsuperscript{47} Safeway Stores Inc., 236 N.L.R.B. 1126, 1126 n.1, enforced, 622 F.2d 425 (9th Cir. 1980), cert. denied, 450 U.S. 913 (1981); see also NLRB v. Acme Indus. Co., 385 U.S. 432, 436-39 (1967). In General Dynamics Corp., 268 N.L.R.B. 1432 (1984), the NLRB ordered disclosure of a subcontracting study, referring to it as a "procedural issue" that was merely preliminary to resolution of the substantive dispute: the grievances challenging the subcontracting itself. *Id.* at 1432 n.2. The Board also concluded that deferral would mean the grievance procedure would be subject to "inevitable delays" and force the union into a "two tiered" grievance resolution process. *Id.*

More recently, the NLRB refused to defer a charge involving denial of access to the plant by union officials where the contract gave a union the right to enter the plant and investigate grievances. American Nat'l Can Co., Foster-Forbes Glass Div., 924 F.2d 518, 522-23 (4th Cir. 1991), *enforcing* 293 N.L.R.B. No. 110, slip op. at 7-10, 131 L.R.R.M. (BNA) 1153, 1155-56 (Apr. 28, 1989). The union had filed a grievance complaining of excessive heat in the plant and sought to take temperature readings. *Id.* at 521. The Board noted that the arbitrator could not resolve both issues (access and excessive heat) simultaneously and that forcing the union to arbitrate twice would be an "unacceptable impediment" to effective representation by the union. *Id.* at 523.

\textsuperscript{48} See, e.g., Superior Forwarding Co., Inc., 282 N.L.R.B. 806, 806 n.1 (1987) (holding it improper to defer claims brought under NLRA § 8(a)(4) which prohibits employers from discharging or discriminating against an employee who files charges with or gives testimony to the Board).
\textsuperscript{49} See, e.g., Servair, Inc., 236 N.L.R.B. 1278, 1278 n.1, 1280 (1978) (holding it improper to defer claims brought under NLRA § 8(a)(4) which prohibits employers from interfering with the administration of a union), *enforced in part*, 607 F.2d 258 (9th Cir. 1979), *opinion withdrawn and case remanded*, 624 F.2d 92 (9th Cir. 1980).
clarification; and cases where the union's interest is adverse to that of the grieving employee.

With these narrow exceptions, however, the NLRB is telling unions (and workers represented by unions) that the grievance-arbitration procedure will be the exclusive avenue for remedying employer conduct during the contract's term. The moment a collective-bargaining agreement is executed, the parties lose access to statutory protection from a broad range of employer misconduct.

II. UNION CRITICISM OF NLRB DEFERRAL

Our criticism is directed at the broad scope of deferral reflected in Olin and United Technologies rather than the deferral doctrine originally stated in Collyer and Spielberg. As we have mentioned, unions determine their position on


51. See, e.g., Hammontree v. NLRB, 925 F.2d 1486, 1498 (D.C. Cir. 1991) (en banc) (noting that deference in situations where the interests of the union diverge from those of the employee may "constitute not deference, but abdication"); Taylor v. NLRB, 786 F.2d 1516, 1520 n.3, 1521 (11th Cir. 1986), cert. denied, 493 U.S. 891 (1989); see also infra notes 123-46 and accompanying text.

52. Perhaps the most glaring example of this broad loss of statutory protections is the case of union officials who are singled out for discharge when the employer believes that they should have more actively discouraged or prevented "wildcat strikes" or similar types of spontaneous concerted activity by employees. See, e.g., Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983). By singling out union officials for harsh discipline in that context, the employer has clearly discriminated against them based on their participation in union affairs in violation of NLRA § 8(a)(3). Id. at 703-05. And yet, if the labor agreement contains a standard "just cause" limitation on the employer's right to discharge employees, the Board will refuse to process such a complaint despite the arbitrator's inability to view the discharge or discipline in light of the specific statutory protection from employer reprisals for union activity. See, e.g., West Penn Power Co., 274 N.L.R.B. 1160, 1161-62 (1985) (finding deferral proper although the arbitrator allowed harsher punishment for a union officer). This result deprives the employee of specific statutory protections of section 8(a)(3).

In Metropolitan Edison, the Supreme Court examined just such a situation and determined that a standard no-strike clause did not waive the protections of NLRA § 8(a)(3) for union officials who fail to take "adequate" measures to prevent violations of the no-strike clause. 460 U.S. at 707-10. Notwithstanding Metropolitan Edison, Board doctrine now requires such union officials to pursue reinstatement under the "just cause" provision of their contract and provides direct Board review of their discharge only if the arbitrator's failure to reinstate them is "palpably wrong." Olin Corp., 268 N.L.R.B. 573, 574 (1984) (citing International Harvester Co., 138 N.L.R.B. 923, 924 (1962), aff'd sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964)). In our view, the Board has indirectly brought about the result prohibited by the Court in Metropolitan Edison.
deferral to some extent by balancing general pro- and antideferral policies and to some extent by utilizing principled distinctions applicable in narrower circumstances. In Part A, we will catalog some general deferral considerations, from both a policy and a practical perspective, and apply those considerations to certain aspects of the NLRB's recent expansion of its deferral doctrine. Next, in Part B, we will develop briefly some of the more particularized arguments that, we believe, should be used to limit the NLRB's deferral policy. Finally, in Part C, as a prelude to our discussion of the debate between the labor movement and various individual rights groups, we explore in more depth some of the broad prodeferral policy arguments.

A. General Considerations

As we have discussed, the competing policy goals in this debate are the desire to maximize employee protections, from whatever source, and the desire to encourage the development of private institutions internal to the union-employee-employer relationship that are capable of rendering final dispositions of workplace disputes. It is hardly surprising that the labor movement has been hostile to the Board's expansion of its deferral policies. The labor movement should be expected to resist whenever the Board denies an aggrieved party (whether a union or an individual) access to an alternate forum that can provide relief from employer actions.

No matter how much a union might wish for a perfect arbitral mechanism, inevitably arbitrators will make occasional mistakes. The Board, then, should provide a basic appellate review function in the postarbitral resolution context even in the most prodeferral of worlds. In our view, the Board has improperly abdicated even this limited appellate review function with its expansion of deferral and, in particular, its adoption of the "palpably wrong" standard. The Board's standard of reversing only those decisions "not susceptible to an interpretation consistent with the Act," no matter how

53. See supra notes 12-17 and accompanying text.
54. See supra notes 3-5, 10-11 and accompanying text.
poorly conceived or how far from application of proper standards, is such a passive standard as to amount to little more than a rubber stamp of arbitral awards.

This postarbitral standard nearly eliminates any review based on compliance with applicable statutory standards of conduct. The “palpably wrong” standard, in combination with the “factually parallel” test for determining whether the arbitrator adequately considered the unfair labor practice issue, erodes important substantive protections. Instead of going to the Board with allegations of unfair labor practices, the union and its members must now go to an arbitrator, obtain a determination regarding contract compliance (generally without any regard for statutory standards), and may invoke Board application of statutory standards only if the union and employee can prove that the arbitrator’s decision is “palpably wrong” and that the facts presented to the arbitrator were not “parallel” to those that would be presented to the Board. Thus, even though the Board might, if reviewing employer conduct de novo, find certain employer conduct an unfair labor practice, that employer conduct will go unremedied so long as (a) the arbitrator finds no contract violation and (b) the arbitrator’s decision is at least “susceptible to an interpretation consistent with the Act.” The important postarbitral appellate review function that the Board served under its prior formulation is thus almost entirely eliminated.

Because there are some types of remedial orders which only the Board can impose, current deferral doctrine—in both pre- and postarbitral contexts—also deprives employees of access to the full range of remedies fashioned by Congress in the NLRA. Arbitral authority finds its source in the parties’ contract, and is generally limited to interpreting and applying

56. See supra notes 44-45 and accompanying text.
57. See Olin Corp., 268 N.L.R.B. at 574.
58. Id.
59. It is also important to note that, from a union perspective, present deferral doctrine imposes an improper double standard. Unions find it intolerable that the Board defers to contractual mechanisms for vindication of employee rights against employers—thereby diminishing employee protections against employer misconduct—but consistently refuses to defer to internal union mechanisms for vindication of individual employee rights when the party accused of misconduct is not the employer but the union itself. See infra notes 167-82 and accompanying text.
the agreement. An arbitrator has no general authority, for example, to require that the parties enter into bargaining on a topic not covered by their agreement. In fact, in a recent case the Sixth Circuit refused to enforce an arbitral award because the arbitrator had exceeded his authority by ordering the parties to rebargain on a previously settled issue. In NLRB proceedings, such bargaining orders, in contrast, are the "usual remedy for an employer's refusal to bargain in violation of Section 8(a)(5)."

Finally, there are some practical reasons that unions occasionally prefer NLRB litigation to arbitration. The NLRB mechanism permits use of discovery and subpoenas. Because formal discovery in arbitration cases is relatively rare, parties frequently face the unfortunate burden of confronting their opponent's evidence for the first time at the hearing itself. Also, a union can challenge employer conduct essentially cost-free through the NLRB; avoiding arbitration costs is undeniably advantageous to a union. The NLRB provides an attorney at no charge. The union's often scant resources are therefore not called upon to enforce statutory rights and, perhaps more importantly, a union need not make resource-allocation decisions when considering potential settlement offers; full vindication of statutory rights may be pursued regardless of cost.

60. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974) (stating that arbitrators have "no general authority to invoke public laws that conflict with the bargain between the parties").
62. 2 C. Morris, THE DEVELOPING LABOR LAW 1663 (2d ed. 1983). Nor do arbitrators have any statutory authority on which to base "cease and desist" orders or to require that the employer, by posting appropriate notices in the workplace, advise employees of the relief ordered. Cf. Gardner-Denver, 415 U.S. at 53-54 (finding that "the arbitrator has authority to resolve only questions of contractual rights"). The Board, in contrast, has broad statutory authority to do so and will typically order such cease and desist and notice-posting remedies whenever it finds that an unfair labor practice has been committed. See 29 U.S.C. § 160(c) (1988); see also 2 C. Morris, supra, at 1653-55 (cease and desist order), 1655 (notice-posting requirement).
63. See 29 U.S.C. § 161(1) (1988) (subpoena power); see also id. § 160(b) (rules of evidence applicable under the federal rules of civil procedure shall be followed as far as practicable).
B. Analytic Considerations

In addition to the general considerations outlined above, we believe the labor movement should be critical of some of the analytical foundations on which recent deferral doctrine is built. In our view, current doctrine incorrectly fails to distinguish between NLRA § 8(a)(5) cases and § 8(a)(3) cases. The Board's conclusion that deferral may be appropriate in most or all NLRA § 8(a)(5) cases simply does not, in our view, justify deferral in any NLRA § 8(a)(3) cases.

Section 8(a)(5) of the NLRA, and its companion, section 8(b)(3), impose duties on the employer and the union to bargain in good faith. The Board and the courts have interpreted this bargaining duty to require not constant bargaining but rather the creation of a situation in which bargaining results in a contract setting forth the rights and obligations of the parties (employer, employee, and union) for some specified period of time. During the term of that contract, the presence of contractual rights and obligations completely extinguishes the duty to bargain (if the parties have covered every possible area in their contract or otherwise waived their respective obligations to bargain during the contract term), or at least limits the duty to those areas not covered in the agreement. In short, as the language of section 8(d) makes clear, once the parties reach an agreement in a particular area they are entitled to rely on that agreement and need not bargain on that subject again until the contract expires.

Deferral analysis in NLRA § 8(a)(5) cases, we believe, should proceed directly from these premises. The existence of a contract containing a private mechanism for dispute resolution is, by operation of law, a waiver of the duty to bargain, at least as to those subjects covered by the agreement. Deferral of NLRA § 8(a)(5) charges in this context is therefore nothing more than the Board's recognition of the existence of the agreement; deferral is not contingent on the substance of that

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66. NLRA § 8(d) provides in part that the duty to bargain does not require "either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period . . . ." 29 U.S.C. § 158(d) (1988); see infra notes 73-77 and accompanying text.

agreement. In this context there is no reason for the Board to scrutinize arbitral resolutions to any great degree because it is the existence of the contract covering particular topics, and not the particular substantive terms related to those topics or their interpretation, that justifies deferral.

In our view, however, even this rationale for deferral of NLRA § 8(a)(5) cases must be applied with caution. This rationale assumes that the parties, by executing a collective-bargaining agreement, have waived entirely the application of the duty to bargain during the term of that agreement, or at least assumes that the parties have already reached agreement on the area of employer conduct at issue. This waiver assumption may be generally accurate in typical cases involving long-standing collective-bargaining relationships and contracts that cover the entire range of workplace issues. Nevertheless, we believe that the Board should not apply the deferral doctrine when there is reason to believe that this assumption is inaccurate.

Although there is no real dispute that the parties may waive entirely their rights (and duties) to bargain during the term of a contract, the determination of whether they in fact have waived those rights (and duties) simply cannot be made by an arbitrator. Instead, that determination is for the Board,

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68. The waiver assumption is further bolstered if the contract contains a "zipper clause" whereby the parties waive their obligations to bargain during the term of the agreement and state that the contract is intended to cover all aspects of their relationship. See, e.g., GTE Automatic Elec. Inc., 261 N.L.R.B. 1491, 1491 (1982) (holding that a zipper clause waived the duty to bargain midterm even over benefits not existing at the time of bargaining). But cf. Rockwell Int'l Corp., 260 N.L.R.B. 1346 (1982) (holding that a zipper clause will not constitute a waiver of the employer's duty to bargain on issues to which the employer has made unilateral modifications or changes).

69. Nothing requires that collective-bargaining agreements cover any particular range of topics. See NLRA § 8(d), 29 U.S.C. § 158(d) (1988); see also NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958); cf. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). It is therefore perfectly permissible, for example, for a contract to cover only wage rates and say nothing about holidays, vacations, health care, pensions, or any other topic. Whether the parties in such a situation intended to waive their rights and obligations to bargain over these topics by not including them in the contract may therefore depend on bargaining history, past practice, or other factors outside the four corners of the agreement itself.

70. The question of to what extent, and under what circumstances, a legal right or obligation may be waived is plainly a legal question implicating questions such as congressional purpose and policy far beyond the merely contractual questions which an arbitrator is empowered to decide. For example, in Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981), the Supreme Court held that rights under the Fair Labor Standards Act are not waivable by contract and a prior arbitral award
and, we believe, the Board should make that determination in each case based on applicable contract language and bargaining history. The Board should not assume, merely because there is a contract calling for arbitral resolution of disputes involving its terms, that the parties intended arbitral relief to be exclusive and intended to waive their statutory rights and duties under NLRA § 8(a)(5) in areas not even covered by the contract.

The Board has had difficulty formulating a consistent body of law on the determination of the employer's continuing duty to bargain during the contract term before unilaterally changing terms and conditions of employment. In our view, the Board is too quick to assume—based on boilerplate zipper clauses or "management rights" clauses—that the parties therefore does not preclude subsequent action under the statute. Id. at 740-45. The duty to bargain is similarly a creature of statute—and not of contract—and it is therefore the agency—and not the arbitrator—that should determine whether the right has been effectively waived.

This inquiry into whether the parties covered a particular area of employer conduct is analogous to the inquiry that courts are required to make in determining whether the parties have agreed to arbitrate certain disputes prior to enforcing the arbitration clause. The arbitrability question requires courts to examine the contract and determine whether the arbitration clause covers the contract dispute at issue, without requiring a court to decide the merits of the substantive contract interpretation issue itself. See AT&T Technologies, Inc. v. Communication Workers, 475 U.S. 643, 649-50 (1986). Similarly, in deciding whether the parties have covered a particular area of employer conduct, and thereby eliminated any ongoing duty to bargain, the Board should examine the contract and determine its breadth of coverage without determining whether the employer conduct at issue breaches the contract's substantive provisions.

There is another, independent reason why the Board should apply deferral policy cautiously to NLRA § 8(a)(5) cases. An employer may, by a series of clearly arbitrable breaches of the contract, attempt to undermine the union and its value in the eyes of its members. Although each employer breach may be an ideal candidate for deferral, the cumulative effect of a series of such breaches may not be entirely remedied by a series of arbitral awards in favor of the union. Complete redress of the delays, costs, and general disruptions caused by the employer's conduct may require applying Board statutory protections and remedies. See supra notes 60-62 and accompanying text.

Compare Columbus & S. Ohio Elec. Co., 270 N.L.R.B. 686, 687 (1984) (holding that a zipper clause waives the union's right to bargain over the elimination of Christmas bonuses that were not specifically provided in the contract where an integration clause, in effect, extinguished the practice), enforced sub nom. International Bhd. of Elec. Workers Local 1466 v. NLRB, 795 F.2d 150 (D.C. Cir. 1986) with Suffolk Child Dev. Center, 277 N.L.R.B. 1345, 1351 (1985) (upholding, without opinion, administrative law judge's holding that a zipper clause does not waive the union's right to bargain during the contract over changes in medical benefits where such benefits continued after the formation of the new contract and the employer did not make clear that such benefits were covered by the clause).

See supra note 68.
have waived the duty to bargain during the contract term.\textsuperscript{75} Still, unlike arbitrators, the Board has upheld the duty to bargain when faced with unilateral employer action on an item not encompassed by the parties' agreement in the absence of zipper or management rights clauses.\textsuperscript{76} For example, the Board has recently held that employers cannot unilaterally impose drug-testing requirements during the term of a contract without bargaining in most circumstances.\textsuperscript{77} Arbitrators, on the other hand, tend to focus only on the contractual language—or lack thereof—to resolve disputes in areas not covered by the agreement.\textsuperscript{78} Worse yet, some arbitrators still cling to the "reserved rights" doctrine, under which all matters not specifically controlled by the agreement are reserved for unilateral management action.\textsuperscript{79} Thus,

\textsuperscript{75} See, e.g., United Technologies Corp., 287 N.L.R.B. 198, 198 (1987) (finding that boilerplate management rights language justified unilateral change in discipline procedure), \textit{modified on other grounds}, 292 N.L.R.B. 248, \textit{enforced}, 884 F.2d 1569 (2d Cir. 1989). The Supreme Court has determined that alleged waivers of statutory obligations must be supported by "clear and unmistakable" contract language. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). In addition, there are some categories of NLRA rights—for example, rights necessary for the exercise of free choice in selecting a bargaining agent—that cannot be waived at all. See NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974). Traditional zipper and management rights clauses are generally proposed by employers as boilerplate language. By agreeing to such language in that context we do not believe that the union has knowingly waived its statutory protections. In fact, in the drug testing context, the Board requires either extremely specific contractual waiver language or evidence that a party "consciously explored ... and ... consciously yielded or clearly and unmistakably waived its interest" regarding drug testing policies before the Board will find a waiver of the right to bargain over employer efforts to implement drug testing. Johnson-Bateman Co., 295 N.L.R.B. No. 26, slip op. at 15, 131 L.R.R.M. (BNA) 1393, 1398 (June 15, 1989).

\textsuperscript{76} See, e.g., Alfred M. Lewis, Inc., 229 N.L.R.B. 757, 757-58 (1977) (holding that an employer committed a NLRA § 8(a)(5) violation, during the contract term, by unilaterally instituting a production quota and disciplinary system to be immediately enforced without offering the union an opportunity to bargain), \textit{enforced in pertinent part}, Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403 (9th Cir. 1978).

\textsuperscript{77} See discussion of Johnson-Bateman, supra note 75 and infra note 79.

\textsuperscript{78} Arbitrators do not, for example, view their role as enforcing the duty to bargain because they are "limited by the common prohibition that the arbitrator not add to, subtract from, or modify the [collective-bargaining] agreement." F. ELKOURI \& E. ELKOURI, supra note 64, at 473.

\textsuperscript{79} One classic statement of this doctrine is found in Vacaville Unified School Dist., 71 Lab. Arb. (BNA) 1026, 1028 (1978): It is a well recognized arbitral principal [sic] that the Collective Bargaining Agreement imposes limitations on the employer's otherwise unfettered right to manage the enterprise. Except as expressly restricted by the Agreement, the employer retains the right of management. This is known as the Reserved Right Doctrine . . . .

\textit{Id.} at 1028 (Brisco, Arb.); see also St. Louis Symphony Soc'y, 70 Lab. Arb. (BNA) 475, 482 (1978) (Roberts, Arb.) (asserting that "[t]he significance of contractual silence on
a particular subject matter is that the contract does not impose a limitation or obligation upon management, so that management is therefore free to act as it pleases with the rights of a common law employer); Fairway Foods, Inc., 44 Lab. Arb. (BNA) 161, 164 (1965) (Solomon, Arb.). See generally F. Elkouri & E. Elkouri, supra note 64, at 457-63. In our view, the reserved rights doctrine improperly places the burden on a union to anticipate—and contractually prohibit—virtually any type of potential employer unilateral action. For example, where the employer has always provided free on-site parking to employees, should the union be required to anticipate and contractually prohibit the possibility that the employer will decide that she can make good money by charging employees for parking? Under the reserved rights theory, the union’s failure to do so would create the risk that the employer, in reliance on its “reserved rights,” will begin to charge employees for parking. The range of potential employer unilateral conduct is limited only by the employer’s imagination or willingness to create mischief.

In addition, as Arthur Goldberg, former Supreme Court Justice and former General Counsel of the United Steelworkers of America, has observed, the reserved rights doctrine “overlooks the degree to which collective bargaining modifies workers’ rights—the right to cease work, the right to press a point without regard to any set of rules or guides, [and] the right to improvise concepts of fairness . . . .” Goldberg, Management’s Reserved Rights: A Labor View, 9 ANN. NAT’L ACAD. OF ARB. PROC. 118, 122 (J. McKelvey ed. 1956). In giving up their rights, workers legitimately expect a degree of mutuality: that management too is committed to the process of collective bargaining and abandons its right to act unilaterally and arbitrarily. This issue arose most recently in the context of unilaterally imposed drug testing policies. It is the UAW’s position that such programs cannot be implemented during the contract term without prior bargaining. Letter from Owen Bieber to all local unions, 40 UAW Administrative Letters, no. 1 (Jan. 10, 1990); Letter from Owen Bieber to all local unions, 36 UAW Administrative Letters, no. 8 (Sept. 17, 1986). The NLRB has generally agreed with this position. See, e.g., Johnson-Bateman Co., 295 N.L.R.B. No. 26, slip op. at 15, 131 L.R.R.M. (BNA) 1393, 1398 (June 15, 1989). But cf. Star Tribune, Div. of Cowles Media Co., 295 N.L.R.B. No. 63, slip op. at 8, 15, 131 L.R.R.M. (BNA) 1404, 1407, 1409 (June 15, 1989) (holding that drug testing of applicants for employment is not a mandatory subject for bargaining and can be implemented unilaterally).

In our view, it is much more sensible, as a general rule, to impose the burden of showing that a changed working condition comports with the labor contract on the party seeking to implement a change. Unilateral changes are prohibited during no-contract periods in the absence of a bargaining impasse. Why should the result be any different during the contract period? If there is no contract language to support the change, the employer should be required to bargain before unilaterally changing terms and conditions of employment, unless the contract clearly waives bargaining rights and obligations during its term. See Suffolk Child Dev. Center, 277 N.L.R.B. 1345, 1349-50 (1985) (affirming, without opinion, the administrative law judge’s finding that unilateral changes in medical benefits without a clear and unmistakable waiver constitute a NLRA § 8(a)(5) violation); cf. Southern Fla. Hotel & Motel Ass’n, 245 N.L.R.B. 561, 567-69 & n.22 (1979) (holding that contractual provision giving employer authority to “change such reasonable rules and regulations as it deems necessary” does not permit unilateral changes in those rules that alter compensation), enforced in relevant part, 751 F.2d 1571 (11th Cir. 1985).

In fact, three compelling arguments can be made that the employer should not enjoy any right to implement changes unilaterally following a bargaining impasse during the contract term. First, allowing unilateral action by an employer during a period in which the union is bound not to strike would create an anomalous result. This is so for the simple reason that no-strike clauses in labor contracts generally
although we are not entirely satisfied with the Board's efforts to develop legal standards in this area, the Board, unlike an arbitrator, at least makes some effort to determine whether unilateral employer action violates the duty to bargain.

Clearly, none of the arguments outlined above justify application of the NLRB's deferral doctrine in cases involving alleged violation of the NLRA § 8(a)(3) statutory protection from employer reprisals for union activity. In that circumstance, Congress has determined that employees must enjoy a particular protection; there is no reason to conclude that such protection becomes irrelevant when bargaining has produced a contract. Although the parties may duplicate those statutory protections with contractual language prohibiting discharge or discipline except for just cause, or even with language prohibiting employer reprisals for union activity, the statute remains, in our view, an important source of independent protection.

In analogous contexts, the Supreme Court has held that duplication of statutory protections in a labor agreement do not make statutory protections inoperable. In *Alexander v. Gardner-Denver Co.*, for example, the Court allowed an employee to pursue a remedy under Title VII of the Civil Rights Act of 1964 despite an arbitrator's failure to find that the employer had violated the "no discrimination" clause.

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80. See *NLRB v. Lion Oil Co.*, 352 U.S. 282, 290-91 (1957). If unilateral employer action is allowed, decisionmakers should find an implied exception to such no-strike clauses so that a union will have access to its traditional economic weapon when faced with unilateral employer action. In the alternative, unions would certainly bargain for limitations on such no-strike clauses. Second, if a labor contract contains a "zipper clause," the employer, as well as the union, has waived its right to bargain during the contract term. The employer's waiver of this right should also be viewed as a waiver of its "right" to make unilateral changes. Finally, allowing unilateral changes (without either an express or implied limitation on the no-strike clause) would certainly undermine the national labor policy of stable labor relations during the contract's term. *See supra* note 3.


of the collective-bargaining agreement. As the Gardner-Denver Court explained, "the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement, and he must interpret and apply that agreement . . . ." In addition, arbitrators have "no general authority to invoke public laws that conflict with the bargain between the parties." Finally, if an arbitrator does base her decision on statutory provisions rather than on the bargaining agreement, she "has 'exceeded the scope of the submission,' and the award will not be enforced." An arbitral resolution of a contractual dispute, therefore, is entirely beside the point when considering whether an employee has been afforded the statutory protections under NLRA § 8(a)(3) fashioned by Congress.

83. Gardner-Denver, 415 U.S. at 59-60; see also McDonald v. City of West Branch, Mich., 466 U.S. 284, 290-92 (1984) (holding that federal courts may not apply res judicata or collateral estoppel to the arbitrator's decision against the employee who sought a remedy for a first amendment violation under 42 U.S.C. § 1983); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (holding that an employee can maintain a federal claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, even though he had previously and unsuccessfully sought the same remedy from a grievance committee established by the collective-bargaining agreement). But see Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1652, 1656-57 (1991) (holding that an agreement to arbitrate "any dispute, claim, or controversy" involving employment limited the employee to an arbitral forum and waived the employee's right to pursue a statutory claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634). We do not believe that one can argue successfully that the rights at issue under the NLRA are different in kind from those protected under Title VII of the Civil Rights Act, the FLSA, or 42 U.S.C. § 1983 (1988). The Supreme Court has clearly stated that the NLRA (like Title VII, FLSA, and section 1983, in our view) protects important "public" rights. National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940).

84. 415 U.S. at 53.

85. Id.

86. Id. (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

87. Where a federal or state statute creates independent rights, the labor movement has not hesitated to support individual employee access to those statutory protections even during the term of a labor agreement that addresses some of the same issues. The AFL-CIO, for example, filed an amicus curiae brief in support of the plaintiff-employee in Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 400-01 (1988). The Lingle Court agreed with the AFL-CIO's arguments and determined that a "just cause" clause and its enforceability under section 301 did not preempt application of a state law prohibiting discharge of an employee for filing workers' compensation claims. Id. at 411-13. In Smolarek v. Chrysler Corp., 879 F.2d 1326, 1328 n.1 (6th Cir.) (en banc), cert. denied, 493 U.S. 992 (1989), the UAW filed an amicus curiae brief in support of an employee who sought to enforce Michigan's Handicapper's Civil Rights Act, MICH. COMP. LAWS ANN. §§ 37.1101-.1605 (West 1985 & Supp. 1991). The employer in that case argued that application of the state law should be preempted because enforcement would require the state court to interpret the terms of the
Although *Gardner-Denver* undermines application of deferral to those cases involving NLRA § 8(a)(3)'s protections, the *Gardner-Denver* analogy goes only so far. It does not, we believe, assist those critics of the deferral doctrine who would mount a wholesale challenge and argue that *Collyer Insulated Wire* and *Spielberg Manufacturing Co.* were wrongly decided. *Gardner-Denver* and its progeny rejected deferral arguments because the individual rights at issue in those cases were themselves objects of specific statutory protection. By contrast, the rights protected under the rubric of the NLRA's duty to bargain are not ends in themselves, but only a mechanism to encourage and protect the formation of labor agreements. The Court in *Barrentine v. Arkansas-Best Freight-System, Inc.*, for example, noted this very distinction when it contrasted rights under the Fair Labor Standards Act (FLSA) with those protected by the NLRA: "The rights established through this system of majority rule [collective bargaining under the NLRA] are thus 'protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife "by encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151.'

UAW/Chrysler labor agreement. 879 F.2d at 1331-32. The plaintiffs, in contrast, argued—and the court held—that the state statute created independent rights the application of which should not be withheld merely because the employee was also covered by a labor agreement that in large measure duplicated the state law protections. *Id.* at 1331, 1334.


89. 112 N.L.R.B. 1080 (1955).

90. Recall that *Collyer* and *Spielberg* approved deferral only in the context of NLRA § 8(a)(5) duty to bargain allegations. See supra notes 21-25, 38-39 and accompanying text.

91. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) (holding that although "a union may waive certain statutory rights related to collective activity," rights under Title VII of the Civil Rights Act of 1964 represent "a congressional command that each employee be free from discriminatory practices" and, therefore, are "not susceptible of prospective waiver").

92. To some extent, the same observation can be made about the right to be free from employer retaliation for union activity. That right is designed not only to protect individual employees from unjust treatment on the job, but also to protect and encourage employees in their efforts to engage in concerted activity, with the result being the formation of labor organizations. As should be obvious from our discussion, we do not believe that the prohibition on reprisals provided in NLRA § 8(a)(3) can be accomplished by signing a collective-bargaining agreement in the same way that the duty to bargain provided in NLRA § 8(a)(5) may be entirely accomplished with the signing of an agreement. Thus, the value of NLRA § 8(a)(3)'s protections are not made superfluous when an agreement is signed; therefore, we believe that there is no reason for agency enforcement of those protections to cease with the signing of a labor contract.


94. *Id.* at 735 (quoting *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975)).
C. Additional Considerations

Even from a union perspective, there are strong policy and practical considerations that lend support to broad deferral doctrines. Any policy that provides a remedy outside of a collectively bargained grievance procedure weakens that procedure's authority. If the procedure can be bypassed, its usefulness is reduced in the eyes of the employees. Moreover, these results would weaken and marginalize unions. Elected union officers bargain contracts and are generally the exclusive channel through which those contracts can be enforced. To weaken or limit the scope of those procedures, therefore, weakens the union and its role in workplace governance. In contrast, the exclusivity of the grievance procedure and the finality of arbitration promote union power and effectiveness.\(^9^5\) Such exclusivity also furthers the fundamental labor policy goal of industrial stability.\(^9^6\)

Judge Edwards of the D.C. Circuit has expressed, both from the bench and as a commentator, the view that collective-bargaining agreements operate as a waiver of all otherwise-available statutory rights under the NLRA.\(^9^7\) This approach,

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\(^{95}\) See Emporium Capwell Co. v. Western Addition Community. Org., 420 U.S. 50, 67 (1975) (suggesting that in order to protect the solidarity of the union, members must pursue their individual complaints of discrimination against the employer through the grievance-arbitration procedure established by the collective-bargaining agreement. Otherwise the strength of the union, the employees' ability to reduce discriminatory practices, and the role of the collective-bargaining agreement would be undermined); see also Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965).

\(^{96}\) See The Steelworkers Trilogy (United Steelworkers v. American Mfg. Co., 363 U.S. 564, 570 (1960) (Brennan, J., concurring) (indicating that when a court is asked to enforce the contractual duty to arbitrate it should not attempt to interpret the collective-bargaining agreement but should leave that task to the parties' chosen arbitrator); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) (agreeing to be bound by arbitration promotes industrial stability and peace); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) (stating that because parties agreed to have arbitrator interpret the collective-bargaining agreement, courts have "no business" overruling the bargained-for arbitrator's decision because their interpretation of the agreement may be different. Such action would make meaningless the contractual provision that the arbitral decision is final.); see also Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 265 (1964) (indicating that arbitration, a voluntary settlement of labor-management disputes, gives substance to the terms of the collective-bargaining agreements and may end disputes and controversies); cf. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) (stating that the grievance-arbitration procedure is "an integral part of the collective-bargaining process").

\(^{97}\) See Hammontree v. NLRB, 925 F.2d 1486, 1503 (D.C. Cir. 1991) (en banc) (Edwards, J., concurring) ("The parties to the collective agreement chose to supplant
we believe, has merit. The ability of unions to bargain for broad contractual protections—and thereby eliminate the need to resort to the generally narrower statutory protections of the NLRA—is indeed a source of union strength. Nevertheless, with all due respect to Judge Edwards, we believe that his approach goes too far in assuming, for example, that the existence of a general "just cause" protection, and its enforceability through private means, should in every instance be deemed to supplant access to the specific statutory protections created by Congress in the NLRA.

In any event, the Board's present deferral doctrine does not seem to be based on a waiver analysis. A waiver analysis, for example, would require an inquiry into the extent of the purported waiver of statutory rights. Such analysis should also either allow for the possibility of a complete waiver of statutory rights or explain why such complete waivers will not be tolerated. If complete waivers are allowed, there would be no need for the "clearly repugnant" aspect of Board deferral doctrine whenever the parties have completely waived reliance on statutory rights. The Board, however, has refrained from establishing this sort of sliding scale of deference based on the extent of the waiver, and instead universally applies the "clearly repugnant" standard. This analysis is plainly inconsistent with a waiver-based deferral policy.

The NLRB's deferral doctrine in prearbitral settings can also be justified largely by analogy to ripeness doctrines. Until the collectively-bargained mechanism for resolution of the parties' contractual rights and duties has run its course, the employer's conduct remains, in an important sense, nascent. Because an employer's or union's action may yet be reversed by a process which, for legal purposes, is internal to the employer-employee relationship, a very strong argument can be made that a legal cause of action has not even accrued. Moreover, delaying Board intervention also serves the salutary purpose of allowing the parties to attempt private resolution

statutory rights with analogous rights created under the contract... Giving legal effect to that agreement respects the private ordering of rights and responsibilities established through collective bargaining, and fosters the strong labor policy of promoting industrial peace through arbitration.); see also Edwards, supra note 6, at 28-32.

of their dispute. The party seeking Board relief may well be satisfied with the arbitral result and may decline to seek further relief. In such cases, delaying Board action avoids wasting Board resources and, most importantly, promotes the integrity of the arbitral process.

Many of the broad policy concerns implicated in the area of deferral have already been examined by the Supreme Court in the context of enforcement of collective-bargaining agreements themselves. In this context, the Court has properly determined that the parties must be required to exhaust the available contractual mechanisms for obtaining final contract interpretations before they may seek direct judicial enforcement of their agreement. The only exception to this exhaustion rule occurs when a worker demonstrates that the union breached its duty to fairly represent the employee in its handling of the employee’s grievance.

The Supreme Court decisions on the exhaustion rule, however, all involve disputes originally concerning enforcement of rights created by the labor contract itself rather than rights created by statute. Although these decisions speak broadly in terms of private dispute resolution, the particular arguments supported by these cases simply do not apply when the rights at issue find their source not in the contract, but in

100. See, e.g., Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53, 656 (1965) (noting the general federal rule that an employee cannot maintain an action against employers for severance pay prior to exhausting grievance procedures, including arbitration); cf. United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 62 (1981) (holding that when an employee files a joint complaint against his union for breach of duty of fair representation and against his employer for breach of contract, the complaint must be brought within the statute of limitations period for vacating arbitration awards because he must show the breach of duty before reaching the merits of the contract claim); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976) (holding that an arbitration decision will not be enforced, despite a finality provision in the contract, where the employee was unfairly represented by the union at the arbitration hearing).

101. See Vaca v. Sipes, 386 U.S. 171, 184-86 (1967). The Court also recently decided that such deference to the parties’ “chosen” means of contract interpretation does not extend to contractual processes which culminate, not in arbitral interpretation of the contract, but in the union’s ability to conduct a strike in defense of its interpretation of the contract. Groves v. Ring Screw Works, Ferndale Fastener Div., 111 S. Ct. 498, 503 (1990). The Groves Court reasoned that congressional preference extends only to methods of contract interpretation and not to the availability of economic force to encourage one’s opponent to concede defeat. Id. at 502-03. The UAW in that case argued successfully that the union and its members should have access to direct judicial enforcement despite the availability of the strike weapon. Id. at 503.

102. See supra notes 100-01.
the law. These decisions turn largely on the Court’s observation that arbitral resolution of contract disputes is appropriate because the parties, by entering into their contract, agreed not only to certain substantive provisions but also to a "system of private law" for enforcing those substantive provisions. As the Court has properly noted, the grievance and arbitration process would lose much of its force and integrity if its mechanisms were not exclusive and its results not final. Respect for the contract, therefore, dictates that courts allow the parties' chosen system of contract interpretation to run its course prior to judicial intervention. Respect for the statute, we believe, similarly requires that access to the administrative agency charged with enforcing its provisions not be withheld.

Finally, we should admit that current Board deferral doctrine does not entirely ignore the statutory policies of the Act. Thus, Board review does remain available to overrule arbitral results when those results are clearly wrong. Although this standard, we believe, is much too forgiving, Board review remains a significant safety valve. Also, from an administrative standpoint, broad NLRB deferral prevents unjustifiable forum shopping and duplicative litigation over what are often the same factual disputes.

Before we complain too long over loss of access to the NLRB, we should also, as union advocates, remind ourselves that the Board's own processes are far from ideal. Criticizing deferral, after all, suggests a preference for Board review and, to some extent, reduces the incentive for unions to obtain the greatest possible contractual protections in areas which the Board may otherwise cover. A brief review of the NLRB's case-processing record is, therefore, in order.

The NLRB conducts an administrative investigation of all unfair labor practice charges to determine if at least a prima facie case exists. Approximately two-thirds of all charges

104. See Maddox, 379 U.S. at 653.
105. See supra note 45 and accompanying text.
106. The risk of duplicative litigation may be eliminated in large part, however, by a narrower doctrine deferring only to arbitral resolution of factual disputes and allowing the arbitral application of the distinct, albeit occasionally overlapping, normative standards of contract and statute. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 & n.21 (1974).
are dismissed as lacking merit before reaching the complaint stage.108 Once a complaint is issued, litigation before the NLRB remains a relatively slow, highly procedural, multi-appeal process.109 Fully litigated cases usually take two to three years from the date the charge is filed until an enforceable order is issued by a court of appeals.110 By contrast, arbitration is relatively quick and final, and arbitrators almost always quickly dispose of procedural issues and reach the merits.111

Furthermore, the NLRB does not assume jurisdiction over all allegations of improper discipline. Although the working public apparently still believes that the NLRB has general jurisdiction to resolve most workplace disputes, the harsh reality is that the agency’s jurisdiction is confined to specific statutory prohibitions of employer or union conduct that substantially affects commerce.112 In addition, the charging party has the burden of establishing a prima facie case based on retaliation for engaging in protected “concerted activities.”113 These jurisdictional limits, and the burden on the charging party to demonstrate a prima facie case without full opportunity for discovery, mean that for every fifty-five employee inquiries the Board files a complaint in only one.114

108. See 35 NLRB ANN. REP. 10 (1989); see also Collyer, A View From the Inside, in AMERICAN LABOR POLICY 385, 387 (C.J. Morris ed. 1987); Dotson, Processing Cases at the NLRB, 35 LAB. L.J. 3, 3 (1984). Of these cases that are found to be of merit, approximately 95 percent are settled. Collyer, supra at 387; Dotson, supra at 3.
111. F. ELKOURI & E. ELKOURI, supra note 64, at 7, 9.
112. NLRA § 10(a) provides that “[t]he Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in [NLRA § 8]) affecting commerce.” 29 U.S.C. § 160(a) (1988). In practice, the Board has exercised its jurisdiction only in those cases that substantially affect commerce. See K. McGuiness, supra note 109, at 33.
114. Although the Board reports almost 200,000 “informational contacts” each year, only approximately 33,000 charges are actually filed each year and only approximately 3600 complaints are issued. See 35 NLRB ANN. REP. 4, 11 (1989).
Moreover, as the recent *Meyers Industries, Inc.* case demonstrates, the NLRB's definition of protected concerted activity under NLRA § 7 has not been sympathetic to individual employees. Under *Meyers*, protected concerted activity must either be some form of group activity (i.e., more than one employee involved in some form of protest over terms and conditions of employment) or individual conduct which is an extension of previous concerted action (e.g., pursuing a grievance under a collective-bargaining agreement). In the *Meyers* case, Steve Prill, a lone over-the-road truck driver, believed that his truck was so poorly maintained that driving it was a safety risk. When a problem arose during a trip, he refused to drive the truck. Although such action, if conducted by more than one employee acting in concert, would be the type of protected "concerted activit[y]" immune from employer reprisal under section 7 of the NLRA, the Board—despite *amicus* support from the UAW for Mr. Prill—determined that his activity was not protected because he had not attempted to involve other employees in his efforts.

Finally, the Board's remedial authority—although in some areas broader than an arbitrator's—is in other important ways more limited. For instance, the NLRB, in contrast to

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116. *Id.* at 496-97 (adopting the standard that a single employee does not initiate or engage in concerted activity under NLRA § 7 when she complains of an employer violation of state workplace safety law even though the law necessarily protects all workers in the state); *see also* Meyers Indus., Inc., 281 N.L.R.B. 882, 884 (1986) (*Meyers II*) (reaffirming the Board's definition of concerted activities in *Meyers I* and dismissal of the employee's claim), *enforced sub. nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).
119. *Meyers I*, 268 N.L.R.B. at 497-99. In *NLRB v. City Disposal Sys.*, Inc., 465 U.S. 822 (1984), the Supreme Court upheld a prior Board's ruling that individual employee action to enforce contractual provisions is protected concerted activity because such activity partakes of the collective actions that led to those provisions initially. *Id.* at 831-32. The Board and the courts have also been somewhat unsympathetic to collective employee action outside traditional union channels. In *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), the Supreme Court agreed with the Board and held that picketing to protest the union's ineffective processing of a civil rights grievance was not protected activity because the employees were attempting to circumvent their union and bargain directly with their employer. *Id.* at 57-58, 67-73.
120. *See supra* notes 60-62 and accompanying text.
arbitrators, generally will not apply equitable considerations to modify a penalty in discharge cases.\textsuperscript{121} The importance of the arbitrator's power in this respect cannot be over-emphasized. The arbitrator's reinstatement-without-backpay remedy has saved many workers from industrial capital punishment.\textsuperscript{122} By comparison, almost any degree of employee misconduct would compel a different result at the NLRB.

III. INDIVIDUAL RIGHTS V. COLLECTIVE RIGHTS: DEFERRAL AND THE DUTY OF FAIR REPRESENTATION

The Public Citizen Litigation Group has crusaded against NLRB deferral policy in a variety of forums with mixed results. Their approach met with some success before a panel of the Eleventh Circuit\textsuperscript{123} but was recently rejected by the D.C. Circuit sitting \textit{en banc}.\textsuperscript{124} In Hammontree, a member of the Teamsters alleged that he was unpopular with the elected local union leadership and that he was threatened with and received discriminatory treatment after successfully pursuing a grievance regarding dispatching practices.\textsuperscript{125} Following its investigation, the NLRB issued a complaint on Mr. Hammontree's behalf.\textsuperscript{126} An administrative law judge (ALJ) endorsed a grievance committee finding of employer violations of NLRA §§ 8(a)(1) and 8(a)(3).\textsuperscript{127}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{121} Although the Board may, for example, have statutory discretion to award reinstatement without backpay, it has generally failed to do so, making discharge cases virtually all-or-nothing propositions. Although section 10(c) of the NLRA allows the Board to order "reinstatement of employees with or without backpay," 29 U.S.C. § 160(c) (1988), the Board has declined to modify employer discipline as a means of resolving disputes. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 419-20 (1975) ("[T]he Board, since its inception, has awarded backpay as a matter of course . . . .").
\item \textsuperscript{122} See generally F. Elkouri & E. Elkouri, supra note 64, at 688.
\item \textsuperscript{123} In Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986), \textit{cert. denied}, 493 U.S. 891 (1989), the panel held that the Board's standard of deferral under Olin Corp., 268 N.L.R.B. 573, 574 (1984), by presuming until proven otherwise that an arbitrator fully confronted the unfair labor practice at issue, did not sufficiently protect individual rights. \textit{Taylor}, 786 F.2d at 1521-22. The panel remanded for reconsideration, after noting that there was no evidence that the arbitrator had considered the unfair labor practice claim. \textit{Id.}
\item \textsuperscript{124} Hammontree v. NLRB, 925 F.2d 1486, 1500 (D.C. Cir. 1991) (en banc) (affirming the Board's broad deferral policy).
\item \textsuperscript{125} \textit{Id.} at 1488-89 n.1; \textit{see also id.} at 1505-06 (Mikva, C.J., dissenting).
\item \textsuperscript{126} \textit{Id.} at 1489.
\item \textsuperscript{127} \textit{Id.}
\end{enumerate}
\end{footnotesize}
the ALJ's decision, the NLRB dismissed the complaint, holding that Mr. Hammontree could have pursued the matter under the antidiscrimination provisions of the labor agreement. On rehearing en banc, however, the District of Columbia Circuit Court of Appeals vacated the panel decision and held that the NLRB was within the range of its discretion in deferring to the arbitration proceeding.

The majority rehearing Hammontree based its decision in part on the distinction between pre- and postarbitration deferral. Deferring prior to arbitration, the court reasoned, does not deny access to the NLRB; such access is merely delayed. Although this observation is certainly true, we do not believe that it justifies development of significantly more relaxed standards for deferral in the prearbitration context.

128. Id. As an aside, it appears that the Board decision was inconsistent with both prior deferral decisions and the NLRB General Counsel Guideline Memorandum concerning United Technologies Corporation, Gen. Couns. Mem. 84-5 (Mar. 6, 1984), reprinted in 1984 Lab. Rel. Y.B. (BNA) 344. The General Counsel Memorandum states that deferral should not occur where the respondent allegedly has "engaged in conduct designed to interfere with employee rights to resort to the grievance-arbitration machinery." Gen. Couns. Mem. 84-5, at ¶ V, reprinted in 1984 Lab. Rel. Y.B. (BNA) at 345.

129. Hammontree v. NLRB, 894 F.2d 438, 443-44, 446 (D.C. Cir. 1990) (stating that NLRB deferral policy was improper because: (1) the deferral of unfair practice claims which exist independently of any contractual rights contradicts Supreme Court precedent in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), Barrentine v. Arkansas Best Freight Sys., Inc., 450 U.S. 728 (1981), and McDonald v. City of West Branch, 466 U.S. 284 (1984); and (2) because the deferral of individual discrimination cases is inconsistent with "congressional commands that such cases be given priority treatment"), vacated, 925 F.2d 1486 (D.C. Cir. 1991) (en banc).

130. Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) (en banc). Judge Edwards, writing separately, expressed his view that the existence of a collective-bargaining agreement constitutes a waiver of the substantive protections found in the NLRA. Id. at 1502 (Edwards, J., concurring). Judge Mikva, in lone dissent, adopted the arguments put forth by the Public Citizen Litigation Group. His dissent features a lively, but in our view gratuitous, discussion of "union bureaucrats," the "risk of collusion between unions and employers," "union bosses," and, inexplicably, "crooks and racketeers in the labor movement." Id. at 1507-11 (Mikva, J., dissenting). Mikva then concludes that, because Mr. Hammontree alleged that his interests were adverse to those of his union, deferral was inappropriate. Id. at 1516. Mikva further accepts the argument made in this Article that section 8(a)(3) creates independent statutory rights which are not subsumed into a collective-bargaining agreement but continue to have independent vitality even while such an agreement is in effect. Id. at 1515.

131. 925 F.2d at 1496-97.

132. Id. This rationale, if applied literally, would apply equally to grievances by union dissidents. The Court, however, indicated approval of the NLRB's exception for individuals whose interests are "adverse" to those of their union. Id. at 1498-99.
If the arbitration decision, when issued, is not to be given preclusive effect or deference, access to the Board should not be delayed to await that decision.\textsuperscript{133}

The NLRB's deferral policies implicate a central issue that has separated the trade union movement from individual rights groups such as the Association for Union Democracy and the Public Citizen Litigation Group. If employee rights under NLRA § 7 are the ends we seek, then protection of those rights should not be deferred to private mechanisms. If, however, these individual rights are primarily tools for establishing and strengthening the collective rights of workers to bargain with their employers in a unified and organized fashion, then a deferral policy must be judged also by whether it encourages the expansion of collective bargaining which, after all, is the very purpose of the NLRA.\textsuperscript{134}

As advocates for the labor movement, we believe that—just as the forces of capital are organized by the invisible hands of the marketplace and the profit motive—the forces of labor must be organized into a coordinated, unified, and potent force. We also believe that history demonstrates that without such organization the working class will survive only as an overlooked, exploited, and powerless appendage to the marketplace. Individual rights, although of obvious importance, draw their value in this context largely by enabling individuals to organize their activities in a coordinated fashion to confront the already-organized forces which would seek to deprive them of economic security and a decent worklife.

To oversimplify a bit for dramatic purposes, we can ask the question of how best to address the economic and social imbalances of our system. When workers face the corporate/political Goliath, is it better to have each worker launch an individual attack armed with his sling and stone of

\textsuperscript{133} Of course, there are some reasons for delaying access to the Board. The arbitration award may satisfy all parties and each may decline to seek NLRB review of that award. In addition, delaying Board action allows arbitration to occur and work its "therapeutic" function, possibly obviating the need for further intervention. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960). Even so, we do not believe that these possibilities are sufficiently forceful to justify development of a relaxed standard of deferral in a prearbitration context unless the award, when issued, receives a similar degree of deference.

\textsuperscript{134} See NLRA § 1, 29 U.S.C. § 151 (1988) ("It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . "); see also supra note 3.
individual statutory protections? Or are those workers more likely to succeed if they confront their adversary with discipline and unity, deciding together whether to hold or charge? The lone David is romantic, and heroic, and therefore appealing. Unfortunately, except in the Bible, the lone David almost always dies a quick death at the hands of his oversized adversary.

Fundamental differences between advocates of individual and collective rights will probably never be reconciled. Both individual rights groups\textsuperscript{135} and the trade union movement\textsuperscript{136} earnestly claim to support both strong unions and union democracy. Although these principles are not by any means mutually exclusive, they do compete on occasion and therefore some balance must be struck. The eternal debate between groups like the Association for Union Democracy and the labor movement is over where to place that balance.

This brings us to the specific subject of the impact of deferral on union reform. The concerns of union reformers usually arise in situations where an employer disciplines a political dissident and an incumbent rival controls the grievance.\textsuperscript{137} In our view, the NLRB should not defer where animosity between the individual grievant and her bargaining agent implicates the union's duty of fair representation. Deferral in this context is appropriate only if both parties are willing to arbitrate and the arbitral process is not likely to be potentially tainted by the perception of animosity between grievant and union officer. The NLRB will not defer where the union declines to pursue the grievance or where "the interests of the union are adverse to those of the charging


\textsuperscript{137} For an illustration of this scenario, see the discussion of the Hammontree case, supra note 125 and accompanying text. If the Board returned to its prior doctrine, under which NLRA § 8(a)(3) cases were not subject to deferral to begin with, see supra notes 21-28 and accompanying text, this potential problem would arise only in the narrow context of section 8(a)(5) duty to bargain charges; the right of any employee to pursue full statutory relief under section 8(a)(3) would not be limited at all. The discussion that follows, however, deals with Board doctrine in its current form.
party-employee.” Unfortunately, the NLRB in practice apparently requires a rather strong showing of animosity between the grievant and the union. We agree entirely with the Public Citizen Litigation Group that, where hostility exists between the union and a grievant, the NLRB should not defer. If the NLRB is willing to relieve unions of the duty of handling the disciplinary case of an alleged dissident, a union would be well-advised to step aside.

The UAW publishes Administrative Letters on union policy matters which are binding on staff and local unions. The UAW’s administrative letters concerning fair representation have advised that, if a situation develops where a union official controls the grievance of an ideological or political adversary, the union official should recuse herself from the decision-making process. The UAW typically has established procedures so that if the union official cannot recuse herself, the grievance will be processed to the next level automatically where it will generally be handled by a different union official. Once a grievance reaches the third step, in

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139. See, e.g., Consolidated Freightways Corp., 288 N.L.R.B. 1252, 1252, 1255 (1988) (holding that deferral to the grievance-arbitration procedure is appropriate even though employee had made grievances that the union at one time had agreed not to bring), petition for review denied sub nom. Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) (en banc).
140. See, e.g., Levy, supra note 6, at 490-92.
141. See Bieber, Grievance Handling and the Union’s Duty of Fair Representation, 38 UAW ADMINISTRATIVE LETTER No. 4, at 4 (1988); Woodcock, Grievance Handling and the Union’s Duty of Fair Representation, 25 UAW ADMINISTRATIVE LETTER No. 5, at 3 (1973).
142. The grievance procedure found in the UAW-Ford Motor Company contract is entirely typical. It provides for the handling of all grievances through a four stage process. See 1 AGREEMENTS BETWEEN UAW AND THE FORD MOTOR COMPANY, art. VII, at 43-65 (Oct. 7, 1990) (on file with the University of Michigan Journal of Law Reform). The first stage consists of two “oral discussion steps," first between the grievant and his or her district committeeperson and immediate supervisor. See id. art. VII, §§ 2(a)-(b), at 43-45. District committeepersons are the elected local union officials with responsibility for handling first stage grievances arising in their district. See id. art. VI, § 11(a), at 36. The second oral discussion requires involvement of the plant superintendent or other designated management officials. See id. art. VII, § 2, at 43-44. If not satisfactorily resolved at this first stage, the grievance proceeds to the second stage which involves written reports by the “Unit Committee” of elected local union leadership. See id. art. VII, § 3, at 43-44. In the third stage, voluntary resolution is attempted between the chairperson of the local union’s bargaining committee on behalf of the grievant and the Plant Review Board on behalf of management. See id. art. VII, § 4, at 46-49. This stage requires written
fact, it will generally be handled by a representative of the International Union rather than a local union official.\textsuperscript{143}

Indeed, in our experience, dissidents tend, if anything, to receive better representation than the merits of their particular cases sometimes warrant. We hold this belief because the union has a strong incentive to avoid the appearance of retaliating against its political opposition and to avoid potential legal exposure to a dissident.\textsuperscript{144}

In \textit{Hammontree}, the Court accepted the Board's general policy that deferral is inappropriate when the aggrieved employee is at odds with the elected union leadership.\textsuperscript{145} The Court, however, glossed over the claimed conflict between the employee and the union leadership and refused to overturn the Board's deferral decision on the basis of those alleged conflicts.\textsuperscript{146}

It was also argued in \textit{Hammontree} that deferral was inappropriate there because of the nonarbitral decision-making process of the Teamster Joint Committees.\textsuperscript{147} Such committees are normally composed of equal numbers of representatives appointed by the union and the employer.\textsuperscript{148} No impartial arbitrator is involved.\textsuperscript{149} Instead, the final determination is the result of one side persuading the other to concede on a particular case. The Supreme Court, however, has refused to distinguish joint boards from arbitration on this basis.\textsuperscript{150}

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\textsuperscript{143} See 1 AGREEMENTS BETWEEN \textbf{UAW AND THE FORD MOTOR COMPANY}, supra note 142, art. VII, § 4(d), at 48.
\textsuperscript{144} In Bowen v. U.S. Postal Service, 459 U.S. 212 (1983), the Court indicated that the union retains almost all of the backpay liability after withdrawal of any grievance, where that withdrawal is the result of unfair representation and the grievance is meritorious. \textit{id.} at 228-30.
\textsuperscript{145} 925 F.2d at 1498-99.
\textsuperscript{146} \textit{See id.} at 1498.
\textsuperscript{147} \textit{See id.} at 1516-17 (Mikva, C.J., dissenting).
\textsuperscript{148} See 1 AGREEMENTS BETWEEN \textbf{UAW AND THE FORD MOTOR COMPANY}, supra note 142, art. VII, § 4(d), at 48.
\textsuperscript{149} \textit{See Hammontree}, 925 F.2d at 1516.
\textsuperscript{150} \textit{See General Drivers, Local Union No. 89 v. Riss & Co., Inc.}, 372 U.S. 517, 519 (1963) (per curiam).
\end{quote}
Although this joint board approach lacks some of the characteristics commonly associated with arbitration, there are arguments that a joint board resolution should receive at least the same degree of deference as a negotiated union-employer resolution of a grievance. In essence, joint boards function as a mechanism to achieve just such a negotiated resolution. The Board has had difficulty deciding whether to defer to such negotiated resolutions of disputes.\textsuperscript{151} More recently, however, the Board has announced that it will defer to negotiated grievance resolutions under the same standards applicable to arbitral awards under \textit{Olin}.\textsuperscript{152}

It has also been argued that Teamster joint board resolutions are distinguishable from typical negotiated resolutions of grievances. Public Citizen Litigation Group, for example, argues that such joint boards are generally composed of individuals with limited knowledge of the facts involved in particular cases and that such boards generally resolve a large number of grievances during each session, leading Public Citizen Litigation Group to speculate that improper "horsetrading" occurs.\textsuperscript{153} We express no opinion as to the validity of these arguments.

\textsuperscript{151} See, \textit{e.g.}, Laredo Packing Co., 254 N.L.R.B. 1, 5 (1981) (affirming ALJ's decision not to defer to grievance settlement reached before arbitration stage); Roadway Express, Inc., 246 N.L.R.B. 174, 175 (1979) (holding that deferral to private settlement is not appropriate where it was unclear that the legality of the discharge at issue was discussed and where the parties disagreed about the settlement terms and application), supplemented in 250 N.L.R.B. 393 (1980), \textit{enforcement denied in relevant part}, 547 F.2d 415, 424-26 (4th Cir. 1981) (rejecting the Board's justifications for nondeferral as without a factual basis and concluding that deferral was warranted); Ford Motor Co. (Rouge Complex), 233 N.L.R.B. 698, 700 n.12 (1977) (stating that deferral is not appropriate where grievances changed after the settlement process began and were not submitted to arbitration); Super Valu Xenia, Div. of Super Valu Stores, Inc., 228 N.L.R.B. 1254, 1260 (1977) (adopting the decision by ALJ that deferral to the decision of a two-man Labor Management Council is inappropriate where employees involved were not present, no testimony was taken, no transcript was available, and union representatives did not know which cases were to be discussed); Central Cart Co., 206 N.L.R.B. 337, 338 (1973) (deferral).

\textsuperscript{152} See Alpha Beta Co., 273 N.L.R.B. 1546, 1547 (1985) (stating that arbitral deferral principles apply equally to settlement "because they further the national labor policy which favors private resolution of labor disputes"), \textit{petition for review denied sub. nom. Mahon v. NLRB}, 808 F.2d 1342, 1345-46 (9th Cir. 1987); see also Carolina Freight Carriers Corp., 281 N.L.R.B. 440, 442, (1986) (applying Alpha Beta rule).

\textsuperscript{153} See, \textit{e.g.}, Brief for Teamsters for a Democratic Union as \textit{Amicus Curiae}, Chauffeurs, Teamsters and Helpers Local 391 v. Terry, 494 U.S. 558 (1990) (No. 88-1719) (Sept. 18, 1989) (authored by attorneys from the Public Citizen Litigation Group).
Where a grievance-arbitration system ends in a hearing before a neutral arbitrator, these issues do not arise and the case for deferral to that process cannot be questioned on those grounds. Virtually all UAW contracts of which we are aware employ a system involving a neutral arbitrator or umpire. Most other unions utilize such a system as well.

In closing, we would like to discuss the implications of internal union review mechanisms for Board deferral policies. Internal union review is an important part of the UAW’s grievance-handling structure. Although the decision whether to pursue or withdraw a grievance at any particular stage in the procedure is made by appropriate elected local union or International Union officials, any member has the right to challenge the union’s disposition of her grievance pursuant to procedures spelled out in the UAW’s Constitution. These challenge procedures include consideration by the full membership of the challenger’s local union which, by majority vote, may order the grievance reinstated. If unsuccessful there, the challenger may demand that a committee of the International’s Executive Board consider her case. Finally, the challenging member may choose between two routes for final internal review. The challenger may submit her appeal to the UAW’s Convention Appeals Committee, a group of approximately twenty individuals chosen randomly from among the

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154. See, e.g., AGREEMENTS BETWEEN CHRYSLER CORPORATION AND UAW, ENGINEERING, OFFICE, AND CLERICAL, § 23(a), at 23 (May 16, 1988) (appeal Board with impartial chairman to make final decision in appealed cases); 1 AGREEMENTS BETWEEN UAW AND THE FORD MOTOR COMPANY, supra note 142, art. VII, § 8, at 50 (impartial umpire); CENTRAL AGREEMENT BETWEEN J.I. CASE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA CENTRAL AGREEMENT, and LOCAL AGREEMENT LOCAL UNION NO. 1306, EAST MOLINE, ILLINOIS, art. III, § 3(A), at 9 (May 11, 1987) (impartial arbitrator); PRODUCTION AND MAINTENANCE MAIN LABOR CONTRACT BETWEEN NAVISTAR INTERNATIONAL TRANSPORTATION CORP. AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, art. VII, § 3, at 37 (Nov. 23, 1987) (permanent arbitrator selected by mutual agreement); AGREEMENT BETWEEN VOLKSWAGEN OF AMERICA, INC., WESTMORELAND ASSEMBLY PLANT, AND INTERNATIONAL UNION UAW AND ITS LOCAL 2055, ¶ 31, at 12-13 (March 10, 1986) (arbitrator selected by the parties) (all agreements are on file with the University of Michigan Journal of Law Reform).


156. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, CONST. art. 33, § 1 (1989) (on file with the University of Michigan Journal of Law Reform).

157. Id. art. 33, §§ 2(a), 3(a).

158. Id. art. 33, §§ 2(a), 3(d).

159. Id. art. 33, §§ 2(a), 3(e).
delegates to the Union's triennial convention, or she may submit it to the UAW's Public Review Board (PRB), a group of distinguished lay and clergy individuals with no institutional ties to the UAW. All decisions of the PRB are final and binding.

An appeal at any stage of this process can reverse the decision of the local or International Union official. Moreover, to allow this process to result in complete relief, the UAW has negotiated "reinstatement of grievance" letters with virtually all of the major employers with whom the UAW bargains. Pursuant to these letters, the employer agrees to abide by the decision of the various UAW appellate bodies and reinstate the grievance where it was improperly settled or withdrawn.

The membership of the PRB has included Wade McCree, former U.S. Solicitor General; Robben Fleming, former President of the University of Michigan; Eleanor Holmes Norton, member of Congress for the District of Columbia, former Professor, Georgetown University Law School, and former Chair of the National Labor Relations Board; and other individuals of stature and reputation. The membership of the PRB has included Wade McCree, former U.S. Solicitor General; Robben Fleming, former President of the University of Michigan; Eleanor Holmes Norton, member of Congress for the District of Columbia, former Professor, Georgetown University Law School, and former Chair of the National Labor Relations Board; and other individuals of stature and reputation. See id.; PUBLIC REVIEW BOARD, THIRD ANNUAL REPORT 6 (1960). No member of the PRB can be employed by the UAW, or work under its jurisdiction. They must be independent of the UAW. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, CONST. art. 32, § 1 (1989). The PRB controls its own budget, maintains its own office, and schedules its own docket. While the President of the International Union, UAW, appoints new members to fill vacancies, he must do so from a list submitted by the remaining members of the PRB, and his appointments must be ratified by the next UAW Constitutional Convention. Id. art. 32, § 2.


160. Id. art. 33, § 3(f).
161. Id. art. 32; id. art. 33, §§ 2(a), 3(f).
162. Id. art. 32, § 1 (calling for the establishment of "a Public Review Board consisting of impartial persons of good public repute not working under the jurisdiction of the UAW or employed by the International Union or any of its subordinate bodies").
163. Id. art. 32, § 3(a).
Because the result of these internal appeals can affect the processing of grievances under the contract, these internal procedures should be viewed as part of the contractual grievance mechanism itself. NLRB review is that much less necessary, and deferral that much more appropriate, where these internal review mechanisms are thorough and fair.

In cases involving a claim against a union for breaching its duty of fair representation, the Board has held that deferral is inappropriate because the "issue . . . does not . . . involve a dispute between contracting parties over the interpretation of a provision in the contract." In duty of fair representation cases the NLRB suddenly understands the difference between contract and statutory rights. But in these cases—no less than in cases involving alleged employer reprisals in violation of section 8(a)(3)—the contract and its interpretation may also be at issue. Certainly the presence of internal review mechanisms capable of reversing a union's decision provides at least the same degree of relief from allegedly improper union conduct as arbitration procedures provide from improper employer conduct. The case for NLRB deferral to internal procedures designed to address and remedy fair representation claims is therefore at least as strong as the case for deferral to arbitration of contract disputes.

Deferring to internal union remedies is not only consistent with the Board's Spielberg-Collyer rationale for deferring to arbitration in contract-dispute cases, it is basic to the goal of strong and democratic unions. Requiring members with fair representation claims first to register their complaint with the union itself, and then to exhaust the internal remedies available to them, will improve the union's effectiveness and self-government. Refusal to defer in this context also

166. Cf. Wagner v. General Dynamics, 905 F.2d 126, 127-28 (6th Cir. 1990) (per curiam) (finding that an employee whose claim was reinstated by the UAW and settled with the employer failed to exhaust remedies because he did not appeal the settlement to the Public Review Board as provided in the UAW Constitution).

167. Western Conference of Teamsters, 251 N.L.R.B. 331, 338 n.1 (1980) (ALJ opinion); cf. NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 428 (1968) (concluding that "a court or agency might consider whether a particular [internal review] procedure was 'reasonable' and entertain the complaint even though [the] procedure[] had not been 'exhausted'").

168. In fact, this self-government argument is arguably more compelling in the case of internal union review mechanisms than in the case of contractual grievance procedures. If the union is to be motivated to create—and take pride in the operation of—internal review procedures, those procedures must be respected and unions must
weakens the grievance process itself. Thus, if a union has established a fair, efficient, effective, and accessible process for hearing and remediying member complaints against the union, the Board should stay its hand, at least until the union's remedies have been exhausted.

Mandatory exhaustion of available internal union appeals also supports the development of union democracy by encouraging unions to establish internal procedures to remedy abuses by their officials, while simultaneously providing reasonably expeditious relief to aggrieved employees. In fact, courts have articulated this rationale in applying section 411(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, which protects members' right to file suit against a union in a court or before an administrative agency, but provides that "any such member may be required to exhaust reasonable hearing procedures (... not to exceed a four-month lapse of time) established by the union before doing so."

In addition, the "ripeness" argument in support of NLRB deferral doctrines applies with full force to internal union appeal processes. Until a member has sought internal relief, a union's action remains capable of reversal. Until a union's action is truly final, no cause of action has accrued. In Clayton v. International Union, UAW the Supreme Court held that a hybrid fair-representation/breach-of-contract action be allowed to use those procedures before facing Board charges. In contrast, employers do not implement arbitration procedures out of a unilateral desire to operate honestly and democratically; instead, such procedures are established as the result of bilateral negotiations with the union.

170. Id.
171. See, e.g., Foy v. Norfolk & W. Ry., 377 F.2d 243, 246 (4th Cir.) (holding that where an employee offered no reasons for failing to exhaust the internal grievance procedure, dismissal for such failure to exhaust those remedies was not an abuse of discretion), cert. denied, 389 U.S. 848 (1967). Courts may exercise discretion when requiring exhaustion of remedies. See id.
172. See, e.g., Clayton v. International Union, UAW, 451 U.S. 679, 691 n.18 (1981) (finding that when a collective-bargaining agreement "allow[s] the reinstatement of withdrawn grievances where a union tribunal reverses the union's initial decision" the availability of that "relief ... would presumably be adequate" to require exhaustion of that "union tribunal").
173. Cf. Ghartey v. St. John's Queens Hosp., 869 F.2d 160, 163 (2d Cir. 1989) (holding that statute of limitations in a fair representation hearing does not begin to accrue until after the labor-management grievance arbitration hearing at which the employer was allegedly treated unfairly has been completed).
would be entertained prior to internal union review of the union's contract. More important than the particular result, however, is the fact that the Court determined that exhaustion of internal union review procedures could be required so long as the procedures are fair, prompt, result in review by an unbiased decision maker, and are capable of providing the employee with complete relief. Following Clayton, courts have routinely required exhaustion of such internal union remedies before confronting such a hybrid claim, as long as the internal union appeal procedures can result in either complete relief or reinstatement of the grievance. This requirement is particularly appropriate where the union's remedial procedures culminate in review by a non-biased body such as the UAW's Constitutional Convention Appeals Committee and Public Review Board.

Although the NLRB defers to grievance procedures before addressing unfair labor practice charges against employers, and the courts defer to both grievance procedures and internal union appeal mechanisms before addressing hybrid suits or suits against unions under Landrum-Griffin, the Board completely refuses to defer to such internal union review or appeal mechanisms before addressing a "straight"

175. Id. at 693.
176. See id. at 689. Generally, complete relief means reinstatement of the grievance at the point in the grievance procedure where it was withdrawn or compromised. See, e.g., id. at 692.
177. See, e.g., Wagner v. General Dynamics, 905 F.2d 126, 127-28 (6th Cir. 1990) (per curiam) (involving an appeal to a public review board that could result in reinstatement); Miller v. General Motors Corp., 675 F.2d 146, 148-49 (7th Cir. 1982) (same).
178. See, e.g., Wagner, 905 F.2d at 128 (noting that the Public Review Board is "an independent group of . . . persons with no UAW affiliation [and that] [t]here is no indication whatever that [they] would operate with any bias . . . .") (quoting Monroe v. International Union, UAW, 723 F.2d 22, 24 n.3 (6th Cir. 1983)); Battle v. Clark Equip. Co., 579 F.2d 1338, 1343 & n.5 (7th Cir. 1978) (noting that the adequacy of UAW intraunion appeal procedures is judicially recognized).
180. See, e.g., Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965) (holding that use of contract grievance procedures must be attempted before direct legal redress is sought).
181. See, e.g., Monroe v. International Union, UAW, 723 F.2d 22, 24 (6th Cir. 1983) (requiring exhaustion of union appeals procedures to maintain a duty of fair representation claim unless such procedures are futile).
duty of fair representation charge.\textsuperscript{182} In our view, the NLRB has yet to articulate a sound policy justification for this position. In our view, it just doesn't make sense that failure to exhaust internal remedies results in dismissal if the cause of action is filed in court but has no impact if the employee pursues the same matter through the NLRB.

Deferring "straight" duty of fair representation charges to internal union appeal mechanisms would, in summary, strengthen the grievance-arbitration machinery and the union's internal review mechanisms, would enable unions to direct more attention and resources toward advancing workers' collective interests \textit{vis-à-vis} employers, and would encourage further democratization of unions' structures and processes.\textsuperscript{183} For these reasons, deferral of "straight" duty of fair representation claims to internal union review mechanisms is arguably more appropriate than deferral of section 8(a)(3) charges to contractual grievance and arbitration machinery.

\section*{IV. Conclusion}

As we have attempted to show, the NLRB has developed its deferral doctrine in response to general labor policy concerns, rather than a more sophisticated analysis of the nature of the statutory rights at issue. This analytical flaw, in our view, has led the Board to develop an improperly broad deferral policy which denies employees a significant portion of the statutory protections fashioned by Congress. Moreover, we have attempted to show that the Board has developed an indefensible double standard by applying its current analysis to shield employers from agency scrutiny when private processes are available, but refusing to show the same respect for the processes that are found in the constitutions of many unions.

\textsuperscript{182} See, e.g., Western Conference of Teamsters, 251 N.L.R.B. 331, 338 n.31 (1980) (ALJ opinion) (finding deferral inappropriate because no contract dispute was involved); Teamsters Local Union 519, 275 N.L.R.B. 433, 440 (1985) ("The board has not adopted a policy of deferral for exhaustion of internal disputes resolution procedures between labor organizations and their members." (quoting Musicians Local 47 (American Broadcasting), 255 N.L.R.B. 386, 391 (1981))).

\textsuperscript{183} Cf. Foy v. Norfolk & W. Ry., 377 F.2d 243, 246 (1967) (noting that the purpose of the Labor-Management Reporting and Disclosure Act proviso that employees may be required to exhaust internal review mechanisms, 29 U.S.C. § 411(a) (1988), "is to further development of union democracy").