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Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again

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Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again

William R. Corbett†

*At the end of the twentieth century, the body of the law of employment in the United States has evolved to a scarcely rational patchwork. It is comprehensible as a whole, if at all, only when viewed through the lens of its history.*¹

—Patrick Harden

*If employees begin knowing that they have the right to organize, that they have the right to develop a sense of organization, and that they can experience organization through trial and error—such as by standing by each other in disciplinary interviews, or discussing with one another common problems of the workplace and not being afraid to bring them to the attention of management—they will indeed have begun to exercise their right of association in the workplace. This was Senator Wagner’s grand vision.*²

—Charles J. Morris

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1. Patrick Hardin, *United States*, in 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS 23-2 (American Bar Ass’n 1997).

2. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1753-54 (1989).

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I. INTRODUCTION

A. Vulnerable Workers, Nervous Employers, and Irrelevant Unions

It is the dawn of the twenty-first century. In the United States, the world's most productive economy, workers are vulnerable to the largely unbridled discretion of their employers regarding employment decisions. In comparison with many other industrialized nations, the United States does not provide much legal protection for employees. With few exceptions, employers can terminate employees at will for any reason.³ This ultimate power over employees in the workplace means that employers can do almost whatever they want to employees working for them; they can monitor employees' computers, they can harass and bully them or permit such conduct by co-workers, they can pay them low wages,⁴ and they can give them few benefits. If mistreated workers find conditions unbearable, they can quit or be fired. They may sue, but the prospects of a successful lawsuit are low.⁵

At the beginning of the twenty-first century, employers in the United States claim to feel besieged by legal regulations and potential liability.⁶ A patchwork of federal and state statutes and common law provide some protections to employees by prohibiting some employment actions and requiring others. Some laws mandate that employers provide minimum terms and conditions of employment. Notwithstanding the daunting power the employment-at-will doctrine supposedly bestows on employers, many insist that it is a myth, a "rule" riddled with so many exceptions that it cannot be relied upon.⁷ These exceptions to the at-will doctrine mean that

3. A popular statement of the employment-at-will doctrine is that employers can fire employees "for a good reason, a bad reason, or for no reason at all." See, e.g., REBECCA HANNER WHITE, *EMPLOYMENT LAW AND EMPLOYMENT DISCRIMINATION: ESSENTIAL TERMS AND CONCEPTS* 8 (1998); see also *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 520 (1884) ("All may dismiss their employe[e]s at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."), *overruled on other grounds by Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915). That rendition of the doctrine demonstrates the *absolute power* the doctrine gives employers, but does anyone ever do anything for no reason at all?

4. As long as the wages are not below the federal minimum wage established in the Fair Labor Standards Act, or some higher state or municipal minimum wage, 29 U.S.C. §§ 206, 218 (2000).

5. Workers do have protections provided by federal legislation and state legislation and case law, which have created exceptions to the employment-at-will doctrine. Still, employment-at-will is the default rule, and it has provided significant protection to employers in terminations and other adverse actions taken against employees.

6. See generally WALTER OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* (1997).

7. See, e.g., Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (2000) ("[T]he lessons of the current trends in the wrongful discharge area . . .

employers must be careful about whom they fire, why they fire, and how they fire. To prepare for possible litigation, employers must document everything negative about employees' performance and conduct. They may be sued, and though the employee's chance of success is low, the employer's liability may be quite large.

And labor unions? At this time they are not a major player in most workplaces in the United States and represent only about thirteen and a half percent of the workforce and about nine percent of the private sector workforce.⁸

While this situation may cause alarm for some, others believe that the relative lack of legal protection of employees in the United States is a factor in producing the nation's recent economic growth.⁹ The United States has the largest economy in the world with the lowest unemployment rate in the industrialized world. It advises Japan, the second largest economy in the world, on how to refashion its labor laws to reinvigorate that nation's economy.¹⁰ The European Union member nations, while disdaining the relative lack of legal protection that laws in the United States afford employees, envy the economic growth, job creation, and low unemployment rate that the United States enjoys.¹¹

suggest that employers soon will no longer be able to terminate employees for no cause or bad cause. The future of employment-at-will, then, is that it has no future.").

8. *Union Members Decline to 16.3 Million as Share of Employed Slips to 13.5 Percent*, Daily Lab. Rep. (BNA) No. 13 (Jan. 19, 2001).

9. It can be argued persuasively that it is a non sequitur that the recent economic prosperity and low unemployment in the United States is a product of the labor laws; indeed, the United States had basically the same labor and employment law when the unemployment rate was high and the economy was much less productive, and Japan and its lifetime employment model was looked upon as the paragon. See, e.g., Sonni Efron, *A Wobbly Japan Puts on Training Wheels With Lifetime Job Guarantees in Ruins, Anxious Workers Flock to Western-Style Re-Education Centers*, LOS ANGELES TIMES, June 10, 1999, at A1 ("Just 10 years ago, Japan's vaunted lifetime employment system was the envy of the West."); John Duckers, *Business View: Respect for the Workers Remains Priority for Japanese*, BIRMINGHAM POST, June 5, 1999, at 19 ("The Japanese economy is struggling badly when not so long ago it was the envy of the world."); Marcus Gee, *The Japanese Disease*, THE GLOBE AND MAIL, October 30, 1996 ("Japan is a mess, and it may be for quite a few years yet. How did it get that way? How did this economic colossus, envy of the world, suddenly find itself in so much trouble?"). I thank Professor Summers for emphasizing the incongruity of the view that the United States' labor laws are responsible for the nation's low unemployment rate.

10. See Kiroku Hanai, *Hold Off on U.S.-Style Layoffs*, THE JAPAN TIMES, May 3, 1999 (discussing the United States government's and the American Chamber of Commerce's urging the Japanese Labor Ministry to abandon the nation's lifetime employment system by adjusting the labor laws).

11. See Roger Blanpain, *Employment and Labour Law: The European Union*, in COMPARATIVE LABOUR AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 129 (Roger Blanpain, et al. eds., 6th ed. 1998). Prime Minister Tony Blair of the United Kingdom has championed the notion of a "third way," between the deregulation, low labor standards, and low unemployment of the United States and the United Kingdom on the one hand, and the heavy regulation, high labor standards, and high unemployment of the European nations. See, e.g., *Roundtable Discussion: What the Experiences of the Recent Past Tell Us About the Labor and Employment Law Issues of the Future*, 76 IND. L. J. 179,

So, does the labor law of the United States need to be changed as we move into the twenty-first century? And if it does, is there likely to be political support for changes that increase regulation of employers?

B. The Labor Law/Employment Law Dichotomy

"Labor and employment law" is what we in the United States call the area of law dealing with legal regulation of the employment relationship. Labor law is the name given to the law governing labor-management relations, primarily in unionized workplaces.¹² Employment law, on the other hand, is thought of as the body of law regulating principally non-unionized workplaces.¹³ Labor law deals primarily with the National Labor Relations Act (NLRA),¹⁴ which protects the rights of employees to engage in collective bargaining and other forms of collective action.¹⁵ Employment law encompasses the federal and state statutes and state case law regarding individual employment rights.¹⁶ This dichotomy is not recognized in Europe and much of the rest of the world, where the term "labor law" is used to describe the whole body of law regulating the workplace.¹⁷ However, the workplace laws in many European nations are similar to those in the United States, at least in the topics they regulate.

One could conclude that the labor law/employment law dichotomy is simply a matter of terminology and that it has had little influence on the

183 (2001) (comments of Professor Catherine Barnard of Trinity College, Cambridge University). The Italian government has announced plans to reform the nation's labor laws to make it easier to fire employees. See *Government Says Strike Fails to Halt Plans to Overhaul Italy's Law, Making Firing Easier*, Daily Lab. Rep. (BNA) No. 75, at A-5 (Apr.18, 2002).

12. INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 1, at 23-1; Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL'Y 489, 489 (2001).

13. Scalia, *supra* note 12, at 489. In 1988, Professor Steven Willborn, discussing the labor law that is taught in law schools, observed that "[f]or the vast majority of today's workers and employers, labor law is relevant only to the extent it considers individual employment rights, rights outside of the context of collective bargaining." Steven L. Willborn, *Individual Employment Rights and the Standard Economic Objection*, 67 NEB. L. REV. 101, 102 (1988).

This dichotomy between labor law and employment law is, of course, a generalization. Most employment laws also apply to unionized workplaces, although some provide exceptions for employers with collective bargaining obligations. Moreover, as this article will discuss, some of the labor law regulations of the NLRA also apply to nonunion employers.

14. The Wagner Act, Pub. L. No. 74-198, 49 Stat 449 (codified as amended at 29 U.S.C. §§ 151-169) (1935). The current NLRA is the Wagner Act as amended by the Taft-Hartley amendments of 1947 and the Landrum-Griffin amendments of 1959.

15. See, e.g., Katherine Van Wenzel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 575 (1992); Scalia, *supra* note 12, at 490; Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 688 (1997).

16. Stone, *supra* note 15, at 576; Scalia, *supra* note 12, at 490; Bales, *supra* note 15, at 688-89.

17. INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 1, at 1-2.

development of law governing the workplace. This is not the case, however. In the United States, labor law and employment law are distinct bodies of law regulating the workplace.¹⁸ Collective labor rights are one type of rights, and individual employment rights are another type of rights. On a theoretical level, this categorical way of thinking about labor (and employment) law has caused many lawmakers, labor law scholars, and practicing attorneys to fail to develop a holistic view of the law governing the workplace in the United States.¹⁹ On a practical level, it has contributed to management and workers not being aware of rights that workers possess and remedies that are available to them for violations of those rights.

While there may be a need to substantially overhaul the body of law regulating the employment relationship in the United States, it is doubtful that such a project will be undertaken by lawmakers absent an economic catastrophe.²⁰ Although studies may be conducted and reports may be issued,²¹ reform of labor law is likely to be heard not as a bang, but as a whimper.²² It is more likely that additional individual employment rights laws will be passed, assuming that sufficient political pressure can be brought to bear.²³ While the proliferation of such laws is not inherently bad, they are not likely to assure most workers that they will have a workplace where they feel that they can perform their jobs safely and be treated in a fair and dignified manner by their supervisors and co-workers.²⁴

18. Scalia, *supra* note 12, at 489.

19. Professor Stone argues that the individual employment rights regime is "a distinct and separate form of legal regulation" that is in tension with the old collective bargaining system of regulation. Stone, *supra* note 15, at 577. Professor Rabin has argued, however, that "[w]hile that may have seemed to be the initial dichotomy, I believe that the two approaches may be harmonized." Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, U.S.F. L. REV. 169, 171 (1991).

20. The Wagner Act was part of the New Deal response to the Great Depression. 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 25 (Patrick Hardin ed., 3d ed. 1992) [hereinafter THE DEVELOPING LABOR LAW]; see also James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1599 (1996) ("There remains the possibility that economic and political crisis might trigger renewed congressional attention. The NLRA emerged from a crisis that disrupted public faith in an individual rights based common-law regime.").

21. Consider, for example, President Clinton's Commission on the Future of Worker-Management Relations ("the Dunlop Commission"). Professor Paul Weiler, who served as Chief Counsel to the Commission, described the experience as beginning as "an enlightening and enjoyable experience," but having "a rather frustrating closing." Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 177 (2001). The much-ballyhooed Dunlop Commission submitted its report to the Senate in 1994. The report has provoked no legislative action.

22. See, e.g., Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 24 (1988) [hereinafter Summers, *Labor Law*] ("... I fear that because of the wide variety of rights to be protected and our hesitant legal recognition of them, the solution must be piecemeal and will inevitably be incomplete.").

23. *Id.* at 16-18.

24. Michael Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 101, 115 (2000).

Moreover, even if such laws are a good way of protecting workers, it may become increasingly difficult to get such laws enacted.²⁵

The objective of this article is neither to propose a redesigned comprehensive labor and employment law regime nor to propose more individual employment rights laws to be patched onto the existing collage. Instead, the proposal in this article is more limited, but potentially quite useful. One of the existing laws that has fallen into relative desuetude, the NLRA, could and should be used to protect workers in more of their work-related conduct.²⁶ As we contemplate the employment law of the present and future, we might do well to reconsider the labor law of the past. While we await the coming of the great new employment law regime, we may have to make do with what we have. Breaking the labor law/employment law dichotomy may enable us to view labor law more broadly. If the current legal regime of individual employment rights is not completely satisfactory in its approach to or provision of rights or protections, we may find that the old approach is still useful. Thus, the objective of this article is to examine the rights of nonunion workers that the NLRA protects and to suggest minor changes in the law that will make these rights more widely known and more broadly asserted.

C. A Reinvigoration of the NLRA

The National Labor Relations Board (NLRB) provided a recent reminder of the continuing relevance of the NLRA to nonunion workplaces in its decision in *Epilepsy Foundation of Northeast Ohio*.²⁷ In that decision, the Board overruled precedent and held that the “*Weingarten* right”²⁸ extends to the nonunion setting and entitles a nonorganized (not represented by a union) employee, upon request, to be accompanied by a co-worker at an investigatory interview by management that she reasonably believes may result in discipline. The D.C. Circuit subsequently enforced the Board’s decision on the application of the *Weingarten* right to nonunion employees, although the court declined to enforce the retroactive application of the rule to the employer in the case before it, and the Supreme Court denied *certiorari*.²⁹

25. See *infra* footnotes 72-75 and accompanying text.

26. See, e.g., Calvin William Sharpe, “By Any Means Necessary”—Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act, 20 BERKELEY J. EMP. & LAB. L. 203, 207 (1999) (“[B]ecause it affords employees protection beyond or short of organizational activity, section 7 can potentially fill some of the void in employee protection resulting from recent declines in union membership.”).

27. 331 N.L.R.B. 676 (2000), *enforced in part and rev’d in part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 2356 (2002).

28. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

29. *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001), *cert.*

The Board's decision in *Epilepsy Foundation* has generated considerable debate and controversy,³⁰ in part because the issue is one on which the Board has vacillated over a twenty-year period.³¹ While extension of *Weingarten* hardly sounds like a right that will have the impact on protecting employees from adverse employment actions of, say, a new federal statute on employment discrimination³² or employee privacy.³³ The decision could be helpful to unorganized employees who face the prospect of investigatory interviews, and it may raise some concerns for employers.³⁴ The decision's principal impact could come not from its holding regarding

denied, 122 S.Ct. 2356 (2002).

30. See, e.g., Sam Heldman, Hilary E. Ball & Frederick T. Kuykendall III, *Epilepsy Foundation of Northeast Ohio and the Recognition of Weingarten Rights in the Non-Organized Workplace: A Manifestly Correct Decision and a Seed for Further Progress*, 17 LAB. LAW. 201 (2001) (arguing Board's decision was correct); M. Jefferson Starling III, *Epilepsy Foundation of Northeast Ohio: A Case of Questionable Reasoning and Consequences*, 17 LAB. LAW. 221 (2001) (arguing that the Board should reverse the decision); G. Rodger King, et al., *Who Let the Weingarten Rights Out? The National Labor Relations Board Compounds Earlier Error by the Supreme Court*, 2002 MICH. ST. U. DET. C. L. L. REV. 149 (2002) (arguing that *Weingarten* was a misinterpretation of the NLRA, and that *Epilepsy Foundation* compounds the error); see also *Attorneys Disagree About Wisdom of NLRB Extending Weingarten Rights*, Daily Lab. Rep. (BNA) No. 152, at C-1 (Aug. 7, 2000); *Extension of Weingarten Rights Debated at ABA Meeting on Development of Act*, Daily Lab. Rep. (BNA) No. 35, at C-1 (Feb. 21, 2001). Eight trade associations filed an amicus brief with the D.C. Circuit, seeking to have the Board's decision in *Epilepsy Foundation* overturned, to no avail. See *Business Seeks Reversal of NLRB Ruling Extending Weingarten to Nonunion Workers*, Daily Lab. Rep. (BNA) No. 95, at A-4 (May 16, 2001).

31. In 1982, the Board held that the *Weingarten* right extended to nonunion workers. *Materials Research*, 262 N.L.R.B. 1010 (1982). Three years later, the Board reversed *Materials Research*, holding that the NLRA "compels" the conclusion that *Weingarten* applies only to employees represented by a union. *Sears, Roebuck*, 274 N.L.R.B. 230 (1985). In 1988, the NLRB again addressed the issue, rejecting the rationale of *Materials Research* that the NLRA compelled the nonapplication of *Weingarten* to nonunion employees, but still clinging to that result. *E.I. DuPont*, 289 N.L.R.B. 627 (1988).

The D.C. Circuit noted in its opinion that the Board had "come full circle" on the issue, returning to its *Materials Research* holding. *Epilepsy Foundation of Northeast Ohio*, 268 F.3d at 1097. The Board's vacillation on the issue did not dissuade the court, however, from according deference to the agency in its reasonable interpretation of section 7 of the NLRA. The court commented that, "[i]t is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board." *Id.* Of course the D.C. Circuit was correct about politics, and *Epilepsy Foundation* may not remain the law on the *Weingarten* right for long. See *Management, Union Reactions Differ on D.C. Circuit Affirmance of Epilepsy*, Daily Lab. Rep. (BNA) No. 215, at C-1 (Nov. 8, 2001) (hereinafter *Management, Union Reactions*) (citing Daniel Yager, vice president and general counsel of LPA, Inc., stating that once the NLRB has a Republican majority *Epilepsy Foundation* may be overruled).

32. See, for example, the proposed legislation discussed *infra* note 69.

33. See, for example, the proposed legislation discussed *infra* notes 71, 173.

34. Regarding the possible impacts on employers, see Paul J. Siegel, *Cutting-Edge Developments in Compliance: Labor & Employment Law Issues* in ADVANCED CORPORATE COMPLIANCE WORKSHOP 2001, 487, 548-550 (PLI) (predicting that "most profound implications" may be investigations of sensitive workplace matters such as sexual harassment); see also Judith E. Harris, *Ethical Issues Arising in Labor and Employment Law* in EMPLOYMENT AND LABOR RELATIONS LAW FOR THE CORPORATE COUNSEL AND THE GENERAL PRACTITIONER, 299, 326-27 (ALI-ABA 2002) (discussing confidentiality concerns in sexual harassment investigations).

the *Weingarten* right, but from its reminder that section 7 of the NLRA applies both to employees represented by a union and to unorganized employees.

The scope of coverage of section 7 and its application to nonunion employees may have been one of the best-kept secrets of labor law.³⁵ It also may be one of the best means for protecting employee rights in the United States in the twenty-first century. Who would have thought that the hoary NLRA might provide new hope in the era of individual employment rights? Some of the most distinguished labor law scholars in the nation have argued for broad interpretations of the section 7 right to engage in concerted activities for mutual aid or protection³⁶ and have asserted the importance of that right in a nation where union representation is dwindling.³⁷ In 1989, Professor Charles Morris, suggesting a potential resurgence of the NLRA, said, "the National Labor Relations Act offers American industry and American workers an ideal framework in which to organize their relationships so that they will be able to compete more successfully in the world of the twenty-first century."³⁸ For his vision of the NLRA to be realized, Morris suggested that the NLRB needed to develop a broader theory of section 7 protected activity and to enforce those rights adequately.³⁹ That has happened to some extent.⁴⁰ As union representation continues to decline, particularly in the private sector, a broad interpretation and application of section 7 in the nonunion workplace is even more important today than it was ten or twenty years ago.

This article is not meant to suggest that it is time to give up on unions,

35. See, e.g., Morris, *supra* note 2, at 1675 ("Many employers, perhaps most, and certainly most employees, are totally oblivious of the existence of this important body of law."); Cynthia Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 939-40 n.93 (1992) (discussing "popular perception that the NLRB deals only with cases involving union activity."); Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under The National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431 (1995) ("Most likely, the vast majority of non-union employees remain ignorant of this right, or are too fearful to exercise it.").

36. 29 U.S.C. § 157 (2002).

37. See Morris, *supra* note 2; Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286 (1981).

38. Morris, *supra* note 2, at 1752-53.

39. *Id.*

40. Significantly, the Board's decision in *E.I. DuPont de Nemours*, 289 N.L.R.B. 627 (1988), maintaining that *Weingarten* rights did not apply to the nonunion workplace, was the impetus for Morris's article. In 1996, Professor Morris, along with Professors Clyde Summers, Joseph Grodin, and Ellen Dannin filed a petition with the NLRB requesting that the Board use its rulemaking power to extend the *Weingarten* right. See *Professors Seek Expansion of Employee Rights at Disciplinary Interview*, Daily Lab Rep. (BNA) No. 242, Sum-2 (Dec. 17, 1996). See also Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 816-19 (1989) (citing *E.I. DuPont de Nemours* as an example of the "promise of reciprocal benefit" requirement that infects the interpretation of "mutual aid or protection").

nor that section 7 of the NLRA works fine without unions. Instead, the proposals herein are made in light of the reality that unions represent a small percentage of the workforce in the United States. Notwithstanding that reality, this article insists that the NLRA provides useful protection for employees who are not represented by unions.⁴¹ Far from being detrimental to unions, the increasing importance of section 7 in nonunion workplaces could create opportunities for unions to provide valuable services to nonunion employees and to cultivate organizing opportunities.⁴² If employees exercised their section 7 rights in nonunion workplaces and saw the need for, and power in, collective action, unions actually might benefit from increased interest among employees in union organizing. For example, the most important step toward increasing employee reliance on the protection of section 7 is to give employees notice of their rights. Unions could play a pivotal role by notifying employees of their section 7 rights. Thus, increased reliance on and use of section 7 in the nonunion workplace would not diminish the need for unions; indeed, it might give them an opportunity to show why they are needed.

Employers may not applaud the resurgence of the NLRA. Still, many management-side labor law attorneys prefer the law, structures, and procedures under the NLRA to the individual employment rights regime. If the choice is between expanded application of the NLRA and more individual employment rights law, employers may favor the NLRA.

The next step is for the NLRB, the courts, Congress, employers, unions, and workers to recognize that a reinvigorated NLRA, applied to protect concerted employee expression and other concerted conduct in nonunion workplaces, is an important part of the body of law regulating the American workplace and not an archaic piece of New Deal legislation that applies only to employees represented by a union. If broadly interpreted and vigorously enforced, section 7 could obviate the need for some additional individual rights statutes. It could give employees a far-reaching protection that individual rights laws cannot. And, it could give employees considerable voice in their workplaces and some power to obtain better terms and conditions. For those concerned with the inadequacy of the individual employment rights regime for protecting workers, a reinvigorated NLRA is a refreshing prospect. It is no panacea for the problems of regulating the workplace and protecting workers, but it is an

41. Gorman & Finkin, *supra* note 37. In their 1981 article, Professors Gorman and Finkin said: "With the decline in the percentage and numbers of organized workers in the private sector over the past two decades, the NLRB appears increasingly to have become a source of protection against discipline in the absence of collective bargaining agreements and procedures." *Id.* at 288. With the continuing decline in union density since that declaration in 1981, the NLRB is even more significant today.

42. *Cf.* Rabin, *supra* note 19 (arguing that unions may develop broader missions, beyond just acting as the collective bargaining agent for bargaining units; for instance, advising employees regarding their individual employment rights and helping employees enforce those rights).

opportunity to expand protection using existing law. Moreover, it may revive a sense among workers that they can identify the things that they want in the workplace, rather than relying on the federal or state government to determine what they need, and that they can then work together to obtain these objectives.

Part II of this article chronicles the shift from the NLRA to individual employment rights laws and highlights some of the inadequacies of a system in which the individual rights laws are the predominant method of regulating the workplace. Part III considers the requirements for coverage under NLRA section 7, which guarantees the right to engage in concerted activities for mutual aid or protection. Part IV discusses a number of recent cases that illustrate the application of section 7 to the conduct of employees who are not represented by unions. Part V recommends changes in the law that would facilitate nonunion workers' assertion of their section 7 rights. Part VI forecasts some possible results of a reinvigorated NLRA.

II.

LABOR LAW YESTERDAY, EMPLOYMENT LAW TODAY, AND LAW OF THE WORKPLACE TOMORROW

A. Labor Law Yesterday

To many traditional "real labor lawyers"⁴³ labor law was about unions and management, getting down and dirty and fighting over representation and collective bargaining; it was about the NLRB and its regional offices. Many such labor lawyers, both on the management side and the labor side, bemoan the decline of the NLRA and the ascendancy of individual employment rights statutes.⁴⁴ Many scholars also have decried the decline of the collective bargaining regime and its replacement by an individual employment rights paradigm.⁴⁵

43. Eugene Scalia provides a caricature of a "real labor lawyer": "Some practitioners still proudly identify themselves as 'real labor lawyers,' by which they mean they are of the cigar-chomping, rough-and-tumble world of labor-management relations." Scalia, *supra* note 12, at 489.

44. The author asserts this based on experience, having worked with some wonderful "real labor lawyers." One might attribute management attorneys' grudging affinity for the NLRA to a desire to limit remedies available to employees, but there may be more to it than that. After all, attorneys representing management may rail about the proliferation of employment legislation and judicially created theories of recovery, but at bottom, what they see are employment opportunities—for themselves.

45. See, e.g., Stone, *supra* note 15, at 635-44 (enumerating five flaws in the "individual rights/minimal terms model"); Summers, *Labor Law*, *supra* note 22, at 26 (stating that none of the individual rights legislation gives workers a voice in the decisions affecting their lives in the workplace). Professor Kenneth Dau-Schmidt discusses the strengths and weaknesses of four different methods used to address the legal protection of workers: individual bargaining, collective bargaining, legislative regulation, and development of the common law. Kenneth G. Dau-Schmidt, *Meeting the Demands of*

The Wagner Act was enacted in 1935.⁴⁶ It was followed by the Fair Labor Standards Act (FLSA) in 1938.⁴⁷ The objective of enacting the FLSA was not to impinge upon the NLRA, but to set a floor for wages, hours, and child labor; it sought to set collective bargaining minimums from which unions could bargain upward.⁴⁸ Organized labor and its friends supported the FLSA. The FLSA, however, represented a different approach to legal regulation of the workplace. The NLRA sought to invest the weaker party, workers, with more power so that they could decide what they wanted from the employer, make their demands known, and obtain whatever their collective power enabled them to obtain. Section 7, the heart of the Act, recognized the following general rights of employees: self-organizing; forming, joining, or assisting labor organizations; bargaining collectively through representatives of their own choosing; engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and the right to abstain from the foregoing activities.⁴⁹ Everything that was legal was on the table under the NLRA—workers could try to obtain what they wanted.⁵⁰ Other than the general section 7 rights, nothing was made an inalienable right of the workers by the NLRA.⁵¹ This was the NLRA as interpreted through the lens of industrial pluralism.⁵² In contrast, the FLSA declared a minimum wage, a maximum

Workers into the Twenty-First Century: The Future of Labor and Employment Law, 68 IND. L.J. 683 (1993). Professor Brudney argues that the individual rights regime has not succeeded in achieving the goals of fair distribution of economic resources and providing workers an opportunity to participate in the management of the workplace. Brudney, *supra* note 20, at 1597-99; *see also* Rabin, *supra* note 19, at 171 (arguing that the “new workplace rights fail to provide workers with two essential ingredients of a sound workplace policy”—voice and muscle).

46. *See supra* note 14.

47. 52 Stat. 1060 (1935) (codified as amended at 29 U.S.C. §§ 201-219).

48. Bales, *supra* note 15, at 698; Summers, *Labor Law*, *supra* note 22, at 9.

49. 29 U.S.C. § 157.

50. Professor William Gould, former Chairman of the NLRB, explains that “the genius of the New Deal is that it placed responsibility for the social contract in the hands of the parties themselves to be resolved through collective bargaining.” William B. Gould IV, *The Third Way: Labor Policy Beyond the New Deal*, 48 U. KAN. L. REV. 751, 754 (2000). *See* Scalia, *supra* note 12, at 490 (describing the NLRA as “constitutive,” establishing a framework for employees to obtain for themselves what the individual rights employment laws provide by direct intervention).

51. Senator Wagner’s legislative assistant and the principal draftsman of the statute, Leon Keyserling, said, “[I]t was our view that the greatest contribution to greater equity and the distribution of the product between wages and profit would come, not through the definition of terms by government, but by the process of collective bargaining with labor placed in a position nearer to equality.” Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 319 (1987); *see also id.* at 362 (“The Wagner Act was in some ways a very conservative statute, because it says that there are a lot of things that the government ought not to decide. We should permit business and labor to decide them.”).

52. *See, e.g.,* Stone, *supra* note 15, at 622-24 (describing the industrial pluralist vision of the workplace as an “autonomous, self-sufficient, democratic realm” in which legislatures should not intervene); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 9 (1999) (describing

number of hours before overtime was due, and minimum ages for engaging in work and in certain types of work.⁵³ These are rights that cannot be bartered for something else, even if employees prefer something else.

B. Employment Law Today: Employment Law Sprawl

In 1960 there were only two generally applicable federal labor acts. In 1963, Congress enacted the Equal Pay Act.⁵⁴ Since 1963, the following federal employment laws have been enacted: Title VII of the Civil Rights Act of 1964,⁵⁵ the Age Discrimination in Employment Act (ADEA),⁵⁶ the Occupational Safety and Health Act (OSH Act),⁵⁷ the Employee Retirement Income Security Act (ERISA),⁵⁸ the Pregnancy Discrimination Act (PDA),⁵⁹ the Employee Polygraph Protection Act (EPPA),⁶⁰ the Worker Adjustment and Retraining Notification Act (WARN Act),⁶¹ the Americans with Disabilities Act of 1990 (ADA),⁶² the Civil Rights Act of 1991,⁶³ and the Family and Medical Leave Act of 1993 (FMLA).⁶⁴ The proliferation of such laws has created a veritable alphabet soup of federal individual employment rights legislation.⁶⁵ And that is only the federal employment law. At the same time, state legislatures have passed numerous statutes, some more or less tracking analogous federal statutes, such as state employment discrimination statutes, and some creating rights not recognized by federal law, such as wrongful discharge statutes and wage payment statutes. State courts have also been active in expanding individual employee rights in the workplace. They have recognized numerous contract and tort theories of recovery, including implied contracts, breach of the covenant of good faith and fair dealing, promissory estoppel, wrongful termination in violation of public policy, invasion of

the four basic tenets of industrial pluralism, including the subordination of individual rights to group rights to achieve collective power, and the role of the government as responsive—enforcing agreed upon terms—rather than prescriptive).

53. See Scalia, *supra* note 12, at 490 (“Federal employment laws, most of which post-date the NLRA, supply directly many of the things that labor unions strive to achieve through bargaining.”).

54. 29 U.S.C. § 206(d) (2002).

55. 42 U.S.C. §§ 2000e through 2000e-15 (2002).

56. 29 U.S.C. §§ 621-633a (2002).

57. 29 U.S.C. §§ 651-678 (2002).

58. 29 U.S.C. §§ 1001-1461 (2002).

59. 42 U.S.C. § 2000e (k) (2002).

60. 29 U.S.C. §§ 2001-2009 (2002).

61. 29 U.S.C. §§ 2101-2109 (2002).

62. 42 U.S.C. § 1201 et seq (2002).

63. 42 U.S.C. § 1981a and scattered sections of Title VII (2002).

64. 29 U.S.C. §§ 2601-2617, 2651 & 2652 (2002).

65. See *generally* INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 1.

privacy, and intentional infliction of emotional distress.⁶⁶ In recent years, it has been the states that have been the innovators in employment rights laws; the last major federal legislation was the Family and Medical Leave Act, which was enacted in 1993.

*C. Law of the Workplace Tomorrow:
More Individual Employment Rights?*

The NLRA and the collective bargaining approach is the law of the past, and the individual employment rights regime is the law of the present—and probably the future. The bottom line is that unions have not done the job of protecting a substantial portion of American workers, regardless of who or what is to blame for that fact, and the decline of collective rights and collective bargaining has been predictable.⁶⁷ Congress has given up on the group rights and collective action model of the NLRA and adopted the individual rights model for regulating the workplace.⁶⁸

However, if workers are to be given adequate protection by individual employment rights laws, more laws will be needed. More and more groups

66. Professor Dau-Schmidt treats common law development as a separate method of employment regulation from legislative regulation. See Dau-Schmidt, *supra* note 45, at 688-99. Although there are important differences, both confer individual rights and, to a great extent, leave enforcement of the rights to the individual. This article opts to distinguish between the rights created under the NLRA and individual employment rights.

67. Sumner, *Labor Law*, *supra* note 22, at 10 ("The consequence is foreseeable, if not inevitable; if collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party."). It may be, however, that Congress, state legislatures, and courts will become less sympathetic to the call to adjust for the inequality of bargaining power between employees and employers and instead consider the asserted needs of businesses to remain competitive in global markets. See Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces*, 76 IND. LJ. 29, 46-48 (2001).

68. Brudney, *supra* note 20, at 1571 ("At some point during this legislative barrage, it became clear that Congress viewed government regulation founded on individual employment rights, rather than collective bargaining between private entities, as the primary mechanism for ordering employment relations and redistributing economic resources."); Schiller, *supra* note 52, at 73 ("Since the 1960s, the labor movement has suffered from American liberalism's rejection of the group basis of its own past and its inability to find a place for group rights within the model of individual rights it clings to so dearly.").

During the ascendancy of the individual rights laws, lawmakers have been unwilling to amend the NLRA in some significant ways, which may have made it more relevant to contemporary workplace issues. Consider, for example, the failure of the Labor Reform Act of 1977, which would have amended the NLRA to provide for more effective remedies. S.2467, 95th Cong., 2d Sess. (1978); H.R. 8410, 95th Cong., 1st Sess. (1977). The House bill passed in 1977. 123 Cong. Rec. 32, 613 (1977). The Senate bill was killed by filibuster. 124 Cong. Rec. 18, 398, 18,400 (1978). A second example is the numerous defeats of striker replacement bills, which would have prohibited the hiring of permanent replacements during strikes. See, e.g., William R. Corbett, *A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: "A Far, Far Better Thing" Than the Workplace Fairness Act*, 72 N.C. L. REV. 813 (1994). More recently, the Teamwork for Employees and Managers Act (S. 295, H.R. 743), which would have amended the NLRA to give employers greater flexibility in establishing labor-management committees, was passed by Congress and vetoed by President Clinton. See *Clinton Vetoes TEAM Act Despite Pleas From Business for Passage*, Daily Lab. Rep. (BNA) No. 147 (July 31, 1996).

will need to be protected by employment discrimination laws.⁶⁹ Employees are being mistreated and abused by supervisors and co-workers, and there is an outcry against workplace bullying along with proposals to address it through law.⁷⁰ Furthermore, Congress and state legislatures have only begun considering how to protect employees' privacy interests in light of recent innovations in technology and science.⁷¹

While more individual employment rights laws may be needed to address emerging workplace issues, it is doubtful that the politics of the United States in the new global economy will support ever-increasing regulation of employers.⁷² U.S. businesses will oppose increased employee

69. Consider, for example, H.R. 323, 107th Cong. (2001); S. 318, 107th Cong. (2001). Both of the preceding bills would prohibit employment discrimination on the basis of genetic information. See *Sen. Kennedy to Address Genetic Bias Bill's Overlap of ADA, Privacy Regulations*, Daily Lab. Rep. (BNA) No. 143, at A-1 (July 26, 2001) (discussing S. 318). In 2001, Louisiana enacted state legislation prohibiting employment discrimination based on "protected genetic information." 2001 La. Acts 330 (codified at LA. REV. STAT. § 23: 302 (5)-(8) & 23:368-69); see also *Louisiana Governor Signs Bill Banning Genetic Bias in Employment*, Daily Lab. Rep. (BNA), No. 120, at A-4 (June 22, 2001). Most states now have laws addressing genetic discrimination, although not all cover employment discrimination. See *Impetus Is Growing, But Is There A Need for Law Barring Genetic Discrimination*, Daily Lab. Rep. (BNA), No. 57, at C-1 (March 25, 2002). Turning from employment discrimination based on genetic information to discrimination based on sexual orientation, the Employment Non-Discrimination Act ("ENDA"), which would amend Title VII of the Civil Rights Act of 1964 to prohibit employment discrimination based on sexual orientation, was reintroduced in the House and Senate on July 31, 2001. EDNA was approved by the Senate Health, Education, Labor, and Pensions Committee on April 24, 2002, and it could be scheduled for a full Senate vote before the Fall 2002 elections. See *Senate Committee Approves Bill Banning Sexual Orientation Bias in the Workplace*, Daily Lab. Rep. (BNA) No. 80, at AA-1 (Apr. 25, 2002). That bill was first introduced in 1994. *ENDA Will be Re-Introduced in Congress on July 31*, Daily Lab. Rep. (BNA) No. 145, at A-8 (July 30, 2001).

70. See David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000); see also *Oklahoma Fixture Co. & Carpenters, Local 943, 01-02 Arb. (CCH) para. 3912 (2001) (Shieber, Arb.) (overturning discharge of employee for insubordination where employee was provoked by supervisor's bullying behavior)*.

71. See, e.g., the genetic discrimination bills cited *supra* note 69, and the Notice of Electronic Monitoring Act, H.R. 4908, 107th Cong. (2000), which would have limited the circumstances under which employers could electronically monitor employees. See also *Business Coalition Blocks Markup of Bill Requiring Electronic Monitoring Notification*, Daily Lab. Rep. (BNA) No. 180, at A-9 (Sept. 15, 2000).

72. This argument goes beyond short-term party-in-power limitations, which advocates of labor law reform have discussed regarding the current Republican administration and its appointments to the Board and the general counsel. See, e.g., Heldman, *supra* note 30, at 220 ("We do not predict with confidence that, in the next few years, a newly appointed general counsel will advocate, or that a changing NLRB will accept, broad new rights for employees."). Pro-labor legislation is politically dangerous even for pro-labor politicians. President Clinton, a Democrat, had the support of organized labor in his presidential campaigns. He promised to sign the Workplace Fairness Act (the striker replacement bill), which was organized labor's legislative priority, into law if it made it to his desk. *Aide Reaffirms Clinton Support for Workplace Fairness Bill*, Daily Lab. Rep. (BNA) No. 73 (Apr. 18, 1994). Some have questioned, however, how hard the President worked to make sure that it got to his desk; the two Arkansas Democrats were among the senators who would not vote to invoke cloture and avert a Republican-led filibuster. See *NLRB Member Devaney Tells Management to Prepare for Bumpy Ride with New Board*, Daily Lab. Rep. (BNA) No. 94 (May 18, 1994) (discussing rumor in Washington, D.C. that President Clinton was not willing to "twist arms," including those of the two Arkansas

protections, raising the politically powerful argument that they cannot compete in global markets when the law is over-regulating and restricting them.⁷³ For example, the governor of California, a Democrat, vetoed a bill for the third consecutive year that would have restricted employers' monitoring of employees' e-mail and computer files, citing, in part, his concern about burdening employers with another regulation.⁷⁴ For politicians, even traditionally pro-worker Democrats, labor and employment laws are incendiary.⁷⁵

A second concern with an approach to workplace regulation dominated by individual employment rights is whether such a regime provides an adequate forum in which employees can effectively vindicate their rights. Some commentators have made the argument that it is unrealistic to believe that an individual employment rights system that depends on plaintiffs suing in federal or state court can adequately address more than a fraction of worker complaints.⁷⁶ A companion concern is whether there are enough lawyers willing to take the cases.⁷⁷ These concerns may have been assuaged somewhat by routing individual employment rights cases into alternative dispute resolution.⁷⁸ While ADR may be efficient for employers

senators, to win passage of the act). Globalization and free trade exert pressures to resist increased labor law regulation that likely will subdue all politicians except perhaps the staunchest champions of labor.

73. On this argument, see for example, Schwab, *supra* note 67, at 34 (predicting that "[m]ore frequently will the argument be heard and accepted that a country cannot afford extravagant employment-law protections when other countries are only providing efficient protections"); see also Dau-Schmidt, *supra* note 45, at 697-98 (discussing this issue as one of the limitations of the legislative-regulation approach to legally protecting workers).

74. See *Privacy Bill for Employee E-Mail Vetoed for Third Time by California Gov. Davis*, Daily Lab. Rep. (BNA), No. 195 (Oct. 11, 2001).

75. Deron Zeppelin, Director of Government Affairs for the Society for Human Resource Management, expressed it this way: "Most members of Congress, believe it or not, do not like to vote on [employment] issues, period. It is not fun to be labeled either anti-worker or pro-business. Most of them will run for the hills before they have to vote on them." See *Hill Watchers Foresee Little Activity on the Labor and Employment Law Front*, Daily Lab. Rep. (BNA), No. 153 (Aug. 9, 2001).

76. Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI-KENT L. REV. 149, 154 (1993) ("It would be hard, however, to find anyone who believes that the nation has enough judges and courthouses to make common law litigation the modal institution of employee grievance processing.").

77. See Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 467-68 (1992) [hereinafter Summers, *Effective Remedies*] ("Because of litigation costs, all but middle and upper income employees are largely foreclosed from any access to a remedy for wrongful dismissal. . . . Lower income employees without substantial tort claims will have difficulty finding a lawyer."); *Alternative Dispute Resolution: Mandatory Arbitration Better for Workers With EEOC, Courts Stretched, Professor Says*, Daily Lab. Rep. (BNA) No. 151, at C-2 (Aug. 6, 1997) (quoting Professor Theodore St. Antoine as stating that experienced attorneys accept only about one out of every hundred potential discrimination cases because the rest are not worth their time).

78. The Supreme Court recently extolled the virtues of arbitration agreements in employment and held that employment contracts are not generally exempt from the Federal Arbitration Act's requirement that valid arbitration agreements be enforced. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). However, the effect of the Supreme Court's most recent decision on arbitration remains to be seen. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). In *Waffle House*, the Court held that the EEOC

and employees, new concerns arise when the cases are channeled into mandatory arbitration.⁷⁹ Employers have advantages in mandatory arbitration, such as the repeat player advantage, that may deprive employees of an adequate opportunity to vindicate violation of their rights. Employer advantages in mandatory arbitrations can be alleviated where arbitration of an employee's claim takes place under a collective bargaining agreement in which the union provides representation, as the union can balance the employer's advantages (such as repeat player). However, the question remains whether an *efficient* and *fair* forum has been found for adjudication of employment claims.

A third concern with a regime of individual employment protections is that statutory and common law protections can overlap to such an extent that the system does not function well. Professor Summers, warning of this problem years ago,⁸⁰ predicted that a body of employment law with too many cumulative rights and remedies would "hold out promises to the employee, harass and impoverish the employer, enrich the lawyers, and clog the legal machinery."⁸¹ The overlaps are now a major concern with the existing statutes. For example, does an employee who has a "serious health condition" under the FMLA also have a "disability" under the ADA so that the employee is entitled not only to twelve weeks of leave, but also to reasonable accommodation? The overlaps among the ADA, the FMLA,

could bring an enforcement action for all statutory remedies, including backpay, reinstatement, and compensatory and punitive damages, even though the discharged employee had entered into an arbitration agreement with his employer.

The EEOC has opposed mandatory arbitration of employment discrimination claims. *See generally* EEOC Policy Statement on Mandatory Arbitration, No. 915.002 (July 10, 1997). For a critique of the EEOC's position, see Beth M. Primm, Comment, *A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMP. L. 151 (1999). However, in 1999, the EEOC launched a voluntary mediation program that has, by the Commission's account, been very successful. *Commission's Voluntary Mediation Program is Off to Strong Start, Chairwoman Asserts*, Daily Lab. Rep. (BNA) No. 232, at A-3 (Dec. 3, 1999); *EEOC's Mediation Program Going Strong Despite Budget Shortfall, Coordinators Say*, Daily Lab. Rep. (BNA) No. 59, at B-1 (March 27, 2000).

79. *See, e.g.*, Martin H. Malin, *Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 601-22 (2001) (discussing matters that should be considered by courts in deciding whether to enforce mandatory arbitration agreements—neutrality of arbitral forum, arbitral control over discovery, limitations on limitations periods and remedies, allocation of costs of arbitration, and mutuality regarding mandatory nature of arbitration); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 43-44 (1999) (discussing study results that repeat players and higher-level employees with resources for representation fare better in mandatory arbitration); Marcela Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885, 1911-1918 (2000) (discussing inadequacies of current mandatory arbitration systems—lack of public accountability, limited discovery, no jury, selection of arbitrators, advantage of repeat players, and limitation of remedies).

80. Summers, *Labor Law*, *supra* note 22, at 18 (predicting that "[t]he most difficult problem of the near future will be reconciling overlapping protections").

81. *Id.*

and states' workers compensation laws are legendary and have given rise to a cottage industry of continuing legal education. In addition, the proposed federal legislation prohibiting discrimination based on genetic information raised a number of questions in the Senate committee about overlaps with the ADA.⁸² There are also overlaps among the employment discrimination statutes, particularly under the theory of harassment, and state tort theories.⁸³

A fourth concern, and the one most relevant to the proposal in this article, is employment law's provision of minimal terms. The rights specified in the statutes are not always what employees want or need and they may prefer to trade the statutory right for what they actually want or need. As one commentator put it, "employees often know better than Washington Bureaucrats how to improve their workplace."⁸⁴ The limitations of the employment statutes are a product of their specification of minimum rights.⁸⁵ For example, under the FMLA, a covered worker is entitled to twelve weeks of unpaid leave. While this is an important right for many employees, it is also a right that many employees would not choose to assert. Similarly, the right to overtime pay for working over forty hours in a week under the FLSA is a valuable right to many employees. However, many employees would prefer to barter this right for something else. Yet, employment statutes take away that option. The employment discrimination statutes all prohibit employers from taking adverse employment actions based on an employee's membership in a protected class. Practically, these statutes ensure one type of fairness for some employees.⁸⁶ It is this limitation of employment rights laws that both renders them ineffective for many employees and ensures that there will be many more of them as more rights and classes are identified that need to be protected and that have sufficient political support.⁸⁷

82. See *Sen. Kennedy to Address Genetic Bias Bill's Overlap of ADA, Privacy Regulations*, Daily Lab. Rep. (BNA) No. 143, at A-1 (July 26, 2001) (discussing S. 318); see also *Impetus Is Growing, But Is There A Need for Law Barring Genetic Discrimination*, *supra* note 69. The EEOC sued Burlington Northern Santa Fe Railway Co. for genetic testing of employees, alleging a violation of the ADA. On May 6, 2002, the case was settled for \$2.2 million. See *EEOC's First Genetic Testing Challenge Settled for \$2.2 Million, Parties Announce*, Daily Lab. Rep. (BNA) No. 90, at A-1 (May 9, 2002).

83. See, e.g., Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 330 (1990).

84. Scalia, *supra* note 12, at 493.

85. See, e.g., Dau-Schmidt, *supra* note 45, at 697; Stone, *supra* note 15, at 637. Professor Schwab predicts that future employment laws will emphasize default rules that can be varied rather than mandatory rules. Schwab, *supra* note 67, at 41-42. He may be correct, but that will require movement away from a trend that has held for at least four decades.

86. Harper, *supra* note 24, at 117-18 (explaining that wrongful termination and employment discrimination laws protect employees from some types of arbitrary or inequitable treatment, but not other types); see also Yamada, *supra* note 70, at 523 (arguing that all workplace harassment is hurtful, and status-based harassment protection law should be expanded to status-blind harassment protection).

87. Professor Stone articulated some of the above four criticisms and added others in her five

What employees need to ensure fairness, safety, and dignity in the workplace is a flexible right that can be exercised when they identify a problem. The right must empower employees to identify problems with the terms and conditions of their employment and to take action to remedy the problems. If the employer retaliates because of the employees' attempt to remedy the problem, then the law should provide a remedy. Such a law would empower workers to manage their own careers.⁸⁸ It is a pleasant surprise to find that we already have a statute that, with a little refinement, provides some of that protection. It is section 7 of the NLRA, and it has been discovered and used by many nonunion employees. For the potential of section 7 to be fully realized in nonunion workplaces, however, it needs some tinkering.⁸⁹ Even without adjustments, however, it still constitutes a useful and underused right.

III.

BACK TO THE FUTURE

A. The "Secret" of Epilepsy Foundation

It is hard to predict how much will change in the nonunion workplace because of the Board's extension of *Weingarten* rights to nonunion

criticisms of the individual rights statutes: 1) such statutes provide no opportunity for corporate decisionmaking; 2) such statutes provide no avenue for expressing discontent with voice rather than exit; 3) minimal terms are too rigid to address preferences of employees at all workplaces; 4) minimal terms are not effective because above a very low level they cannot make meaningful improvements; and 5) the model is inherently unstable because without an organized constituency, the minimal rights are vulnerable and transitory. Stone, *supra* note 15, at 636-38.

88. Schwab, *supra* note 67, at 41.

89. The remedies provided for under the NLRA are not as lucrative as the damages available under some individual rights statutes and theories. The remedial provision in the NLRA states that if the Board finds an unfair labor practice was committed, it "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effect the policies of the Act." 29 U.S.C. § 160(c). Thus, the typical monetary remedy to a charging party is back pay with interest. This remedy often has been criticized as inadequate. See, e.g., Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-91 (1983). I favor enhanced remedies. Some enhanced remedies were proposed in the ill-fated Labor Reform Act of 1977. S. 2467, 95th Cong., 2d Sess. (1978); H.R. 8410, 95th Cong., 1st Sess. (1977). Section 8 of that proposed legislation would have provided for several harsher remedies: a ban, up to a maximum of three years, on government contracts for employers that willfully violated a Board order or court decree enforcing a Board order; double back pay for employees unlawfully discharged during union organizing campaigns or during the period from recognition of the union until a first collective bargaining agreement is reached; and compensations for employees whose employer violates its bargaining duty regarding a first contract. Section 9 would have made preliminary injunctions under § 10(1) of the NLRA, § 29 U.S.C. 160(1) (1998), applicable to discharges during organizing campaigns or during the period from recognition of a union until the parties enter into a first collective bargaining agreement. The House passed the bill on October 6, 1977. 123 Cong. Rec. 32, 613 (1977). The Senate bill died on the Senate floor due to filibuster. 124 Cong. Rec. 18, 398, 18, 400 (1978).

employees in *Epilepsy Foundation*.⁹⁰ There are reasons to believe that not much will change. First, an employer does not have to advise an employee of her right to representation; the right is triggered when the employee requests to be accompanied by a co-worker.⁹¹ Second, if an employee asserts her *Weingarten* right, the employer may choose to forego the investigatory interview and to make a disciplinary decision without the benefit of the interview.⁹² Still, as Professor Morris observed, the *Weingarten* right “provide[s] an excellent training opportunity for nonunion employees to acquire and improve their organizational skills.”⁹³

Epilepsy Foundation is most important because it clearly proclaims that the Section 7 rights of the NLRA are not limited to employees represented by a union. This fact is not well known beyond labor and employment lawyers, but perhaps it will gain some notoriety now.⁹⁴ All workers have the right to engage in concerted activities for purposes of collective bargaining or other mutual aid or protection. This is an important, flexible right that allows employees to identify problems at work and to attempt to remedy them without fear of reprisal. Until recently, many employees have had no idea that the NLRA applied to them and thus have not exercised these rights. Section 7 does apply, and if properly invoked by workers and properly interpreted by the Board and federal courts of appeals, it can protect some employees engaged in certain types of workplace concerted conduct that is not covered by existing individual employment rights laws.⁹⁵ It is, of course, trite by now to say that collective bargaining is not likely to provide legal protection to a substantial part of the workforce in the United States in the twenty-first century. But we need not conflate the NLRA and collective bargaining as we tend to do under the labor law/employment law dichotomy. This is not new law, but it is valuable old law that relatively few people know, or if they know, use.

90. 331 N.L.R.B. 676 (2000), *enforced in part and reversed in part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 2356 (2002).

91. See, e.g., *Management, Union Reactions*, *supra* note 31 (quoting management attorney Maurice Baskin as saying “[e]mployers do not have to notify employees of their rights but should be ready to deal with the issue when an employee raises it”).

92. *Id.*

93. Morris, *supra* note 2, at 1749.

94. The Supreme Court of the United States made this point in its 1962 decision *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Is it reasonable to expect recent decisions by the NLRB and the D.C. Circuit to publicize a legal principle that a Supreme Court opinion clearly states? Perhaps. First, the *Washington Aluminum* case is almost forty years old, and a recent reminder helps people remember or learn for the first time. Second, *Epilepsy Foundation* states the principle in the context of a specific rule that applies to a particular workplace scenario, and this specificity may help people remember.

95. Cf. Heldman, *supra* note 30, at 220 (advocating a “renewed focus on other aspects of section 7 rights in the non-organized ‘workplace’ and encouraging ‘creative advocacy’ in pushing section 7 rights in the nonunion setting”).

B. The Section 7 Right to Engage in Concerted Activity for Mutual Aid or Protection

The Section 7 right that is relevant to this discussion is the right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.”⁹⁶ While no union activity or even nascent union organizing activity is required, there are several specific requirements for the activity to be covered under section 7: 1) it must be concerted; 2) it must be for the objective of mutual aid or protection; and 3) the nature of the activity must not be unlawful, too disloyal to the employer, in breach of contract, or such that it undermines the authority of a labor organization that represents a majority of the employees in a bargaining unit.⁹⁷ Section 8(a)(1)⁹⁸ is the unfair labor practice provision that correlates with interference with, restraint of, or coercion of employees in the exercise of their section 7 rights. If the employer discriminates or retaliates against the employee for engaging in protected activity, an unfair labor practice occurs under Section 8(a)(3).⁹⁹

1. Concerted

This is the most important requirement of Section 7 activity in a nonunion workplace because it is the one that is most likely not to be satisfied.¹⁰⁰ The most obvious interpretation of “concerted” is that the activity must be engaged in by more than one employee. Practically, that is the safest definition to provide guidance to workers in planning their conduct, but that is not the limit of the Board’s interpretation of the term. Professor Morris has clearly articulated that Section 7 protects both concerted activity and the right to engage in concerted activity, and that there is a difference.¹⁰¹ Activity by a single employee can be an exercise of the right to engage in concerted activity.¹⁰² On the other hand, a “personal gripe” made by one employee for her personal benefit alone is not concerted.¹⁰³ In 1951, the Board stated in *Root Carlin, Inc.*,¹⁰⁴ that “the

96. 29 U.S.C. § 157 (2002). The omitted language covers concerted activities for purposes of collective bargaining.

97. Morris, *supra* note 2, at 1689-90; see also THE DEVELOPING LABOR LAW, *supra* note 20, at 73-75; Sharpe, *supra* note 26, at 208.

98. 29 U.S.C. § 158(a)(1) (2002). See THE DEVELOPING LABOR LAW, *supra* note 20, at 73.

99. 29 U.S.C. § 158(a)(3) (2002). See THE DEVELOPING LABOR LAW, *supra* note 20, at 73.

100. Morris, *supra* note 2, at 1690.

101. *Id.* at 1679.

102. NLRB v. Main Street Terrace Care Center, 218 F.3d 531, 539 (6th Cir. 2000) (“It is well settled that ‘an individual employee may be engaged in concerted activity when he acts alone.’”) (quoting NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 831 (1984)).

103. Gorman & Finkin, *supra* note 37, at 290-93 (citing as factors in the conclusion that an

guarantees of Section 7 extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.”¹⁰⁵ Thus, there is a type of activity engaged in by a single employee that qualifies for Section 7 protection, which may be termed “constructive concerted activity.”¹⁰⁶

In *Alleluia Cushion*,¹⁰⁷ the Board articulated an expansive, employee-friendly standard for determining when single-employee conduct constitutes concerted activity. In that case, a lone employee who complained to his employer about safety conditions and was not satisfied with the employer’s response wrote a letter to the state OSHA office. The employer discharged the employee the day after an OSHA inspector toured the plant.¹⁰⁸ The Board stated that there was no evidence that the employee had discussed the safety problems with other employees, solicited their support, or requested their help in preparing the letter to OSHA.¹⁰⁹ Nonetheless, the Board found concerted activity and articulated the following standard for determining when an employee’s action is concerted activity: “[W]here an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.”¹¹⁰

In *Meyers I*,¹¹¹ the Board repudiated the standard of *Alleluia Cushion*. *Meyers I* involved an employee who complained to a state transportation agency about his employer’s failure to remedy safety defects in his truck. The Board stated that the statutory language of Section 7 requires some concert-in-fact, and that there can be no implied concert. The D.C. Circuit reversed the decision on the ground that the definition of concerted action articulated by the Board was not mandated by the NLRA. On remand, in *Meyers II*, the Board reaffirmed its rule from *Meyers I* that “to find an employee’s activity to be ‘concerted’ [it must] be engaged in with or on the authority of other employees, and not solely by and on behalf of the

expression is a “personal gripe” the following: action taken alone and without prior planning or discussion with other employees; actor’s motive is to advance self-interest; and favorable resolution of complaint would not likely improve other employees’ working conditions).

104. 92 N.L.R.B. 1313 (1951).

105. *Id.* at 1314.

106. Gorman & Finkin, *supra* note 37, at 293-99; Morris, *supra* note 2, at 1709.

107. 221 N.L.R.B. 999 (1975).

108. The OSHA representative was asked whether the employee could be terminated. He responded that he could not be fired for filing the complaint, but he could be terminated for poor work performance. *Id.* at 999.

109. *Id.*

110. *Id.* at 1000.

111. 268 N.L.R.B. 493 (1984), *rev’d sub nom.* Prill v. NLRB, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 971 (1985), *decision on remand*, Meyers Indus., 281 NLRB 882 (1986), *aff’d*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

employee himself.”¹¹² This was a more restrictive, less employee-friendly standard than the *Alleluia Cushion* standard. The *Meyers II* standard excludes from coverage many acts engaged in by a single employee which would have been considered “constructively” concerted under the *Alleluia Cushion* standard. As the Board said, the *Meyers II* standard is “expansive enough to include individual activity that is connected to collective activity.”¹¹³ *Meyers II* has been criticized by commentators who believe that *Alleluia Cushion* was a permissible interpretation of the statutory requirement of concertedness.¹¹⁴ Nonetheless, though individual employees would be given a wider berth to engage in constructive concerted action under the *Alleluia Cushion* standard, the *Meyers II* standard has permitted the Board and courts to find some activity undertaken by lone employees to be concerted, as will be discussed below.

A finding of concerted activity is only one element of an employee’s case. Under the Board’s proof structure established in *Wright Line*,¹¹⁵ the General Counsel must prove the existence of the protected concerted activity, the employer’s knowledge or belief that the protected concerted activity occurred, and that the adverse action was motivated by the protected concerted activity.¹¹⁶ For example, in *Air Surrey Corp. v. N.L.R.B.*,¹¹⁷ the activity for which the employee was fired was concerted, but the court of appeal concluded that the employer did not know of the concerted nature of the activity and thus found against the employee. In that case, the colleagues who accompanied the discharged employee to the bank to verify that the employer’s level of funds on reserve was adequate to meet payroll disclaimed their involvement when confronted by the employer. The “knowledge of concertedness” requirement is controversial and has been criticized as being based on a misinterpretation of the NLRA and as frustrating the objectives of the Act.¹¹⁸

112. 281 N.L.R.B. at 885.

113. *Id.*

114. See, e.g., Morris, *supra* note 2, at 1722.

115. 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

116. *Meyers I*, 268 N.L.R.B. at 497; see also *NLRB v. McEver Eng’g, Inc.*, 784 F.2d 634, 640 (5th Cir. 1986) (“Before an employer can be held to have discriminated against its employees for their protected activity, the Board must show that the supervisor responsible for the alleged discriminatory action knew about the protected activity, and that the employees’ protected activity was a motivating factor in the employer’s decision.”); *Timekeeping Sys.*, 323 N.L.R.B. 244 (1997) (same); *United Ass’n of Journeymen and Apprentices of the Plumbing and Pipefitting Indust.*, 328 N.L.R.B. 1079 (1999) (same).

117. 601 F.2d 256 (6th Cir. 1979), *denying enforcement of* 229 N.L.R.B.1064.

118. Gorman & Finkin, *supra* note 37, at 351-53.

2. *For Mutual Aid or Protection*

The Board went to great pains in *Meyers II* to develop a standard for concertedness that did not render it redundant with “for mutual aid or protection.”¹¹⁹ Most discussions of the scope of “for mutual aid or protection” begin with the Supreme Court’s decision in *Eastex, Inc. v. N.L.R.B.*¹²⁰ In that case, the Court addressed an employer’s refusal to circulate in nonworking areas of the plant a union newsletter that criticized a presidential veto of an increase in the minimum wage and that urged employees to write to their state legislators in opposition to the incorporation of a right-to-work law in the state constitution. The Court rejected the employer’s argument that efforts to improve working conditions through channels beyond the immediate employer-employee relationship are unprotected under the NLRA. The Court distinguished between the relatively narrow scope of the Section 7 protection of “self-organization” and “collective bargaining” and the relatively broad scope of the Section 7 protection of “mutual aid or protection.”¹²¹ The Court did not give a concrete standard for determining the outer boundary of “mutual aid or protection.” Instead, it held that “some concerted activity bears a less immediate relationship to employees’ interests as employees than other such activity [and] at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the . . . clause.”¹²² In short, the activity must be reasonably related to wages, hours, or other terms and conditions of employment.¹²³ The foregoing standard does not give much guidance or predictability, and courts finding conduct not to satisfy the standard often state in conclusory terms that there is an insufficient nexus or relationship between the conduct at issue and employee concerns about employment related matters.¹²⁴

The Court’s *Eastex* interpretation of “mutual aid or protection” generally has been interpreted as giving a fairly broad, pro-worker scope.¹²⁵ Professor Cynthia Estlund, however, has characterized the standard, as interpreted in subsequent cases, as narrower than it might and should be.¹²⁶ Comparing the Section 7 cases with public employee free speech cases, she characterizes the interpretation of “mutual aid or protection” this way:

119. *Meyers II*, 281 N.L.R.B. at 885.

120. 437 U.S. 556 (1978).

121. *Id.* at 565-67.

122. *Id.* at 567-68.

123. Morris, *supra* note 2, at 1705.

124. See, e.g., *Tradesmen Int’l, Inc. v. NLRB*, 275 F.3d 1137, 1142 (D.C. Cir. 2002) (rejecting the Board’s interpretation of the standard that conduct intended to “level the playing field” between union and non-union employers is for “mutual aid or protection”).

125. See THE DEVELOPING LABOR LAW, *supra* note 20, at 144-45.

126. Estlund, *supra* note 35, at 928.

“some speech on matters beyond the actual terms and conditions of employment—even on matters over which the employer has no direct control—may gain section 7 protection, but only if it can be linked to a traditional self-interested economic objective.”¹²⁷ This criticism is also directed at the broad loss of protection of activities that satisfy both concertedness and “mutual aid or protection” but lose protection for other reasons discussed in the next section.¹²⁸ Professor Estlund’s proposed reinterpretation of “mutual aid or protection” would, within a very broad range of work-related topics, leave it to employees to decide what was for their protection and would not second guess them.¹²⁹ Thus, employees would not be required to show that they had acted in their own economic self-interest to satisfy the “mutual aid or protection” requirement. For example, product disparagement based on concern for safety or service to the public would be for mutual aid or protection. Generally, employee conduct motivated by social or public interest concerns would come within the ambit of “mutual aid or protection.”¹³⁰

3. *Limitation for Egregious, Opprobrious, Illegal, and Disloyal Conduct*

Even if conduct is deemed to be concerted and for mutual aid or protection, it still may not be protected under section 7. The Board and the courts have developed a common law exception to section 7 protection where the employee engages in bad faith conduct.¹³¹ Such conduct may be considered in bad faith because of either the nature of the activity or the purpose of the activity.¹³² The Board has described the degree of badness required to lose protection as “so flagrant, violent, or extreme as to render [the employees] unfit for service.”¹³³ Conduct that is illegal is one type of such conduct. In addition, violent, disruptive, or disloyal conduct is not protected under Section 7.¹³⁴ Determining whether conduct loses protection requires a balancing of the interests of the employer against the section 7 rights of the employee.¹³⁵ Depending on how the balance is struck, this can be a substantial limitation on protected activity, as almost all concerted

127. *Id.*; see also Fischl, *supra* note 40.

128. See *infra* notes - and accompanying text.

129. Estlund, *supra* note 35, at 974.

130. Estlund, *supra* note 35, at 949-60.

131. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 302 (1976).

132. *Id.* at 302-318; Morris, *supra* note 2, at 1704-1708.

133. Dreis & Krump Mfg. Co., Inc., 221 N.L.R.B. 309, 315 (1975), *enforced*, 544 F.2d 320 (7th Cir. 1976).

134. Morris, *supra* note 2, at 1707-08. For an excellent discussion of the types of activity found to be unprotected and an appendix that is a “typology of unprotected conduct cases,” see Sharpe, *supra* note 26.

135. Morris, *supra* note 2, at 1708.

activity for mutual aid or protection which results in unfavorable employment action is adverse to the employer.¹³⁶ At what point does such activity become so adverse as to be termed “disloyal” and lose protection?

The most significant case on this issue is *Jefferson Standard Broadcasting*.¹³⁷ In that case, television technicians, who were on strike and picketing, distributed leaflets that criticized the quality of programming offered to the public by the employer television station. The Supreme Court held that the activity was not protected. The Court first stated the general legal principle that “insubordination, disobedience, or disloyalty is adequate cause for discharge.”¹³⁸ The Court then explained that the product disparagement at issue did not relate to a labor practice of the company and was made in the interest of the public rather than in the interest of the employees.¹³⁹ The Court then held that, even if the conduct was concerted and for mutual aid or protection, the means used by the technicians defeated section 7 protection.¹⁴⁰

The *Jefferson Standard* decision has been heavily criticized. In dissent, Justice Frankfurter objected to the vagueness of the principles articulated by the majority: “[T]o float such imprecise notions as ‘discipline’ and ‘loyalty’ in the context of labor controversies, as the basis of a right to discharge, is to open the door wide to individual judgment by Board members and judges.”¹⁴¹ The cases have shown that the amorphous standard does not lead to predictability, as very similar cases have yielded different results. For example, in *New River Industries v. N.L.R.B.*,¹⁴² the Fourth Circuit considered a sarcastic letter written by several employees and posted on a bulletin board “thanking” management for free ice cream cones given to employees in celebration of a deal. Management was not amused by the letter, and employees who were involved in the writing, typing, and posting of the letter were fired. The Board held that the employer violated section 8(a)(1) by firing employees who were engaged in protected concerted activity. The court denied enforcement of the Board order, holding that the letter was not intended to spur collective action to correct a working condition.¹⁴³ The court cited *Jefferson Standard* and

136. Estlund, *supra* note 35, at 988-94.

137. *NLRB v. Electrical Workers (IBEW) Local 1229*, 346 U.S. 464 (1953).

138. *Id.* at 476.

139. *Id.* at 476-77.

140. *Id.* at 477-78.

141. *Id.* at 481 (Frankfurter, J., dissenting). For a recent case in which the ALJ and the Board concluded that the employee’s public disparagement of the employer did not lose protection but the court of appeals concluded that it did, see *St. Luke’s Episcopal-Presbyterian Hosp., Inc. v. NLRB*, 268 F.3d 575 (8th Cir. 2001) (nurse appeared on local news broadcast and accused hospital of “jeopardizing the health and safety of mothers and babies” by changing shift assignments and duties of nurses).

142. 945 F.2d 1290 (4th Cir. 1991).

143. *Id.* at 1295.

explained that the criticism of management at issue was not related to mutual aid or protection of the employees.¹⁴⁴ In contrast, the Fifth Circuit in *Reef Industries, Inc. v. NLRB*,¹⁴⁵ dealt with a fact situation which it admitted was “almost identical”¹⁴⁶ to that in *New River Industries*. Employees, who learned of a statement (taken out of context) by a manager in an unfair labor practice hearing about the level of education of plant employees, sent a sarcastic letter and tee shirt to the manager. The employee who made the tee shirt was terminated for insubordination. The Fifth Circuit enforced the Board’s order, holding that the activities were not so offensive or harmful to the business as to lose protection,¹⁴⁷ that the activities related to an ongoing labor dispute,¹⁴⁸ and that the activities were adequately related to the employment relationship, even though they did not request or demand that the employer take a specific action regarding a term or condition of employment.¹⁴⁹ On petition for rehearing, the employer argued that the Fifth Circuit was creating a circuit split by reaching a different result from that of the Fourth Circuit in *New River Industries* on indistinguishable facts. The Fifth Circuit rejected that argument, saying that the cases were “almost” factually identical, but the few factual differences were material.¹⁵⁰

The criticism that the standard under which conduct becomes unprotected is vague, first made by the dissent in *Jefferson Standard*, was more recently raised by Professor Sharpe.¹⁵¹ He proposed a standard under which concerted activity that is otherwise protected by section 7 loses protection only if the activity “unreasonably threatens the long-term viability . . . of the enterprise, the labor-management relationship, or the employment relationship.”¹⁵² This standard appears more favorable to employees than the current capricious principles, and it arguably provides more information and predictability for all parties.

144. The court thus actually held that the conduct at issue was not protected rather than that it lost protection. The court’s citation of *Jefferson Standard*, in which the reviewing court considered both issues, further demonstrates the lack of a definitive standard: conduct can be treated either as unprotected in the first instance or as having lost protection because of insubordination, disobedience, or disloyalty.

145. 952 F.2d 830 (5th Cir. 1991), *reh’g denied*, 952 F.2d 839 (5th Cir. 1992).

146. *Id.* at 840.

147. *Id.* at 837-38.

148. *Id.* at 838.

149. *Id.* at 838-39.

150. *Id.* at 840 (“Although the facts in *New River Industries* are ‘almost’ identical to those in the instant case, they are not identical-and in the word, *almost*, lies the significant distinction that eschews a conflict between this circuit and the Fourth.”). For further comparison of *Reef, Industries, Inc.*, and *New River Industries*, see Sharpe, *supra* note 26, at 239.

151. Sharpe, *supra* note 26.

152. *Id.* at 233.

4. *The Three Requirements*

In view of the interpretations, criticisms, and proposals regarding the three elements of section 7 protected conduct, one can conclude that the criticisms are meritorious and that the more worker-friendly interpretations are more consistent with the intent of section 7. That does not mean, however, that the Board or the federal courts must accept those interpretations.¹⁵³ If the NLRA came to play a larger role in the body of employment law protecting nonunionized as well as unionized employees, the three elements and the interpretations given them would become even more important.¹⁵⁴

IV.

PROTECTED CONCERTED ACTIVITY OF NONUNION EMPLOYEES

What can nonunionized employees get in the workplace from the section 7 right to engage in concerted activity for mutual aid or protection? The most obvious thing is voice, a means for nonunion employees to express their views and to obtain information regarding terms and conditions of employment and other aspects of the employment relationship and the business.¹⁵⁵ The second thing that employees might obtain through exercise of this section 7 right is power.¹⁵⁶ Professor Harper argues that the most lamentable aspect of the decline of unions is not, as many say, employees' loss of voice through their representative, but instead their loss of the power to get a larger share of the pie and to protect themselves from "arbitrary, unjust, or discriminatory treatment by their managers."¹⁵⁷ Exercise of section 7 rights directly gives employees such voice. Power is a less direct result of the exercise of section 7 rights, and, even when mustered, it rarely, if ever, will reach the level in the nonunionized context that it does when there is a union and a collective bargaining agreement. Still, exercise of section 7 rights can give employees some power. While the section 7 right lacks the direct power of individual employment rights statutes, which require an employer to provide a certain thing or to refrain

153. The Board, during most periods of time, has been more receptive of employee-friendly interpretations and standards and more protective of workers than have the federal courts of appeals.

154. Professor Alan Hyde, after discussing the limitations on section 7 conduct, concluded that "[a]ll these subtle and treacherous limitations on section 7 have historically performed the function of reinforcing bureaucratic unionism, by eliminating the kinds of quick, spontaneous action that groups at low levels of organization (such as industrial unions in 1930's America) may undertake." Hyde, *supra* note 76, at 170-71.

155. See, e.g., Harper, *supra* note 24, at 110-15 (and sources cited therein).

156. See Rabin, *supra* note 19, at 171 (discussing voice—input regarding terms and conditions of employment—and muscle—mechanism for enforcement of rights—as two essential ingredients of sound workplace policy).

157. Harper, *supra* note 24, at 104.

from taking a particular employment action, section 7 gives employees the flexibility to decide what they want and protects them in undertaking their own concerted actions to persuade the employer to give them what they want. The employer is not required by law to give employees what they want, but the employer cannot fire the employees for acting in ways that cause the employer to do so. Moreover, the exercise of voice may cause employees to seek unions or other representative structures that will increase their power to obtain what they want.

A number of Board and court decisions in the last few years on the issue of protected concerted activity suggest that section 7 is becoming an important law for nonunionized employees and that it could become even more important. This section discusses some of the decisions from the last three years.¹⁵⁸ The following decisions are selected to exemplify the scope of section 7 protection and the potential for protecting employees who are not represented by a union.

A. Expression and Technology

At its core, the NLRA is about communication and expression, which then give impetus for other action to improve the workers' lot. In an age of information technology, a law rooted in communication should not only fit in well, but flourish. Computers, e-mail, and the Internet make the NLRA more relevant in the twenty-first century than at any time since its passage. Employees can now exercise their section 7 rights by means of these new technologies. Lacking the level of detail of some employment laws, section 7 of the NLRA derives its relevance and power from its simplicity and flexibility.¹⁵⁹ Commentators are now beginning to explore how the NLRA will fare in the age of information technology more generally, but most of the commentary at this time addresses the potential for unions to use technology for organizing.¹⁶⁰

The most obvious thing that nonunion employees can do under Section 7 is express or communicate their views (often read as "complain") about terms and conditions or other aspects of the employment relationship.¹⁶¹

158. For a good compilation of cases involving nonunionized employees claiming to exercise section 7 rights, see Melissa K. Stull, Annotation, *Spontaneous or Informal Activities of Employees as "Concerted Activities," Within Meaning of § 7 of National Labor Relations Act (29 USCS § 157)*, 107 ALR FED. 245 (1992 & Supp. 2000).

159. Frederick D. Rapone, Jr., *This Is Not Your Grandfather's Labor Union—Or Is It? Exercising Section 7 Rights in the Cyberspace Age*, 39 DUQ. L. REV. 657, 658 (2001) ("The beauty of the Act lies in its simple language and clear purpose.").

160. See *id.*; Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1 (2000); Gwynne A. Wilcox, *Section 7 Rights of Employees and Union Access to Employees: Cyber Organizing*, 16 LAB. LAW. 253 (2001).

161. See Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L. J. 101,

This protected right to express views takes on added significance with advances in technology, which have simplified dissemination of information on a broad scale. Employees can use new technologies to express their views about their jobs and to attempt to rouse support for their views and for collective action.¹⁶² However, technology has also made it possible for employers to monitor employee communications pervasively and clandestinely and has created some incentives for employers to monitor and/or investigate how employees are using new technology.

Consider the case of the “wise guy” using the company e-mail in *Timekeeping Systems, Inc.*¹⁶³ The employee, Leinweber, was a software engineer who prepared computer programs at a company that manufactured data collection products. The company’s chief officer sent a message to all employees via the company’s e-mail system in which he described a proposed new vacation policy which he said would give employees more days off each year than the current plan. The e-mail message invited employees to respond to the proposal: “Your comments are welcome, but not required.”¹⁶⁴ One employee took the message at face value and responded, “GREAT!” Leinweber, on the other hand, offered comments of a different tenor, sending an e-mail message to all employees in which he demonstrated that the boss’s assertion that the proposed plan would result in more days off each year was wrong. Moreover, Leinweber wrote with, shall we say, an attitude. He began by saying that he would prove the boss’s statement to be false, and he concluded by saying that he had proven it to be false. The employee who had first responded favorably, sent a follow-up message in which he concluded “Not so Great.” A record-breaking volume of responses was generated.

The boss was not too pleased with Leinweber’s response, and he sent a memorandum (no more e-mails for the boss) to him saying that he was very disappointed with him for the “inappropriate and intentionally provocative” message. The memorandum further said that Leinweber’s e-mail message ran afoul of the company employment manual provision stating that “[f]ailure to treat others with courtesy and respect” could result in immediate dismissal. Still, the boss wanted to be merciful, and his memorandum instructed that Leinweber could save his job if he composed an e-mail message explaining why he did a bad thing, submitting a draft of

118-19 (1995) (“The NLRA is rarely used by and is largely unfamiliar to nonunion employees outside the organizing context. But section 7 is a potentially significant source of free speech rights in the workplace on issues of concern to workers; it protects speech about unionization or other forms of employee representation, discussion of work-related grievances, and petitioning for their redress.”).

162. See Hyde, *supra* note 76, at 149 (“Employee representation through caucuses is most developed among higher-educated employees in high technology workplaces who communicate through computer networks.”).

163. 323 N.L.R.B. 244 (1997). The case involved a nonunion setting.

164. *Id.* at 246.

that message to the boss for approval, and thereafter, posting the approved message by e-mail to those who had received Leinweber's inappropriate message. Leinweber proved unable to grovel well, after staying up late into the morning trying to compose something. His discharge letter gave two reasons for termination: "[f]ailure to treat others with courtesy and respect" and "[f]ailure to follow instructions or to perform assigned work."¹⁶⁵

So what was Leinweber to do? Did he have a legal cause of action? Imagine Leinweber walks into an attorney's office and tells his story. His conclusion is that he was unfairly terminated because he sarcastically communicated his opposition to his employer's proposal regarding a term of employment, and he was terminated because his expression was sarcastic or rude, and when his employer gave him the ultimatum to apologize and grovel or else, he chose or else. The attorney agrees that it is a sad story but can think of no individual employment rights statute that applies. What law says you can sass your boss? So, Leinweber suffers the misfortune, noting that life is sometimes unfair, and finds another job? Well, not so fast. He files an unfair labor practice charge with the regional office of the NLRB alleging a violation of section 8(a)(1) of the NLRA for discharge because he engaged in protected, concerted activity.

The rest of the story is that Leinweber won, and the remedy ordered by the administrative law judge and affirmed by the Board ordered the employer to offer Leinweber reinstatement with all of the benefits he had and to make him whole for any losses he suffered.¹⁶⁶

Leinweber's conduct fell within the purview of section 7, even though two of the required elements caused some concern. "For mutual aid or protection" clearly was satisfied, as the employee was discussing a proposed vacation plan, a term of employment. Under concerted, the ALJ concluded that Leinweber's conduct satisfied the *Meyers II* standard because his e-mail message was intended to "incite" other employees to help him keep the old vacation policy.¹⁶⁷ The ALJ also found that the employer knew of the concerted nature of Leinweber's conduct; indeed, it was the fact that the sarcastic message was sent to other employees that most angered the boss. The judge recognized that "[s]ome concerted conduct can be expressed in so intolerable a manner as to lose the protection of Section 7."¹⁶⁸ Although the ALJ found Leinweber to be "a rather unusual person . . . [and] a bit of a wise guy,"¹⁶⁹ the conduct was not so violent or serious to render him unfit for service.¹⁷⁰

165. *Id.* at 247.

166. *Id.* at 245.

167. *Id.* at 248.

168. *Id.*

169. *Id.* at 250.

170. *Id.* at 248. The ALJ considered the sarcastic tone of the e-mail in *Timekeeping Systems* less

Timekeeping Systems is an important recent Board decision demonstrating the potential of section 7 protection in the nonunion workplace. One employee expressed his views via “new” technology to his employer and his co-employees about a term of employment. He expressed his views in a disrespectful manner, and his response appears to have started a groundswell of support for retaining the existing policy.

The Board and courts will have to resolve another issue regarding section 7 and technology: whether it is an unfair labor practice for an employer to monitor communications among employees regarding matters for mutual aid or protection. Employers have recently responded to advances in technology by rampant monitoring of employees in the workplace.¹⁷¹ The technology provides both new methods of monitoring and new reasons for monitoring employees, who may use the technology to disseminate information that may cost the business money.¹⁷² Congress has not yet passed legislation restricting monitoring of employees, despite introduction of proposed legislation regarding this issue,¹⁷³ and states also have been reluctant to enact such laws.¹⁷⁴ The tort theory of invasion of privacy has not provided much protection because one element of the tort is an expectation of privacy, and employers can easily undermine the employee’s privacy expectation by stating in its policies that the employer reserves the right to monitor and search e-mails and computer files. The best protection currently available for communications about terms and

offensive than the protected statement of an employee in another case that the CEO was a “cheap son of a bitch.” *Id.* (citing *Groves Truck & Trailer*, 281 N.L.R.B. 1194, 1195 (1986)).

171. See generally AMERICAN MANAGEMENT ASSOCIATION, *WORKPLACE MONITORING & SURVEILLANCE: POLICIES AND PRACTICES* (2000) (report examining the policies, practices, and motivations regarding computer monitoring by 435 employers); *Workers Are Losing Their Privacy at Work, According to ILO Study*, Daily Lab. Rep. (BNA) No. 146 (Aug. 2, 1994) (study by International Labour Organization indicated that, among industrialized nations, American workers are most susceptible to monitoring by their employers).

172. For example, employers are concerned that employees may use e-mail or the Internet to send trade secrets to competitors. A second concern is that employees may send material to co-employees or others that may result in the employer being held liable for sexual harassment, some other type of harassment, or various torts, including defamation and invasion of privacy. See *Attorneys Say Employees’ Use of E-Mail Creating Possible Legal Pitfalls for Employers*, Daily Lab. Rep. (BNA) No. 130, at C-1 (July 6, 2000); see also AMERICAN MANAGEMENT ASSOCIATION, *supra* note 171 (survey of employers indicating that potential legal liability is a principal reason that they monitor employees’ computer use).

173. The Notice of Electronic Monitoring Act, H.R. 4908, 107th Cong., (2000), would have limited the circumstances under which employers could electronically monitor employees. See *Business Coalition Blocks Markup of Bill Requiring Electronic Monitoring Notification*, Daily Lab. Rep. (BNA) No. 180, at A-9 (Sept. 15, 2000). A similar bill, the Privacy for Consumers and Workers Act (H.R. 1900) was introduced in Congress in 1993, and after some early success in subcommittees, it bogged down in Congress. See *House Education, Labor Subpanel Approves Measure to Curtail Electronic Monitoring*, Daily Lab. Rep. (BNA) No. 36, at D-14 (Feb. 24, 1994).

174. See *supra* note 74 and accompanying text (discussing California governor’s veto of such legislation).

conditions of employment may be section 7 of the NLRA. This is a privacy protection limited to a particular type of communication—communication for mutual aid or protection—but it could be important.

B. Rules Established by Employers

Employees can also challenge rules established by employers, arguing that the rules restrict conduct protected under section 7. In some of the cases, the employers argue that they established the prohibitory rules in an attempt to avoid liability under some other law, such as sexual harassment under Title VII or discrimination under the Americans with Disabilities Act.¹⁷⁵

The Board's standard for analyzing whether maintenance of workplace rules violates section 8(a)(1) was established in *Lafayette Park Hotel*.¹⁷⁶ The Board held that:

[T]he appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.¹⁷⁷

In *Compuware Corp. v. NLRB*,¹⁷⁸ the state had awarded a contract to Peat Marwick to upgrade the state's computers. Peat Marwick then contracted with Compuware to provide support personnel to train the state's employees. Plaintiff was one of the Compuware employees. Plaintiff discussed with co-employees and supervisors his dissatisfaction with several of Compuware's employment practices, including long hours, stress, and last-minute changes to training materials. When he discussed these concerns with the master trainer and got no satisfaction, he threatened to bring the concerns up at a meeting at which a representative of the state would be present. When this threat was relayed to a Peat Marwick supervisor, the supervisor requested that Compuware remove plaintiff from the project. Compuware terminated plaintiff, a temporary employee hired for the particular job. At the beginning of the job, all employees were told that Peat Marwick had a rule that prohibited subcontractors from directly approaching the client without authorization from Peat Marwick.

The employer argued that none of the elements of section 7 protected activity were satisfied. First, it argued that the plaintiff employee's conduct was not concerted because he acted alone and that he was not specifically

175. See, e.g., *Lockheed Aeronautics*, 330 N.L.R.B. 422 (2000), discussed *infra* notes 187-188 and accompanying text.

176. 326 N.L.R.B. 824 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

177. *Id.* at 825 (footnote omitted).

178. 134 F.3d 1285 (6th Cir.), *enforcing* 320 N.L.R.B. 101, *cert. denied*, 523 U.S. 1123 (1998).

authorized by any co-workers to represent them. Two co-workers testified at the hearing that they had not authorized the plaintiff to represent them before management. The Sixth Circuit rejected this argument, explaining that specific authorization is not needed to establish concerted activity; rather, the question is “whether the employee acted with the purpose of furthering group goals.”¹⁷⁹

Second, the employer argued that rules that discourage exercise of section 7 rights are permissible when the rules protect important employer interests. The court rejected this argument because the rule facially did not strike any balance between the employees’ section 7 rights and Peat Marwick’s business interest. The court agreed with the Board that the employer could not “institute a work rule that restricts employees’ ability to engage in concerted activity by prohibiting communication with third parties.”¹⁸⁰

Third, the employer argued that the conduct did not come under section 7 because there was no ongoing labor dispute, since management was on the workers’ side and was trying to address the workers’ concerns. This essentially was an argument that the conduct was not for mutual aid or protection. The court gave that argument short shrift, holding that the employees were involved in a dispute over working conditions.¹⁸¹

Finally, the employer argued that the plaintiff’s threat to go to a third party, even if concerted and for mutual aid or protection, lost protection because it was disloyal to the employer. Again, the court agreed with the Board that an employer cannot make a rule or acquiesce in another employer’s rule that prohibits the concerted activity of communications with third parties. Such communications do not lose protection unless they are very disloyal or maliciously false. The communications that the plaintiff threatened to make were about working conditions and were neither false nor disloyal and thus were not divested of section 7 protection.¹⁸²

179. *Id.* at 1287. The following evidence established the concerted nature of the plaintiff’s activity: plaintiff had discussed his concerns about working conditions with the other trainers from the beginning of his employment; he had arranged a lunch meeting between trainers and managers to discuss grievances, which the employees attended; in his discussion with the master trainer, the plaintiff said he was going to the meeting with the state representative to speak for all of the employees; the plaintiff made it known to his manager and co-workers alike that he had organized a union at a previous job and that he had a labor relations degree; and some of the trainers had commented that, since the plaintiff had been a union steward, he should be the one to talk to management. *Id.* at 1290.

180. *Id.* at 1290. Employers may have even greater concerns about employee communications with third parties than they have regarding internal communications because such external communications may do greater damage, such as causing loss of a customer. Nonetheless, the Board has held such communications are protected under section 7 if they are not disloyal or maliciously false. *Id.* at 1291.

181. *Id.*

182. *Id.* at 1291.

In *NLRB v. Main Street Terrace Care Center*,¹⁸³ the Sixth Circuit enforced the Board's order holding that an employer's rule that prohibited employees from discussing their wages with other employees constituted a violation of section 8(a)(1). The court held that such a rule "undoubtedly tends to interfere with the employees' right to engage in protected concerted activity."¹⁸⁴ The employer attempted to avoid a violation by arguing that the rule was not written, that it was not promulgated by a person who had rulemaking authority, and that it was not enforced. The court rejected the argument that there was no rule because it was not written, reasoning that such an approach would enable employers to do with an orally communicated rule what is prohibited when done by a written rule.¹⁸⁵ Regarding authority to promulgate the rule, the court held that the person who made the rule was a supervisor, thus making the employer responsible for the rule. Finally, the court rejected the argument that the rule was not an unfair labor practice because it was not enforced. The court responded that even absent enforcement, the rule nonetheless would have a chilling effect on the employees' exercise of their section 7 rights. The Court also agreed with the Board's conclusion that, although the employee who presented the wage-related complaints to management often did so alone, she always acted as the representative of at least one other employee. Therefore, her activity was concerted.¹⁸⁶

Another recent case involving an employer rule and section 7 activity is *Lockheed Aeronautics*.¹⁸⁷ Though the case involved employees represented by a union, this was not a factor in the finding of an unfair labor practice. Guards at Lockheed became dissatisfied with work accommodations that were granted to a co-employee because of her medical limitations. When the employee discovered that her co-workers were discussing her physical limitations, she filed an internal complaint, alleging a hostile environment. Concerned with potential liability under the Americans with Disabilities Act, the company warned employees not to discuss the matter and also warned them not to discuss disciplinary investigations or discipline decisions. The Board acknowledged that the employer had legal obligations that might justify some restrictions. However, the restrictions imposed by this employer were not narrowly tailored to its legitimate interests and to avoid unnecessary interference with the employees' exercise of their section 7 rights.¹⁸⁸

183. 218 F.3d 531 (6th Cir. 2000), *enforcing* 327 N.L.R.B. 522.

184. *Id.* at 537.

185. *Id.* at 538.

186. *Id.* at 539-40.

187. 330 N.L.R.B. 422 (2000).

188. *Id.* at 423.

In *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc.*,¹⁸⁹ an employer rule restricted speech. Though the case involved the commencement of a union organizing campaign, the principle regarding the interaction of employer rules and section 7 protection would be equally applicable to a nonunion workplace. In *Adtranz*, the employer had a rule in an employee handbook that classified as “serious misconduct,” subject to suspension without pay for a first violation and termination for a second, “using abusive or threatening language to anyone on company premises.”¹⁹⁰ The ALJ, affirmed by the Board, held that, because abusive language was not defined, it could be interpreted as barring union organizing (or other protected section 7) expression. Thus, the ALJ and Board found an 8(a)(1) unfair labor practice. The D.C. Circuit was less receptive of the argument that the rule unnecessarily interfered with section 7 rights, labeling the position “simply preposterous.”¹⁹¹ The court went on to say that “[i]t defies explanation that a law enacted to facilitate collective bargaining and protect employees’ right to organize prohibits employers from seeking to maintain civility in the workplace.”¹⁹²

The foregoing cases demonstrate that employer rules restricting conduct and communication by and among employees can violate section 7. Many of the cases involving challenges of employer rules have occurred in unionized workplaces, but several cases have arisen in non-unionized workplaces. Employers have resorted to rules in recent years to attempt to avoid liability for sexual harassment, disability discrimination, defamation,

189. 331 N.L.R.B. No. 40, 2000 N.L.R.B. LEXIS 334 (May 31, 2000), *enforcement denied*, 253 F.3d 19 (D.C. Cir. 2001).

190. 2000 N.L.R.B. at *12.

191. 253 F.3d at 28.

192. *Id.* The Board recently discussed the D. C. Circuit’s decision in *Adtranz* in *Community Hosp. of Central Calif.*, 335 N.L.R.B. No. 87, 2001 N.L.R.B. LEXIS 770 (September 26, 2001). The Board considered a handbook provision that prohibited “[i]nsubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual.” The Board held that maintenance of that rule was an 8(a)(1) violation under the standard in *Lafayette Park Hotel*. After discussing the court’s decision in *Adtranz*, the Board distinguished the rule in the case before it by saying that the rule was clearly broader and “significantly more likely to chill employees in the exercise of their Section 7 rights than the rule at issue in *Adtranz*.” 2001 N.L.R.B. LEXIS 770 at *18.

A case similar to *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc.*, but with the court reaching a different result, is *Consolidated Coal Co. v. NLRB*, 168 L.R.R.M. (BNA) 2026 (4th Cir. 2001). That case involved union organizing, but the principles regarding enforcement of a rule in derogation of section 7 rights would apply in a nonunion context. The employer had a harassment policy which stated that “[a]ny unwelcome action, intended or not, which is considered offensive may be labeled harassment” Employees distributing literature as part of a union organizing campaign had harassment complaints filed against them, they were investigated and, after official committee hearings on the charges, had documentation placed in their files that no action was taken on harassment charges. The court held that when employees are engaged in protected activity under section 7, an employer may not subject them to “coercive proceedings” on the basis of subjective allegations of harassment.

and other causes of action. Regardless of the reason for which a prohibitory rule is adopted, it may violate section 7.

C. *Speaking Out Against Employers*

Some cases find whistleblowing to be a specific type of expression protected by section 7. While whistleblowing is also protected by numerous federal and state statutes, these statutes often protect only a certain type, such as environmental whistleblowing.¹⁹³ Certain statutes¹⁹⁴ and the tort theory of wrongful discharge in violation of public policy¹⁹⁵ provide more general protection in most states. Section 7 can supplement such protections already in place and fill some gaps.

Consider the Board's decision in *Georgia Farm Bureau Mutual Insurance Co.*¹⁹⁶ In that case, insurance agents, not represented by a union, reported to the state insurance commissioner that their supervisor had knowingly mishandled claims. The employer retaliated, eventually leading to the alleged constructive discharge of the reporting agents. The employer argued that the agents' reporting of the supervisor's conduct was not protected under section 7 because it did not bear any relationship to their working conditions;¹⁹⁷ accordingly, the employer argued that the concerted conduct was not for mutual aid or protection. The Board rejected this argument because the agents knew that failure to report insurance fraud was a violation of the company's policy and a violation of state law. The agents feared that if they did not report the conduct, they could be terminated, suffer other losses in wages and terms and conditions of employment, and lose clients if they were considered part of the fraud.¹⁹⁸ The Board thus reasoned that the agents reported their supervisor's conduct because of their concerns that a failure to do so might affect their terms and conditions of employment.¹⁹⁹

193. See, e.g., LA. REV. STAT. ANN. § 30:2027 (West 2000).

194. See, e.g., LA. REV. STAT. ANN. § 23:967(A)(1)-(2) (West 2000); ARIZ. REV. STAT. § 23-1501(3)(c)(ii) (2000).

195. Whistleblowing is one of the four types or categories of wrongful discharge in violation of public policy tort theory. See generally MARK A. ROTHSTEIN, ET AL., EMPLOYMENT LAW § 8.11 (2d ed. 1999) (stating that three-quarters of states have whistleblower statutes, but others permit wrongful discharge tort claims).

196. 333 N.L.R.B. No. 100, Case Nos. 10-CA-31631-1, 10-CA-31631-2, 2001 N.L.R.B. LEXIS 211 (Apr. 5, 2001).

197. 2001 N.L.R.B. LEXIS 211 at *3.

198. *Id.* at *4-5.

199. *Id.* at *5 (citing *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981)). The Board's explanation that the actions of the agents benefited the employees' own employment and economic interests, rather than the public, illustrates Professor Estlund's point that the Board has given "mutual aid or protection" a narrow, self-centered interpretation, rather than interpreting it more broadly so that a public interest reason would satisfy it. See Estlund, *supra* note 35, at 967-970.

Employees who publicly criticize their employers for conduct that is not necessarily illegal and then suffer retaliation by the employer do not have an applicable statutory or common law theory of recovery in most states.²⁰⁰ Section 7 may provide a remedy. In *Allstate Ins. Co.*,²⁰¹ an employee who was operating under the company's "neighborhood office agent" arrangement found that she had contributed \$200,000 of her own money to the business over the years and had obtained only debts in return. She and other employees in the "NOA" program were interviewed for an article published in *Fortune* magazine, entitled *Stalked by Allstate*, in which plaintiff and others were critical of the program. After the article was published, the employer issued a "job-in-jeopardy" disciplinary warning to her. She filed an unfair labor practice charge, alleging a violation of section 8(a)(1). The Board concluded that the employee's conduct was concerted because she was "initiating or inducing group action" with the objective, in part, to alert others in the NOA program to the problems she had encountered.²⁰² The Board concluded that the disciplinary letter was an infringement on the employee's exercise of her section 7 rights and thus was a violation of section 8(a)(1).

In *Robert F. Kennedy Medical Center*,²⁰³ the hospital decided to out-source its transcription department. The three transcriptionists took their appeal to staff doctors by writing them a letter on hospital stationery in which they apprized doctors of the hospital's decision and asked the doctors to voice their opinions in favor of preserving the in-house department to the hospital administration. The Board found that the conduct of speaking out against the employer was a self-interested appeal to others to prevent job loss, and thus protected activity under section 7. Furthermore, the employer did not prove that it would have fired the employees for the use of hospital stationery in the absence of the protected concerted activity. Therefore, the terminations violated section 8(a)(1).

Whistleblowing is a type of employee communication that has often resulted in employers taking adverse actions. While there are state and federal statutes that provide protection for some forms of whistleblowing, section 7 can play a valuable role in the interstices between these laws. More generally, the foregoing cases demonstrate that employees who suffer adverse consequences after speaking out against their employers may have recourse under section 7.

200. See, e.g., *Marsh v. Delta Airlines*, 952 F. Supp. 1458 (D. Colo. 1997) (employee of airline who wrote letter to newspaper that was critical of his employer and was terminated could not recover under either state wrongful discharge statute or covenant of good faith and fair dealing).

201. 335 N.L.R.B. No. 83, Case No. 3-CA-21350, 2000 N.L.R.B. LEXIS 727 (Sept. 29, 2000).

202. 2000 N.L.R.B. LEXIS 727 at *6 n.3.

203. 332 N.L.R.B. No. 153, Case Nos. 21-CA-33110, 21-CA-33152, 2000 N.L.R.B. 915 (2000).

D. Work Stoppages

One of the most traditional types of concerted activity in unionized workplaces is a work stoppage. Protected work stoppages can also occur in nonunion settings. In *Vencare Ancillary Services, Inc.*,²⁰⁴ physical therapists were advised of wage cuts. They voiced their protests to a supervisor and gave him a memorandum in which they objected to implementation of the wage cuts. When the employees met with a supervisor and presented the memorandum to him, one of them said that they had no union and no representative to voice their concerns for them, but they felt very strongly about the wage cuts. When management did not promptly respond, the physical therapists refused to see patients in protest. They were discharged for their actions. The Board found an 8(a)(1) unfair labor practice because the physical therapists were engaged in a short-term work stoppage that was protected under section 7.²⁰⁵

V.

CHANGES TO FACILITATE REINVIGORATION

Nonunionized employees have found recourse in the NLRA. How can more employees avail themselves of the rights and protections that the Act gives them? One prerequisite is that employees and employers become better informed that section 7 rights apply to employees not represented by unions. Section 7 rights have very little significance if employees are unaware that they exist.²⁰⁶ A second requisite is that the Board²⁰⁷ and the federal courts of appeals give increased recognition to the section 7 rights of nonunion employees.

A. Advising Nonunion Employees of Their NLRA Rights

1. Requirement of Notice Posting Regarding Section 7 Rights

The most obvious step toward making the NLRA a major source of

204. 334 N.L.R.B. No. 119, Case No. 2S-CA-26096-2, 2001 N.L.R.B. LEXIS 574 (Aug. 6, 2001).

205. The Board rejected the employer's argument that the five employees constituted a statutory "labor organization" which violated section 8(g) by not giving ten days advance notice of the work stoppage. The Board also rejected arguments that the work stoppage was an unprotected partial strike and that it lost protection because it was too disruptive of patient care. 2001 N.L.R.B. LEXIS 74 at *19.

206. See, e.g., Hyde, *supra* note 76, at 167 ("[W]hile section 7 protects group action in the nonunion workplace, the hypertechnical nature of its boundaries provides shaky protection for employees who take spontaneous action in pressurized situations without assistance from any formal organization.")

207. I use "Board" to mean all of the procedural infrastructure of the NLRB, including the regional offices and the administrative law judges who hear unfair labor practice cases.

protection for nonunion employees is for employers and employees to become informed of employees' rights. The rights and protections of nonunion employees under the NLRA are perhaps the best-kept secret in labor law. Employees and employers could become better informed of nonunion employees' rights through a requirement of notice posting by employers. This is an obvious and unoriginal recommendation, but it is fundamental,²⁰⁸ and it has become more important in light of the cases involving unfair labor practice claims by nonunion workers and the Board's decision in *Epilepsy Foundation of Northeast Ohio*.²⁰⁹

Labor law scholars have recommended that the NLRB adopt a rule requiring that employers post notices prepared under the auspices of the Board in conspicuous places in the workplace.²¹⁰ Professor Morris filed a petition with the Board, joined by Professor Samuel Estreicher, requesting that it issue a rule requiring such a posting.²¹¹ It is interesting that most of the federal individual employment rights statutes have notice posting requirements,²¹² but the NLRA, the oldest federal labor law and the cornerstone, does not. I agree with Professor DeChiara that what is needed is a Board rule, either by adjudication or by use of the Board's rulemaking authority,²¹³ requiring notice posting, which should state the rights involved and give examples.²¹⁴ *Epilepsy Foundation* provides a good opportunity to do this because it is a major change in the law that can be stated as a concrete rule. But, if the Board requires covered employers to post a notice regarding the *Epilepsy Foundation* right, there is no need to limit the notice to statement and explanation of the *Weingarten* right. Rather, the notice should go on to explain the other section 7 rights applicable to nonunion as well as union employees.

208. DeChiara, *supra* note 35, at 438 ("Ignorance of the law disempowers people. It prevents them from seeking redress for legal wrongs, and also causes them to shy away from taking actions to which they are legally entitled.").

209. See Heldman, *supra* note 30, at 220 ("Should the employer be required—as a matter of case adjudication or as a matter of rulemaking—to notify employees of their right under *Epilepsy Foundation*?"); see also *Management, Union Reactions*, *supra* note 31 (quoting AFL-CIO Associate General Counsel Nancy Schiffer saying that a notice posting requirement would help to educate employers and employees).

210. Charles J. Morris, *Renaissance at the NLRB—Opportunity and Prospect for Nonlegislative Reform at the Labor Board*, 23 STETSON L. REV. 101, 110-12 (1983) [hereinafter Morris, *Renaissance*]; DeChiara, *supra* note 35.

211. See Morris, *Renaissance*, *supra* note 210, at 110-12.

212. DeChiara, *supra* note 35, at 440-43 (discussing notice posting requirements under ERISA, the federal employment discrimination statutes, the Fair Labor Standards Act, the Family and Medical Leave Act, and the Employee Polygraph Protection Act).

213. 29 U.S.C. § 153(b)(6) (2002) ("The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.").

214. DeChiara, *supra* note 35, at 459.

2. *Organized Labor Assuming the Mission of Advising Nonunion Employees of Their NLRA Rights*

The other way of ensuring that employees and employers know of the nonunion workers' section 7 rights is for someone to undertake an aggressive campaign to inform them. The obvious candidate for this educator is organized labor. Unions should undertake this mission as a service to workers. While it may seem ironic for unions to tell employees that they have rights and protections under the NLRA without unions, there are good reasons for unions to advise nonunion employees of their rights. Organized labor, although often portrayed as being more concerned with its self-preservation than with workers' well-being,²¹⁵ often has acted in the best interest of workers, even when it was not clear that the actions would help organized labor. Consider, for example, organized labor's support for individual employment rights laws,²¹⁶ even though those laws may have decreased the perceived need for unionization.

Leading labor law scholars have outlined a new role for unions in the individual employment rights regime of advising nonunion workers of their individual employment rights and assisting them in enforcing those rights.²¹⁷ Unions might perform these services out of a sense of duty or out of self-interest in developing a future relationship.²¹⁸ Those motivations should be even stronger when the rights are those protected in the NLRA, which has been the traditional focus of organized labor. Unions might find that this service would raise awareness of the NLRA and perhaps of the value of having a labor organization as a representative. Employees who exercise their section 7 rights without a representative will find that they have voice. However, to muster adequate power to obtain the workplace conditions that they want and to protect their rights may require that they be represented by a union. Thus, unions could view education about section 7 rights and their exercise by nonunion employees as the first experiments with organization by employees, some leading to unionization and others not.²¹⁹ As Professor Summers has written, unions' solicitude for the rights

215. See, e.g., Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1821 (2001) ("To sway public opinion and to move workers to risk joining unions, labor must transcend its image of economic self-interest and protectionism.").

216. See, e.g., Brudney, *supra* note 20, at 168-69 (discussing important role of organized labor in securing passage of federal employment discrimination laws).

217. Clyde Summers, *Unions Without Majority—A Black Hole*, 66 CHI-KENT L. REV. 531, 542-45 (1990) [hereinafter Summers, *Unions Without Majority*]; Rabin, *supra* note 19, at 204-13; cf. Gould, *supra* note 50, at 755 ("My National Labor Relations Board took account of the need of unions to involve themselves in the wide array of new regulatory legislation that has become such a prominent part of the landscape during this past quarter century.")

218. Rabin, *supra* note 19, at 208; Summers, *Unions Without Majority*, *supra* note 217, at 548.

219. See Morris, *supra* note 2, at 1753 ("Such activity often begins with only an elementary expression of mutual aid or protection among a very few employees. . . employees begin to know that

of employees, even outside the majority union, exclusive representative role, "can be the most persuasive path to achieving majority status."²²⁰

The opportunity to embark on a campaign of informing nonunion employees and employers of the employees' section 7 rights is an opportunity for organized labor to perform a valuable service in unorganized workplaces, to improve its image with employees who may have negative views of unions, and to sow the seeds for representation prospects. While the mission may seem unconventional to organized labor, it is part of developing a new, holistic view of labor law in which the NLRA is part of the picture for both organized and unorganized workplaces. This new vision could reinvigorate both the NLRA and organized labor.

B. The Board and the Courts—A New Perspective

The vast majority of cases in which employees file unfair labor practice charges for violation of their section 7 rights have involved employees represented by unions or involved in organizational activity. In such cases, the Board and the courts have considerable experience and have developed a wealth of case law regarding whether conduct is concerted and "for mutual aid or protection."²²¹ The Board certainly has experience with section 7 activity by nonunion employees, but those cases have not been the Board's bread-and-butter. The federal courts of appeals have even less experience and are less comfortable with finding nonunion employees' conduct protected under the NLRA.

If a broader vision of the NLRA as a major source of workplace law protecting nonunion employees is to emerge, the NLRB must take the initiative. The Board is the agency charged with interpretation and enforcement of the NLRA. Procedurally, the regional offices of the Board must be receptive of unfair labor practice charges by nonunion employees and aggressive in investigating and issuing complaints.²²² Substantively,

they have the right to organize, that they have the right to develop a sense of organization, and that they can experience organization through trial and error. . .").

220. Summers, *Unions Without Majority*, *supra* note 217, at 548.

221. For example, the *Interboro* doctrine provides a way of satisfying the concertedness requirement when there is a collective bargaining agreement, but not in the nonunion context. *Interboro Contractors*, 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). Under that doctrine, an individual employee's "invocation" of a right rooted in the collective bargaining agreement is concerted activity. *See, e.g., THE DEVELOPING LABOR LAW*, *supra* note 20, at 138-39.

222. Writing in 1992, Professor Estlund suggested that few cases that do not involve union organizing or employees represented by unions or a direct connection to terms and conditions of employment are likely to proceed to the stage of the General Counsel's filing a complaint alleging an unfair labor practice. *See Estlund, supra* note 35, at 939-40 n.93. Estlund also noted that an informal survey of the regional offices of the NLRB showed that "few calls of this nature come in and that such calls are simply turned away in the absence of a link to unionization or terms and conditions of employment." *Id.*

the Board should consider more liberal interpretations of the three requirements for protected conduct, as discussed above.²²³ Also, the Board must make the case to the courts that a broader vision of the NLRA is both needed and appropriate to protect employees.

It is not clear that the courts of appeals would be receptive of a broad application of the NLRA to nonunion employees, including more liberal interpretations of the three coverage requirements. They are likely to see such a development as the Board's attempt to expand its jurisdiction. The courts have not generally accorded much deference to the Board in its interpretation of the NLRA.²²⁴ This also has been true for some circuit cases dealing with the Board's determination of protected conduct by nonunion employees.²²⁵ For the courts to accept expansive interpretations and applications of the NLRA, they must accept a new vision of the law of the workplace in which the NLRA plays a larger role and is seen as obviating the need for more litigation based on individual employment rights laws. If this new vision is difficult for the courts to develop, it will take a message from the Supreme Court or Congress to sharpen the visual acuity.

VI.

POSSIBLE RESULTS OF A REINVIGORATED NLRA IN NONUNION WORKPLACES

A. Organization and Representation

Unrepresented employees who exercise section 7 rights might find that, although section 7 rights give them a voice to express their complaints and desires, they do not give them much power with which to obtain what they want from their employers. Because of the concertedness requirement, most employees invoking section 7 will have enlisted the input or support of at least one co-worker. From there, it is not a large step to pursue more formal organization and representation to marshal more power.

223. Cf. Hyde, *supra* note 76, at 171 ("If labor law does undertake seriously to protect the informal network or caucus as a basic institution of labor law, many of these interpretations of section 7 will have to be loosened up to give breathing space to unorganized employees.").

224. See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001) (rejecting the Board's test for determining whether registered nurses are supervisors); see also *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S.Ct. 1275 (2002) (rejecting Board's award of backpay to undocumented alien who was discriminatorily fired).

225. See, e.g., *ABB Daimler-Benz Transportation, N.A., Inc.*, 331 N.L.R.B. No. 40 (May 31, 2000), *enforcement denied*, 253 F.3d 19 (D.C. Cir. 2001); *Aroostook County Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), *enforcing in part and denying enforcement in part*, 317 N.L.R.B. 218.

1. *A Newfound Need for Unions*

This article suggests that organized labor can and should undertake the mission of advising nonunion employees of their rights under the NLRA.²²⁶ If unions did so, they would provide a valuable service to these workers, often dispelling negative perceptions of unions, and they would make known their availability to serve as collective bargaining representatives if the employees chose to organize. Employees exercising their section 7 rights might find themselves overmatched when employers resist their complaints and demands. To increase their power to obtain what they want and to secure better preparation and representation in unfair labor practice proceedings, many employees might turn to the unions that educated them regarding their rights in the first instance.

2. *New Forms of Employee Organization and Representation*

Professor Alan Hyde has described an emerging new model of worker organization and representation based on the section 7 rights of nonunion employees, in which employees organize themselves into voluntary, informal caucuses around common causes.²²⁷ He has described these caucuses as having the following characteristics: 1) they arise in nonunion workplaces; 2) they are not experienced by the participants as unions; and 3) they raise demands that unions might raise in unionized workplaces and demands that unions rarely raise.²²⁸ Professor Hyde recognized that such self-initiated organizations are already protected by the NLRA, but he suggested that both broader interpretations of the requirements for section 7 protected conduct²²⁹ and recognizing an employee-choice defense to section 8(a)(2)²³⁰ unfair labor practice charges that an employer has dominated or

226. See *supra* part V.A.2.

227. See Hyde, *supra* note 76.

228. *Id.* at 157.

229. *Id.* at 165-71.

230. "It shall be an unfair labor practice for an employer. . . (2) to dominate or interfere with the formation of administration of any labor organization or contribute financial or other support to it. . ." 29 U.S.C. § 158(a)(2). The Board's interpretation of § 8(a)(2) as prohibiting teams and committees composed of representatives of management and employees has been very controversial and has been the subject of reform proposals. The Board's interpretation was most famously articulated in *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, 35 F.2d 1148 (7th Cir. 1994). Congress passed a bill that would have modified the Board's reading of § 8(a)(2) in 1996, the Teamwork for Employees and Managers Act (S. 295, H.R. 743), but President Clinton vetoed the bill. See *Clinton Vetoes TEAM Act Despite Pleas From Business for Passage*, Daily Lab. Rep. (BNA) No. 147 (July 31, 1996). There is a wealth of academic commentary on § 8(a)(2) and reform proposals. See, e.g., Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(A)(2) of the NLRA*, 72 S. CAL. L. REV. 1651 (1999); Michael C. Harper, *The Continuing Relevance of Section 8(A)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322 (1998); Rafael Gely, *Whose*

unlawfully assisted a labor organization could facilitate and encourage these caucuses.²³¹ His proposal is fully consistent with the new vision of the NLRA for nonunion workers advocated in this article.

Regarding the first change, this article has addressed some of the recommendations that have been made for broadening the concertedness, mutual aid or protection, and egregious conduct requirements for protection under section 7.²³² As to the second change that Hyde advocates, a recent decision of the NLRB provides some new hope for those who have argued that the Board's *Electromation, Inc.*²³³ decision made it too risky for employers to work with nonunion employee committees and groups. In *Crown Cork & Seal Co., Inc.*,²³⁴ the Board held that production teams and employee participation teams composed of employees and managers did not constitute "labor organizations"; consequently, the employer did not violate Section 8(a)(2) of the NLRA by maintaining these committees.²³⁵

Caucuses aside, Professor Summers, Professor Hyde and others have demonstrated the potential roles that nonmajority unions can play in informing employees of their rights, representing them, and bargaining for them.²³⁶ Unions can respond to the challenge of aggressively pursuing nonmajority representation by informing nonunion employees of their section 7 rights and assisting them in asserting and vindicating those rights.

It is premature to predict whether a reinvigorated NLRA for nonunion employees would be a catalyst for voluntary, informal caucuses or

Team Are You On? My Team or My Team?: The NLRA's Section 8(A)(2) and the TEAM Act, 49 RUTGERS L. REV. 323 (1997); Abigail Evans, Note: *Cooperation or Co-Optation: When Does a Union Become Employer—Dominated Under Section 8(A)(2) of the Nation Labor Relations Act?*, 100 COLUM. L. REV. 1022 (2000).

231. Hyde, *supra* note 76, at 171-90.

232. See *supra* notes 100-154 and accompanying text.

233. 309 N.L.R.B. 990 (1992), *enforced*, 35 F.2d 1148 (7th Cir. 1994).

234. 334 N.L.R.B. No. 92 (July 20, 2001).

235. This decision has been praised as a significant inroad in interpreting section 8(a)(2) to permit employers to establish employee committees. See *House Committee Issues Statement on NLRB Ruling*, LAB. L. REP., LAB. REL. (CCH) No. 771, at 5-6 (Aug. 8, 2001). Many people in labor law had called for such a liberalization of the Board's law to permit committee structures that may serve employer and employee needs. Though the legality of employee committees is beyond the scope of this paper, the decision in *Crown Cork & Seal Co., Inc.* may mean that one potential legal constraint on concerted activity in the absence of unions has been eased.

236. Summers, *Unions Without Majority*, *supra* note 217; Alan Hyde, Frank Sheed & Mary Deery Uva, *After Smyrna: Rights and Powers of Unions That Represent Less Than a Majority*, 45 RUTGERS L. REV. 637 (1993). As Professor Summers explains, there has been an inordinate focus on § 9(a) of the NLRA, which provides for exclusive representative capacity of a union selected by a majority of a bargaining unit. See Summers, *Unions Without Majority*, *supra* note 217, at 531. That focus has detracted from the fact that a union without majority support, in the absence of an exclusive bargaining representative, can present employee demands and request negotiations, call a protected strike, and make a collective bargaining agreement for its members; moreover, employees can insist that their employer conduct negotiations over terms and conditions of employment with their nonmajority union representative. *Id.* at 536-40.

nonmajority union representation. Clearly, however, employees would be well advised to seek input and participation from their co-workers to assure that they satisfy the concertedness requirement²³⁷ and to consider whether they have sufficient power to obtain what they want. It seems safe to predict, however, that some employees exercising section 7 rights without any formal organization or representative would learn the value of organizations and representation.

B. The Revival of Group Rights and Worker Self Help

The shift from group rights and industrial pluralism to an individual rights regime has revealed numerous problems with the new paradigm as the dominant form of regulation of the workplace.²³⁸ These problems will become more pronounced if Congress and state legislatures continue to pursue the individual rights regime as the dominant approach for the future. Moreover, it is possible that there will not be sufficient political will or clout to enact needed worker protections under the individual rights paradigm.

A rejuvenation and recommitment to concerted and constructive concerted action in nonunion workplaces would diminish the need to rely on a host of new individual employment rights statutes. This could be good for the nation, and employers should come to see it as preferable to a proliferation of individual rights statutes.²³⁹ But is it better for workers? In many ways, it is. First, section 7 gives employees the freedom to identify what they think they need and to express their views and fight for it, rather than receiving what the legislature thinks they need through an individual rights statute.

Second, section 7 develops in employees a sense of power and self-reliance. It empowers them both to identify what they want and to help themselves in obtaining it. The individual rights regime is sometimes fairly criticized for creating a sense of entitlement to terms and conditions that the workers neither identified nor fought to obtain. The goal of reinvigorating the NLRA for the nonunion workplace should be to give employees flexibility, self-determination, and self-reliance regarding their struggles to obtain terms and conditions of employment.

Third, the NLRB procedures provide an alternative to the litigation of individual rights in the courts or the arbitration of such claims outside the

237. Summers, *Unions Without Majority*, *supra* note 217, at 542 ("The individual, by making the report or protest through the union, relying on established union policy, or obtaining endorsement by the union, converts his or her individual action into 'concerted activity' and obtains the protection of section 7. Where a non-majority union exists, no employee need be vulnerable under *Meyers Industries, Inc.*").

238. See *supra* notes 72-87 and accompanying text.

239. See *supra* text accompanying notes 43-44.

context of collective bargaining. Employees who think their section 7 rights have been violated do not have to find an attorney who is willing to take their case. They can file a charge with a regional office of the NLRB. If, after an investigation, the General Counsel files a complaint, then the General Counsel brings the case, and it is heard by an administrative law judge. The downside for employees is that the remedies under the NLRA are not as great as the remedies available under individual rights statutes and common law theories. There have been numerous proposals for augmenting the remedies under the NLRA, and such proposals continue to merit consideration.

Fourth, a renewed emphasis on a group rights regime of labor law could reverse the “bowling alone” syndrome in the workplace. In his much-discussed book, Professor Robert Putnam argues that American community and the store of social capital (the collective value of all social networks) have been eroding over the past quarter century.²⁴⁰ Professor Cynthia Estlund considers this problem a serious one, but much more than Putnam, she views the workplace as a venue where the problem manifests itself and as a place offering great potential for reconstruction of community and social capital.²⁴¹ In fact, she views the workplace as second only to the family in importance for associational life and cooperative interaction.²⁴² It is arguable that the workplace has superseded the family in that realm. This makes the workplace an important front on which to restore social capital.

Professor Estlund argues that to reconstruct social capital in the workplace, labor law reforms should focus on “encouraging more cooperative and participatory modes of workplace organization and at realizing the law’s often illusory protection of freedom of association and discussion among co-workers.”²⁴³ She recognizes the importance of the NLRA to this vision, although she stresses the dominant role of Title VII.²⁴⁴ For those concerned with the deterioration in community and social capital, the workplace is the place to begin reconstruction. The NLRA is predicated on organization and collective action. If employees learn that they can band together, make their desires known to their employer and act together to exert pressure in support of their demands with the protection of the law, they will relearn the value of community.

240. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

241. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000).

242. *Id.* at 3.

243. *Id.* at 6.

244. *Id.* at 74-77.

VII. CONCLUSION

The NLRA and the industrial pluralism principle of group rights and struggle for employment terms and conditions are the labor law of the past. The individual employment rights laws, with their provision of specified minimum rights and individual enforcement, have been the predominant type of employment law for at least forty years. But, as we enter the twenty-first century, what will be the approach to legal regulation of the workplace? This article has not argued for displacing the individual rights regime; rather, it has argued that this regime has problems and limitations. Moreover, the article has contended that because the NLRA, with its group rights approach, is applicable to nonunion employees, it holds out great promise for supplementing the individual rights regime and decreasing reliance on such laws. Some changes are needed in the law, but what is most needed is a new vision of labor and employment law—a blending of the law of the past and the law of the present—to address the workplace problems of the future. The National Labor Relations Board already has signaled the potential of the NLRA for protecting and empowering nonunion employees in its recent decision in *Epilepsy Foundation, Inc.*

We need a new vision of labor and employment law that includes the National Labor Relations Act as a principal component so that workers can learn the power of association, so that we can protect workers in ways that they want to be protected, and so that our society can learn in the workplace the value of community. In 1989, Professor Morris described this type of revival of the NLRA as “Senator Wagner’s grand vision.”²⁴⁵ It is a vision that we need in the twenty-first century.

245. Morris, *supra* note 2, at 1754.