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Divided We Stand: Concerted Activity and the Maturing of the NLRA

B. Glenn George*

[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit . . . . ¹

Robert Ewing was laid off in 1980 from his job as a piledriver operator with Herbert F. Darling, Inc.² A month before the layoff, the Occupational Safety and Health Administration (OSHA) conducted an inspection of the jobsite at which Mr. Ewing worked. Darling refused to recall Mr. Ewing because of the belief that Mr. Ewing's complaint to OSHA initiated the inspection. The company was mistaken. The OSHA inspection was not prompted by a complaint. Neither Mr. Ewing nor any other employee was responsible. Yet the National Labor Relations Board (NLRB or the Board) concluded that Darling had committed no unfair labor practice. Mr. Ewing was fired lawfully under the National Labor Relations Act (NLRA or the Act).³

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Kenneth Prill suffered a similar fate. Mr. Prill was a truck driver for Meyers Industries. Mr. Prill complained to his employer on several occasions about the brakes and steering on his equipment. Mr. Prill’s trailer was cited for several defects by an Ohio inspection station after Mr. Prill had experienced more problems with the brakes. The brakes failed again on a trip through Tennessee, resulting in an accident. Mr. Prill telephoned the company and was told to get the trailer back “as best he could.” Mr. Prill instead contacted the Tennessee Public Service Commission. The inspection by the Commission required that the trailer be taken out of service because of faulty brakes and damage to the trailer hitch. Mr. Prill was fired when he returned home for “calling the cops like this all the time.” The Board found the termination lawful under the Act.

The problem, in a word, is the “concerted” nature of these individuals’ activities. Section 7 of the NLRA grants to employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Under the Board’s current interpretation of the scope of Section 7, the participation of more than one employee is required to satisfy the “concerted” language of the statute. Mr. Ewing and Mr. Prill regrettably failed to obtain partners for their real or imagined activities. No one questions that two employees acting together under identical circumstances would be immune from discharge for their safety complaints. The employee who acts alone, however, may be risking her job.

The concert requirement is a troubling one, particularly when highlighted by the sympathetic plights of real people like Robert Ewing and Kenneth Prill. The reaction of both lawyers and laymen is likely to be, “That’s not fair.” Yet to say that legal relief is needed is not to say that the NLRA is or should be the source of that relief. Mr. Ewing, for example, may be protected under OSHA provisions that prohibit retaliatory discharge for employee complaints or participation in OSHA inspections. Comparable protection was unavailable for Mr. Prill, however. No systematic coverage exists to

5. 268 N.L.R.B. at 497.
6. Id. at 498.
7. Id. at 498-99.
9. See infra note 23 and accompanying text.
11. Section 405 of the Surface Transportation Assistance Act of 1982 might have protected Mr. Prill today, but the Act was not in force at the time of his discharge. See Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, tit. IV, § 405, 96
shield the lone employee seeking to improve her working conditions.

One is compelled to look to the NLRA for assistance, and it seems a natural source. As the first comprehensive legislation creating and protecting employee rights, the NLRA could be described optimistically as a bill of rights for the American worker. Viewed in a broad perspective, the Act appears to be an appropriate place to seek protection of an employee’s right to communicate job-related concerns to her employer.

To state that the Act should protect the voice of the individual is not to establish that it does. The current Board reads the statutory protection of “concerted activities” narrowly. Certainly nothing in the language of section 7 demands the protection of the lone employee, yet neither does section 7 explicitly forbid the inclusion of a single employee’s complaint. In the context of an organized shop, the Supreme Court in NLRB v. City Disposal Systems recently rejected a literal reading of the term “concerted” and protected a single employee’s attempt to enforce a provision of a collective bargaining agreement.

This Article proposes that a preoccupation with section 7 terminology is misplaced. “Statutory interpretation requires more than concentration upon isolated words.” The protection of the single voice must be evaluated not in terms of the various rights created by the Act, but in terms of the structure of the Act and the process established for employee-management relationships. From this perspective, the Board’s rigid insistence that activity be “concerted” weakens and distorts the existing structure of the statutory scheme. The protection of the individual’s right of communication is a necessary corollary of the Act’s structure.

Pursuing a structural approach, rather than the Board’s literal interpretation of the term “concerted,” admittedly presents dangers. The apparent injustice to Mr. Ewing and Mr. Prill might prompt one to characterize the statutory provisions unfairly in order to reach a desired result. The protection of employees who find themselves in similar dilemmas may be the “right” result, but the “rightness”
must be justified. In this instance, that justification depends on how one regards the statute and defines its role.

Although the NLRA usually is viewed as the law governing union-management relations, it always has provided some protection for non-union and unrepresented employees protesting working conditions. As unionization continues to decline, the future significance of the Act will depend on the perception of the legislation as static or dynamic. Having reached its fiftieth anniversary, the Act has been the target of substantial criticism. Some claim that we are too far removed from the political climate of 1935 for the Act to remain an effective tool. Congress intentionally drafted the NLRA in broad and general terms, however, to ensure its adaptability to changes in the workplace. The workplace is now largely unorganized. The continued viability of the Act may depend, in part, on the willingness of the Board to shift its focus to the non-union workforce. This opportunity is present within the Act's existing structure and, indeed, this Article contends, is compelled by that structure — the "spirit" of the NLRA.

The examination of this problem begins with a brief summary of the Board's development of concerted activity protection. This Article then reviews the judicial response, focusing on the Supreme Court's recent decision in NLRB v. City Disposal Systems, Inc. and the growing circuit court controversy over the current Board's redirection in this area. This Article reexamines the problem by considering the limitations of traditional statutory construction and the potential elucidation of a structural analysis. By concentrating on the processes of labor relations under the NLRA, this Article concludes that protection of the individual under appropriate circumstances is a necessary part of the Act's existing structure.

I. Setting the Stage

A. NLRB Development

Read literally, the section 7 requirement that activity be concerted would protect only groups of two or more employees acting

18. See infra note 157; see also Rees, The Size of Union Membership in Manufacturing in the 1980s, in The Shrinking Perimeter 43-44 (H. Juris & M. Roomkin eds. 1980).
19. See infra note 158.
20. See NLRB v. Weingarten, Inc., 420 U.S. 251, 266 (1975); see also infra note 120.
21. The development of case law in this area, through both the Board and the courts, has been reviewed extensively elsewhere and need not be repeated here. See, e.g., Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. Pa. L. Rev. 286, 289-328 (1981); Note, Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act, 68 CORNELL L. REV. 369, 377-86 (1983); Note, National Labor Relations Act Section 7: Protecting Employee Activity Through Implied Concert of Action, 76 NW. U.L. REV. 813, 816-36 (1981) [hereinafter Northwestern Note]. For a thorough judicial discussion of the case law, see Prill v. NLRB, 755 F.2d 941, 945-56 (D.C. Cir.), cert. denied, 474 U.S. 948 (1985). For the purposes of this Article, the case law development will be highlighted only as necessary to set the framework for the discussion that follows.
together. Two or more employees jointly protesting working conditions are acting unquestionably in "concert" within the meaning of Section 7.23 The "protected" nature of the employees' behavior is the only issue to be addressed. Although engaged in concerted activity, employees may lose the Act's protection if their conduct is illegal, unreasonably disruptive, or in violation of a collective bargaining agreement.24 Yet as long as at least two employees act together, the concert requirement is met automatically. Had Mr. Ewing and Mr. Prill faced their employers with the support of fellow employees, their discharges would have been improper.

Even in its current retrenchment, however, the Board does not read section 7 as narrowly as it might be construed. A single employee complaining to her employer is engaged in concerted activity if she was designated a spokesman by one or more other employees.25 Similarly, the Board continues to protect an individual's efforts to enlist the support of other employees concerning work-related issues. In the well-known Mushroom Transportation Company27 case, the Third Circuit supported protection of individual activity "with the object of initiating or inducing or preparing for group action" or when the activity "had some relation to group action in the interest of the employees."28 Thus, a sole employee's

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23. See, e.g., Ontario Knife Co. v. NLRB, 635 F.2d 840 (2d Cir. 1980); Jim Causley Pontiac v. NLRB, 620 F.2d 122 (6th Cir. 1980); Meyers Indus., Inc. (Meyers I), 268 N.L.R.B. 493, remanded sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir.), cert. denied, 474 U.S. 948 (1985), reaaff'd, 281 N.L.R.B. No. 118, 123 L.R.R.M. (BNA) 1137 (1986), aff'd, 835 F.2d 1481 (D.C. Cir 1987); Traylor-Pamco, 154 N.L.R.B. 380 (1965); Root-Carlin, Inc., 92 N.L.R.B. 1313 (1951); cf. NLRB v. City Disposal Sys., 465 U.S. 822, 831 (1984) ("Although one could interpret the phrase, 'to engage in other concerted activities,' to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not confine it to such a narrow meaning.").


28. Id. at 685. The Mushroom Transportation standard was widely adopted by other
attempts to organize a union or circulate a petition protesting working conditions are considered protected concerted activity. The current Board recently affirmed its adherence to the *Mushroom Transportation* standard.29

The existence of a collective bargaining agreement may provide the lone employee additional protection. The so-called "Interboro doctrine" was introduced almost twenty-five years ago.30 In the landmark decision of *Interboro Contractors, Inc.*,31 affirmed by the Second Circuit, the Board interpreted section 7 as shielding an individual employee who asserts a right contained in a collective bargaining agreement. Under the Board's rationale, the claim of a collectively bargained right operates as an extension of the concerted action in negotiating the contract32 and affects the rights of all employees covered by the agreement.33

The Board reached the watershed of protection for concerted activity in 1975 by extending the *Interboro* doctrine to the assertion of statutory employee rights. In *Alleluia Cushion Co.*,34 the Board declared unlawful the discharge of an employee for filing a complaint under the Occupational Safety and Health Act. The Board reasoned that the NLRA should support public policy declared through other employee protection statutes.35 According to the Board, this support is guaranteed by protecting the employee who asserts her right under the statute or, as sometimes referred to, acts as an "implied spokesman" for all employees affected by the statute. In later cases, the Board justified its position by emphasizing the deterrent effect on other employees if an employer were permitted to terminate the complaining employee for claiming a statutory right or benefit.36

circuit courts, although interpretations and applications of the doctrine have varied. See, e.g., *NLRB v. Datapoint Corp.*, 642 F.2d 123, 128-29 (5th Cir. 1981) (individual complaints did not constitute concerted activity in absence of "substantial evidence" of intent to instigate group action); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28-29 (7th Cir. 1980) ("personal griping" about overtime unprotected even though other employees made similar complaints); *Randolph Div., Ethan Allen, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975) (individual complaints concerning interest in union organization were protected); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969) (activities intended to enlist support of other employees to protest working conditions protected as concerted).

29. See *Meyers Indus.*, Inc. (*Meyers II*), 123 L.R.R.M. (BNA) 1137, 1142 (1986) (dictum) ("To clarify, we intend that *Meyers I* be read as fully embracing the view of concertedness exemplified by the *Mushroom Transportation* line of cases. We reiterate, our definition of concerted activity in *Meyers I* encompasses those circumstances where individuals seek to initiate or to induce or to prepare for group action.")., aff'd sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); see also *Walter Bruckner & Co.*, 273 N.L.R.B. 1306, 1306 n.6 (1984); *Vought Corp.*, 273 N.L.R.B. 1290, 1294 (1984).


31. 157 N.L.R.B. 1295, enforced, 388 F.2d 495 (2d Cir. 1967).

32. *See 139 N.L.R.B.* at 1519.


34. 221 N.L.R.B. 999 (1975).

35. See *id.* at 1000.


Other cases in which the Board protected agency complaints as concerted activity
The Board extended the implied spokesman concept of *Alleluia* even further in subsequent cases involving common employee concerns where no statutory right was at issue. The complaint of one employee was deemed concerted in circumstances where other employees discussed or expressed the same dissatisfaction. Commentators suggested this rationale could be carried so far as to include any employee complaint which could be a concern to other employees or which would affect other employees. Although the Board’s language in these cases might justify such an expansive reading, the facts of the cases do not. Upon closer examination, the cases cited for this proposition consistently include substantial evidence that the complaint in question was *in fact* shared by other employees. The employee discharged could be fairly characterized as an informal, volunteer spokesman.

In *Sullair P.T.O., Inc.* for example, an employee was discharged
for disputing a change in the employer's policy permitting employees to purchase gasoline at a reduced price. The employee's complaints occurred in a meeting between the company controller and seven to twelve employees. This meeting was requested by another employee following an earlier meeting between management and employees to discuss the change. The discharged employee was only one of many who questioned the policy change, although his complaints may have been more vocal and adamant.41 In St. Joseph's High School,42 a lay teacher in a parochial school was terminated for circulating a negative report about the school and mailing the report to the school's accreditation committee. The employee in question was a former president of the lay teachers' certified union. He prepared the report after discussions with other faculty members and with the assistance of three former teachers of the high school.43

Reconsideration of the Alleluia doctrine was the focus of the Reagan Board's recent decision in Meyers Industries, Inc. (Meyers I).44 Meyers I involved the termination of Kenneth Prill for contacting state officials about faulty brakes on his employer's truck.45 The Board reexamined the boundaries of section 7 and concluded that its protection was dependent upon "interaction among employees."46 Alleluia and its progeny were explicitly overruled.47 In its place, the Board articulated a four-part test for protection under section 7.48 First, the activity must be "with or on the authority of other employees."49 Second, the employer must know of the concerted nature of the conduct. Third, the activity must be "protected by the Act" (i.e., the conduct must be for a legitimate objective using permissible means to accomplish that objective).50 Finally, the protected concerted activity must have motivated the action taken

41. 250 N.L.R.B. at 616-18.
42. 236 N.L.R.B. 1623 (1978), vacated on other grounds, 248 N.L.R.B. 901 (1980); see Gorman & Finkin, supra note 21, at 295-96.
45. See supra notes 4-7 and accompanying text.
47. Id. at 496.
48. See id. at 497.
49. Id. at 498.
50. In order to be protected under section 7, employee conduct must be for the purpose of "mutual aid or protection." See infra notes 112-15 and accompanying text. Certain labor organization objectives are specifically prohibited by the Act, such as secondary boycotts, 29 U.S.C. § 158(b)(4) (1982), and organizational picketing under defined circumstances, id. § 158(b)(7). The means of protest also must be protected. See supra note 24. Sit-down strikes, see Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939), and slow-downs, see NLRB v. Blades Mfg. Corp., 344 F.2d 998 (8th Cir. 1965), for example, are considered unprotected even in furtherance of legitimate objectives.
against the employee.\textsuperscript{51}

In a strongly worded dissent, Member Zimmerman, a Carter appointee, criticized the Board majority for ignoring the dual rationale underlying \textit{Alleluia}. The first justification was that safe working conditions are a matter of inherent concern to other employees. \textit{Alleluia}, in essence, presumed "concert" whenever an employee's complaint would benefit others. The second rationale, more relevant to the \textit{Meyers I} case, inferred "concert" where a lone employee's activity advances a legislatively declared public policy. Only the second rationale was necessary to protect Mr. Prill, according to Member Zimmerman, even assuming the first rationale was an unwarranted extension of section 7.\textsuperscript{52}

The Board's strict adherence to the \textit{Meyers I} standards is evident in subsequent Board decisions. In \textit{Jefferson Electric Co.},\textsuperscript{53} for example, an employee was terminated for filing a complaint with the state OSHA agency about exposure to noxious fumes.\textsuperscript{54} Although several employees complained to the employer about the fumes and three employees were later hospitalized, the Board found that the complaint was not concerted activity in the absence of group support or authorization. The Reagan Board rejected any expanded \textit{Alleluia} concept of a volunteer spokesperson where no statutory right is involved. An employee retains her protected status when acting for a group, but more explicit authorization of that representative status now may be required.\textsuperscript{55}

\textsuperscript{51} \textit{Meyers I}, 268 N.L.R.B. at 497. The \textit{Meyers I} test was adapted from a Ninth Circuit per curiam opinion in \textit{Pacific Electricord Co. v. NLRB}, 361 F.2d 310, 313 (9th Cir. 1966).


\textsuperscript{53} 271 N.L.R.B. 1089 (1984).


\textsuperscript{55} See, e.g., \textit{Mannington Mills, Inc.}, 272 N.L.R.B. at 176; \textit{Allied Erecting Co.}, 270 N.L.R.B. at 278; cf. \textit{Meyers I}, 268 N.L.R.B. at 497 ("In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees . . ."). In dictum, however, the Board recently stated that specific authorization is not a necessary prerequisite. See \textit{Meyers II}, 281 N.L.R.B. No. 118, 123 L.R.R.M. (BNA) 1137, 1141-42 (1986), aff'd sub nom. \textit{Prill v. NLRB}, 835 F.2d 1481 (D.C. Cir. 1987).

The recent case of \textit{Salisbury Hotel, Inc.}, 283 N.L.R.B. No. 101, 1986-1987 NLRB Dec. (CCH) ¶ 18,705 (Apr. 21, 1987), suggests the current Board may be less rigid in applying \textit{Meyers II}. The employee in \textit{Salisbury Hotel} complained among her fellow employees and directly to management about a change in the employer's lunch-hour policy. The employee then called the Department of Labor about the legality of the new policy. The Board found the complaints to other employees protected as "calculated to induce, prepare, or otherwise relate to some kind of group action." \textit{Id.} at ¶ 18,705. These discussions, the Board held, involved a "tacit" agreement that the complaint should be raised with management. The Board also found the call to the Department of Labor protected concerted activity as a logical extension of the employee's concerted complaints. \textit{Id.} at ¶ 18,705.
B. Judicial Reaction and the Board’s Response

The circuit courts of appeals exhibited mixed reactions to the Board’s earlier expansion of the concept “concerted activities.” Some courts rejected any notion of “constructive” concerted activity, relying on the literal language of section 7 to require action by at least two employees.56 Other courts took a somewhat broader approach and recognized the protection of an individual who seeks to induce or initiate group action.57 The Interboro doctrine, protecting an employee who asserts a right under a collective bargaining agreement, was the basis for substantial disagreement among the circuits.58

The Interboro dispute was resolved in the Board’s favor in the Supreme Court’s 1984 decision in NLRB v. City Disposal Systems.59 But for the existence of a collective bargaining agreement, the concerns of City Disposal Systems’ employee were much like those of Kenneth Prill. James Brown worked as a truck driver transporting garbage to the city landfill. Mr. Brown brought his truck in for repairs on the morning one of the wheels malfunctioned. The supervisor assigned to Mr. Brown another truck. Two days earlier, this second truck had almost struck Mr. Brown’s regularly assigned truck due to a problem with the brakes. Mr. Brown refused to drive the second truck because “something was wrong with the brakes.” The supervisor sent Mr. Brown home, and the company fired him later that day.60 The collective bargaining agreement that covered Mr. Brown provided, “[t]he Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition . . . . It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.”61

Justice Brennan, writing for the majority, promptly rejected a literal reading of section 7 that restricts its application to only those circumstances where two or more employees act together. Even the most literalistic of appellate courts extended section 7’s protection to a single employee attempting to induce group activity and the

56. See, e.g., Ontario Knife Co. v. NLRB, 637 F.2d 840, 844 (2d Cir. 1980); Jim Causley Pontiac v. NLRB, 620 F.2d 122, 123 (6th Cir. 1980); Aro, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979); NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971).
58. At least three circuits upheld the Board’s Interboro doctrine. See, e.g., NLRB v. Ben Pekin Corp., 452 F.2d 205, 206-07 (7th Cir. 1971); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217, 221 (8th Cir. 1970); NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 500 (2d Cir. 1967). Four other circuits rejected the doctrine, see, e.g., NLRB v. City Disposal Sys., 683 F.2d 1005, 1007 (6th Cir. 1982), rev’d, 465 U.S. 822 (1984); Royal Dev. Co. v. NLRB, 703 F.2d 363, 372 (9th Cir. 1983); Roadway Express, Inc. v. NLRB, 700 F.2d 687, 694 (11th Cir. 1983); NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971), and one has expressed disapproval in dictum. NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 717-18 (5th Cir. 1973) (dictum); see also Kohls v. NLRB, 629 F.2d 173, 176-77 (D.C. Cir. 1980) (questioning the validity of the Interboro doctrine).
60. Id. at 826-27.
61. Id. at 824-25.
sole employee acting as a representative of others. Justice Brennan examined the two justifications used by the Board to support the Interboro doctrine. First, the employee’s reliance on a collective bargaining agreement right is an extension of the concerted activity that resulted in the contract. Second, “the assertion of such a right affects all employees covered” by the agreement. Justice Brennan apparently adopted the Board’s first rationale, characterizing the assertion of a contract right as an inherent part of the collective action that created that agreement.

Justice O’Connor in dissent, joined by three other justices, argued that allowing a contract claim to constitute concerted activity turns every alleged breach into a potential unfair labor practice. This result, Justice O’Connor asserted, undermines the well-established principle that a violation of a collective bargaining agreement does not, in and of itself, constitute an unfair labor practice. Congress explicitly rejected a proposed NLRA provision that would have made contract breaches unfair labor practices. Although a collective bargaining agreement is enforceable in court, Justice O’Connor explained, a violation of the contract constitutes an unfair labor practice only when the breach also qualifies as an unlawful mid-term contract modification under section 8(d).

Armed with the Supreme Court’s rejection of a narrow interpretation of section 7, two circuit courts questioned the Board’s section 7 analysis in Meyers I. In considering the Meyers I decision on appeal, the United States Court of Appeals for the District of Columbia concluded “that the Board erred when it decided that its new definition of ‘concerted activities’ was mandated by the NLRA.” The court

62. Id. at 829.
63. See id. at 831-32.

Justice O’Connor’s argument misconceives the effect of the Court’s ruling. She interprets the result as meaning “every contract claim could be the basis for an unfair labor practice complaint. But the law is clear that an employer’s alleged violation of a collective agreement cannot, by itself, provide the basis for an unfair labor practice complaint.” 465 U.S. at 842-43 (emphasis in original). Whether or not the employer violated the contract, however, is irrelevant to the protection provided under section 7 by the majority. If an employee is fired for asserting a collectively bargained right, the Board need determine only that the employee reasonably and honestly believed she was asserting a contract right. The employee is protected by her reasonable and good faith belief even if she ultimately is proven wrong. The employee’s discharge for her contractual protest is the basis of the unfair labor practice charge, not any alleged violation of the collective bargaining agreement. See Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298-99 n.7 (1966) (merit of employee’s complaint “is irrelevant to the question of whether employees are engaging in protected concerted activity.”) (quoting Mushroom Transp. Co., 142 N.L.R.B. 1150, 1158 (1963), rev’d on other grounds, 330 F.2d 683 (3d Cir. 1964)), enforced, 388 F.2d 495 (2d Cir. 1967).

strongly criticized the Board for ignoring and misinterpreting the more expansive concepts of "concerted activities" already recognized in prior court and Board decisions. Although the Board could have been justified in reaching the same conclusion as an exercise of its discretion and expertise in interpreting the Act, the court noted, the statute did not compel such an interpretation.\textsuperscript{66} The case was remanded to permit the Board an opportunity to reconsider the decision in light of relevant court decisions and policy implications.\textsuperscript{67}

The Second Circuit responded in a similar fashion in \textit{Ewing v. NLRB}.\textsuperscript{68} The Second Circuit agreed with the D.C. Circuit that the Board was mistaken in its conclusion that the \textit{Meyers I} rule is a required reading of section 7. This case also was remanded for the Board to provide a reasoned explanation of its statutory construction.\textsuperscript{69}

In \textit{Meyers II} the Board considered the D.C. Circuit's remand and reaffirmed its earlier conclusion as a "reasonable construction" of section 7.\textsuperscript{70} The Board distinguished \textit{City Disposal} by focusing on the Court's emphasis on the link between the action of the individual and the group. The Board acknowledged that a single employee may engage in concerted activity when that link is established by underlying group activity; specific authorization of representation, the Board stated, is unnecessary.\textsuperscript{71} According to the Board, in \textit{City Disposal}, the group link was a continuation of the ongoing concerted activity establishing the union-management relationship and the collective bargaining agreement. The Board concluded that no such link is evident in the assertion of a statutory right.\textsuperscript{72}

\section*{II. Taking Another Look}

\subsection*{A. Statutory Analysis}

Most attempts by courts and commentators to clarify the scope of protection for concerted activities focus on traditional approaches to statutory analysis. These include reliance on the literal or "plain meaning" of the statutory language, examination of legislative history, and identification of underlying statutory policies that will be furthered by the proposed interpretation. The plain meaning approach can be dismissed without fanfare as already rejected by the Supreme Court in \textit{City Disposal}.\textsuperscript{73} As the Court noted, "[a]lthough

\begin{itemize}
  \item \textsuperscript{66} Id. at 954.
  \item \textsuperscript{67} Id. at 957.
  \item \textsuperscript{68} 768 F.2d 51 (2d Cir. 1985); see supra text accompanying notes 2-3.
  \item \textsuperscript{69} Id. at 55-56.
  \item \textsuperscript{70} 123 L.R.R.M. (BNA) 1137, 1138 (1986).
  \item \textsuperscript{71} Id. at 1141; see Salisbury Hotel, Inc. 283 N.L.R.B. No. 101, 1986-1987 NLRB Dec. (CCH) \# 18,705 (Apr. 21, 1987); see also supra note 55. The Board further endorsed the \textit{Mushroom Transportation} standard protecting employees who attempt to initiate, to induce, or to prepare for group action. 123 L.R.R.M. at 1142; see Salisbury Hotel, Inc. 283 N.L.R.B. No. 101, 1986-1987 NLRB Dec. (CCH) \# 18,705 (Apr. 21, 1987), discussed in supra note 55.
  \item \textsuperscript{72} 123 L.R.R.M. at 1142.
  \item \textsuperscript{73} NLRB v. City Disposal Sys., 465 U.S. 822, 831 (1984). Nor has any other court taken a strictly literal view of the section 7 language.
\end{itemize}
one could interpret the phrase, ‘to engage in other concerted activities,’ to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of section 7 does not confine itself to such a narrow meaning.” 74 Section 7 is of pivotal significance in protecting the American worker. A constrained definitional analysis of section 7 seems no more appropriate than an attempt to determine the literal meaning of “to discriminate” in section 703(b) of Title VII. 75

Several commentators offer extensive analyses of section 7’s legislative history in efforts to ferret out the true intent of the “concerted activities” language. 76 This critical terminology was taken from an equivalent provision in the NLRA’s predecessor, the National Industrial Recovery Act. 77 The National Industrial Recovery Act, in turn, adopted the language from the Norris-LaGuardia Act, passed in 1932 to prohibit federal court injunctions in “labor disputes.” 78 From this historical perspective, commentators argue that section 7 never was intended to eliminate protection of the single employee. Rather, the protection of group activity was in addition to the implicit individual protection inherent in the concept of industrial democracy. 79

Commentators thus make a strong argument, based on legislative history, that section 7 was not designed to foreclose the protection of some types of individual activity. Assuming that much is clear, however, the legislative history cannot fairly be interpreted to establish the intent of individual protection. The Board and the courts might inquire justifiably into why Congress did not explicitly include such protection if it were intended. Although commentators attempt to respond to this problem, the legislative history ultimately is unlikely to convince the courts of the “correctness” of individual protection. The wholesale adoption of the language from other sources might suggest that little thought was given to the precise boundaries of

74. Id.
76. See, e.g., Gorman & Finkin, supra note 21, at 331 (finding that the history of the NLRA suggests that it was intended to encompass the individual’s right to complain and to act on his own behalf); Lynd, The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History, 50 Ind. L.J. 720, 725 (1975) (arguing that the NLRA was intended by Congress to protect as “concerted” employment-related activities whether undertaken by one person or many).
79. See Gorman & Finkin, supra note 21, at 338-46; Lynd, supra note 76, at 727-34; Note, Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act, 58 Tex. L. Rev. 991, 1006-08 (1980).
section 7, one way or the other. At best, such analyses leave the issue an open question.

Perhaps the most popular arena of debate in defining the extent of "concerted activities" is an examination of the Act's underlying policies. The problem with such an approach, however, is that it depends significantly on the definition and emphasis given to the particular policies identified. The subjective element involved leads inevitably to manipulation of the desired result. In arguing for a reading of section 7 that would include individual protection, for example, Professors Gorman and Finkin focus on industrial democracy as an important goal of the NLRA and its antecedents. At the heart of this right of group protest, they assert, is the right of individual protest.

Another commentator describes the "central purpose" of section 7 as encouraging and protecting employee activity; refusal to protect an individual inherently discourages other employees when common concerns are involved.

Yet another commentator criticizes the Interboro doctrine as undermining the principle of exclusive representation. This argument reasons that, in the union context, individual employee complaints circumvent the bargaining representative and thus reduce the power of that representative and derogate the grievance and arbitration process. Other commentators highlight "collective" action and equalization of bargaining power as the Act's central themes. Protecting individual complaints, it is argued, dilutes the Act and runs contrary to these basic concerns.

Each of these policies, and undoubtedly others, have a place in NLRA statutory interpretation. But to pick and choose which policy is applicable to the problem at hand ultimately seems unsatisfactory. The selection of other policies, or even differing definitions of the same policy, leads too readily to inconsistent results. Equalization of bargaining power and minimization of industrial strife, for example, are policy goals explicitly referenced in the Act's preamble. Some commentators use these goals to reject the type of individual protection at issue here. When an entire work force joins together to protest working conditions, their bargaining power undoubtedly is enhanced. Employee dissatisfaction resulting in a strike or other kinds of industrial strife likely will be reduced by the right to demand negotiations with the employer. Yet these same advantages,

80. Gorman & Finkin, supra note 21, at 338-46. See generally Summers, Industrial Democracy, supra note 12, at 29-34.
81. Northwestern Note, supra note 21, at 836.
85. See supra note 83.
albeit to a lesser degree, are just as likely to result from protection of the individual voice. The bargaining power of a single employee is increased with the protected right to communicate concerns and complaints. Rejecting that right could lead to further employee frustration, resulting in some level of "strife" in the workplace.

The examination of underlying policies is a useful tool of statutory analysis but offers only limited insight in resolving the fundamental question concerning the scope of section 7. No single policy underlies all of the Act's various provisions. Determining the appropriate interpretation of section 7 by policy analysis requires agreement on (1) what policies constitute bases for the Act, (2) which of those policies are relevant in an analysis of section 7, (3) how the relevant policies are defined in this context, and (4) how those policies will be furthered or hindered by competing statutory interpretations. With so many opportunities for debate, it is not surprising that such disparate results can be reached using the same analytical approach.

**B. Structural Analysis**

This Article proposes that section 7 be reexamined in light of the structure of the NLRA. Instead of a collection of substantive rights, the Act, from this perspective, creates a process by which employees and employers communicate with each other — a labor-management dialogue supported, encouraged, and protected by the NLRA's structure. The results of that dialogue, however, generally are left to the parties; the Act does not guarantee successful resolution. This concept of communication provides the common thread that links the Act's substantive provisions, as well as the important underlying policies identified by various commentators.\(^86\)

Focusing on the Act's structure avoids much of the multi-level and manipulative debate of identifying, interpreting, and applying competing policies. Instead of starting with the value-loaded question of what should be protected to promote the NLRA's policies, one begins with the more neutral question of how employee rights (whatever they may be) are protected under the Act's scheme. Agreement on the nature of that process narrows the issue of contention to one of degree. If communication is the procedural key to the NLRA, the communication right of a single employee is compatible with that structure almost by definition. The debate then is limited to evaluating the relative benefits and burdens of extending the

\(^86\) Cf. Summers, *Industrial Democracy*, supra note 12, at 34 ("[T]he primary purpose [of the NLRA] was to give employees an effective voice, through collective bargaining, in determining the terms and conditions of their employment.").
The crafting of and restrictions on employee and employer rights and obligations under the NLRA illustrate the dialogue theme. The right of employees to communicate with each other is protected explicitly by the section 7 rights "to self-organization, to form, join, or assist labor organizations." During non-working time, employees have a presumptive right to discuss such matters and solicit support from fellow employees. Subject to the Board's procedural requirements, employees may voice their desire for union representation through a secret-ballot election. When representative status is achieved, unions and employers have a duty to bargain under the Act, yet neither party is required to agree to any proposal. As the Supreme Court stated shortly after the enactment of the NLRA, "[t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." The duty to bargain is reinforced by prohibiting the employer from changing any term or condition of employment without first bargaining to an impasse. Similarly, a collective bargaining agreement cannot be terminated or modified without a sixty-day notice period "to meet and confer." The Act also requires as a condition of contract termination or modification that the party notify the Federal Mediation and Conciliation Service (the Service). The Service, an agency independent of the Board, was created to assist in the communication process of negotiations. Consistent with limitations of the NLRA, however, the Service has no power to compel settlement or agreement. The protection of communication processes is further reflected in the substantial protection and deference afforded grievance/arbitration procedures. The Supreme Court recognizes the promotion and enforcement of these procedures as a high priority.

88. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797 (1945).
90. 29 U.S.C. §§ 158(a)(5), (b)(3) (1982); see H.K. Porter Co. v. NLRB, 397 U.S. 99, 104 (1970); see also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) ("The Act does not compel agreements between employers and employees. It does not compel any agreement whatever."). Section 8(d) of the Act, added in 1947, explicitly states that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1982).
91. Jones & Laughlin Steel, 301 U.S. at 45.
94. Id.
95. See id. § 171(a) ("It is the policy of the United States that . . . the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees.").
96. See id. § 203.
of national labor policy. A Any doubt as to whether an arbitration provision covers the dispute in question is resolved in favor of arbitrability. B Once an arbitration award is rendered, a court must enforce the award unless the arbitrator exceeded her authority under the contract. In only the most unusual case will an arbitration award be overturned. C The policies of the Act, as interpreted by the Court, again operate to provide maximum protection to the communication process while not in any way assuring a satisfactory or “correct” result.

The Supreme Court’s enthusiasm for the arbitration process is highlighted by Boys Markets, Inc. v. Retail Clerks Union, Local 770, a remarkable exercise in judicial legislation. The Norris-LaGuardia Act, enacted in 1932, prohibits federal courts from issuing injunctions “in any case involving or growing out of any labor dispute.” The Court had consistently read the Norris-LaGuardia restrictions broadly to limit federal court interference in labor-management relations. In 1962, the Court included within these restrictions a federal court injunction against a strike in violation of a contractual no-strike clause. The Supreme Court changed its mind eight years later in Boys Markets. In light of the importance of arbitration to national labor policy, the Court created a judicial exception to the “literal” language of Norris-LaGuardia. An injunction is now available whenever the employees are striking, in violation of a no-strike clause, over a dispute subject to a binding arbitration procedure in

97. See, e.g., Textile Workers v. Lincoln Mills, 353 U.S. 448, 455-56 (1957) (holding that arbitration provisions in collective bargaining agreements may be enforced by federal courts because to decide otherwise “would undercut the Act and defeat its policy”).


102. See, e.g., Jacksonville Bulk Terminals, Inc. v. International Longshoremen’s Ass’n, 457 U.S. 702, 709 (1982) (stating that because the term “any labor disputes” is to be read broadly, a court may not enjoin a work stoppage even though it is politically motivated); Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365, 371 (1960) (finding that the term “labor dispute” includes picketing of a foreign vessel by American seamen, and therefore such activity may not be enjoined).

the collective bargaining agreement.\textsuperscript{104} Indeed, even in the absence of a no-strike clause, one can be implied in appropriate circumstances based on the arbitration provision alone.\textsuperscript{105} The Court thus is willing to venture far beyond the “four corners” of the labor laws to protect the parties’ right to be heard.

Not all substantive provisions of the Act fit neatly into this proposed perspective. The point of focusing on the structure of the NLRA, however, is to look beyond the precise statutory language to the symmetry of the whole. From that viewpoint, the Act creates a process through which employee and employer communications are both protected and, in some respects, mandated.

The communication thread that connects the NLRA’s explicit and implied substantive provisions is equally evident in the Act’s underlying policies identified by courts and commentators. Principles of industrial democracy, equalization of bargaining power, dispute resolution through arbitration procedures, minimization of industrial strife, and the right of association are all grounded in the right of communication as the \textit{means} chosen by Congress to protect these interests. The dialogue component is obvious in such principles as industrial democracy, encouragement of arbitration, and the right of association. The connection might be somewhat less apparent when discussing equalization of bargaining power and minimization of industrial strife. Although a variety of methods could have been selected to accomplish these goals, the one selected was the right of communication. Employees are free to discuss their concerns and organize as a group without fear of reprisal. Employees also can force an employer to talk (i.e., negotiate) with their chosen representative. The employer, on the other hand, lawfully may refuse to resolve any or all employee concerns.

C. Protecting Individual Communication

Students of the NLRA might be willing to concede that communication is the rationale or at least one of the rationales behind the Act’s structural approach to employee/employer relations. Many might respond, nonetheless, that the NLRA protects only group or concerted communication, rather than individual communication. This Article next proposes that individual protection should be included within this scheme.

Understanding what is being protected is important to a discussion of why the individual deserves protection under the Act. Individual employee complaints generally fall into two broad categories: complaints or claims to outside governmental agencies (e.g., OSHA, worker’s compensation) and complaints made directly to the em-


\textsuperscript{105} See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-05 (1962). A Boys Markets injunction may then be issued by the court based on the implied no-strike obligation which must be “coterminous” with the arbitration clause. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 382 (1974).
ployer. Employees sometimes may have a choice. Unsafe working conditions could be reported to the supervisor, to OSHA, or to both. Worker’s compensation is available, however, only by filing a claim with the state. Conversely, a complaint of excessive overtime can be resolved only by the employer, assuming no wage and hour laws are at issue. Perhaps employers are more likely to discharge an employee for an “outside” complaint because of the expense that may result from an agency investigation and the employer’s anger at the “disloyalty” of the whistleblower. Employees are terminated, nonetheless, for internal complaints as well.

One could argue that protecting complaints to governmental agencies simply is an unnecessary extension of the Act. Many employees who file agency claims already are protected by retaliation provisions in the relevant legislation. OSHA, for example, specifically prohibits an employer from discriminating against an employee for filing a complaint or instituting any related proceeding. Not all comparable legislation, however, contains this protection. Furthermore, if only agency complaints are protected, a savvy employee will have no incentive to discuss her concern directly with the employer first. Employers undoubtedly would prefer an opportunity to address the problem before the government is brought in, yet the current system of haphazard protection encourages just the opposite. From the employee’s perspective, communication with the employer similarly might seem a more logical first step.

In other instances, the employee will have no choice but to go directly to her employer. To protect the lone employee’s communication right in these circumstances does not guarantee that her wages will be increased, her work station will be changed, her truck will be repaired, or the heat will be turned up. Two employees have a protected right to raise such concerns without fear of retaliation for making the complaint. A single employee should be given that same protection under section 7 when protesting terms or conditions of employment. This protection could be achieved by at least two different approaches. Under one alternative, the complaining individual would be protected by a rebuttable presumption of concerted

106. The discharges of Robert Ewing and Kenneth Prill are good examples of terminations for complaints to governmental agencies. See supra notes 2-7 and accompanying text.


108. See 29 U.S.C. § 660(c)(1) (1982). Applicable regulations also indicate that the provision is violated if an employee is discharged for complaining directly to the employer. See 29 C.F.R. § 1977.9(c) (1987).

109. See infra notes 141-55 and accompanying text.
activity. The second approach would make that presumption irrebuttable. Whether a complaint is made by one or by a group of a hundred employees, however, the employer lawfully may choose to ignore or deny the request. The employee or employees only have the right to protest. Consistent with the Act’s approach to collective bargaining, no results would be required. And as with complaints by two employees, the protection is lost if the manner of complaining becomes disruptive.110

1. The Statutory Language

In spite of this focus on the communicative structure of the Act, many undoubtedly will object to the expanded protection proposed as being contrary to the statute’s explicit limitation to “concerted activities.” Although, as critics might argue, the Supreme Court rejected a literal reading of section 7, the Court did not authorize an interpretation that effectively deletes the word “concerted” altogether. However, this narrow focus on one word is misguided and inconsistent with the treatment of section 7 in other circumstances. The Act protects “other concerted activities for . . . mutual aid or protection.”111 This concept should be taken as a whole, not dissected into pieces for microscopic examination. The courts and the Board have wasted little time analyzing whether “mutual aid” means something separate and distinct from “mutual protection.” If “aid” and “protection” are given the same meaning, why were both words included? If their meaning is different, why are the terms so often treated as a single unit?

The courts have given the “mutual aid or protection” language the most expansive possible interpretation, described by one commentator as including “almost any activity that somehow affects the well-being of the employees as a group.”112 In Eastex, Inc. v. NLRB,113 the Supreme Court concluded that section 7 protects the distribution of a union newsletter which, among other things, criticized a presidential veto of a federal minimum wage increase and urged employees to register to vote. The Court rejected the employer’s contention that “mutual aid or protection” should be restricted to actions affecting the immediate employee/employer relationship. Although the employees were paid more than the vetoed wage, the Court recognized a potential indirect impact on the company employees and employees generally.114 In equally attenuated circumstances, the Board has held that section 7 protected a group of engineers who wrote to legislators opposing changes in immigration laws that might have increased the immigration of foreign-educated engineers.115 The Board’s narrow approach to

110. See supra note 24 and accompanying text.
114. See id. at 565-67.
115. See Kaiser Eng’rs, 213 N.L.R.B. 752 (1974), enforced, 528 F.2d 1370 (9th Cir.
the "concerted activities" language in section 7 stands in stark contrast to the Court's and the Board's broad interpretation of the "mutual aid or protection" phrase that follows.

The literal language of section 7 also has not proven to be an impediment in limiting the scope of the provision. Courts have shown no reluctance to add to section 7 restrictions that cannot be derived from a literal reading of the statute. By its terms section 7 protects all "concerted activities for . . . mutual aid or protection," yet the courts and the Board routinely deny that protection if the activities are disloyal or disruptive in some way. Similarly, nothing in section 7 limits the employee's right to organize. The Supreme Court requires, however, that this right be balanced against employer property rights. To expand the language of section 7 to include individual complaints of common concerns is no more unfaithful to the statutory language than these implied limitations.

The NLRA holds a special place in our legal system as the first and only comprehensive federal labor legislation for most American workers. Although other statutes establish requirements for selected employment conditions, only the NLRA purports to address all terms and conditions of employment. And only the NLRA addresses employment terms by allowing employees themselves to have a voice in what those terms should be, as opposed to externally-imposed governmental determinations. For the employee, the Act functions like a worker's bill of rights and should be construed accordingly.

The NLRA represents a dynamic conception of the working relationship capable of growing with our evolving understanding of the workplace and employee needs. Although the Act's framers might not have fully considered the extent of individual protection in the

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116. See supra note 24.


118. Railway and transportation employees, of course, were covered since 1926 under the Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982)). The NLRA also does not extend coverage, for example, to governmental employees, agricultural employees, domestic service employees, and supervisors. See 29 U.S.C. § 152(2)-(3) (1982).

statutory scheme, the communication structure created is both compatible with the protection proposed and necessary to adjust that structure to employee-management relations fifty years later. The continued viability of the Act is dependent upon the Board's willingness to mold the legislation to the demands of labor relations in the 1980s and 1990s. In the words of the Supreme Court, the Board must accept its "responsibility to adapt the Act to changing patterns of industrial life."120

The framers of other statutes undoubtedly would be surprised to learn of their evolution and expansion. The enforcement of Title VII in the 1970s and 1980s required recognition of more subtle forms of discrimination in sexual harassment121 and the disparate impact of neutral employment practices.122 Indeed, the Supreme Court relies on the fundamental purpose of Title VII to justify rulings that the language itself literally prohibits. Pursuant to appropriate affirmative action plans, employers are permitted to consider an individual's race or sex in making employment decisions.123 Similarly, section 1983 developed a life of its own exceeding its proponents' expectations.124 The maturing of the NLRA, as proposed, presents a far less dramatic extension.

2. Benefits and Burdens

Why should the individual be accorded the same protection as a "concerted" group of two or more persons? The interests of both workers and management suggest there is much to be lost and little to be gained by denying this protection. The employee loses a fundamental right of speech — the right to voice her complaints without risking discipline or discharge. The loss of that right is based on the often fortuitous fact that the employee went to the employer

120. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975); see NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 839-40 (1984) (noting "importance of 'the Board's special function of applying the general provisions of the Act to the complexities of industrial life'" (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 296 (1963))); cf. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 675 (1981) ("Congress deliberately left the words 'wages, hours, and other terms and conditions of employment' [Section 8(d)] without further definition, for it did not intend to deprive the Board of the power further to define those terms in light of specific industrial practices."). Having evaded this responsibility, the Board's current interpretation of section 7 therefore is not entitled to the deference usually accorded the Board's statutory construction. See Weingarten, 420 U.S. at 266-67; American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965); Erie Resistor, 373 U.S. at 235-36; Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196-97 (1941).

Not surprisingly, the Supreme Court often discusses the deference due the Board's expertise only when the Court agrees with the Board's conclusion. Compare First Nat'l Maintenance Corp., 452 U.S. 666 (1981) (containing no reference to judicial deference) with Ford Motor Co. v. NLRB, 441 U.S. 488, 495-98 (1979) (discussing at length the "considerable deference" due the Board).

alone without the aid of a friend. Had the employee understood the ramifications of that fact, she certainly would have taken a co-worker with her or convinced the co-worker to allow her to speak as their joint representative. Surely we cannot expect an employee to know the legal significance of her actions in this respect, at least not until it is too late.

As other commentators have discussed persuasively, the Act’s protection should not depend on chance. The fortuity of refusing section 7 coverage to the lone employee while protecting that employee if she happens to bring a friend is a largely irrational distinction from the employee’s perspective. The appearance of unfairness in the administration of the Act is almost overwhelming. Although protection of one employee may do little to promote the type of collective bargaining power referenced in section 1 of the Act, neither does the traditional protection afforded two employees in identical circumstances.

From the employer’s perspective, the protection of such a fundamental employee right involves minimal cost. Again, the employer need not satisfy the employee’s request. The employer could not lawfully discipline or discharge two employees making the same request jointly. To permit a sole employee to raise the same complaint adds only a nominal burden on management’s prerogatives. Undoubtedly many employers, already cautious due to the recent rise in wrongful discharge actions, would consider such protection no practical burden at all in conjunction with policies already in place requiring “for cause” terminations.

Protecting the voice of the individual in fact may provide some significant advantages for the employer. A number of studies demonstrate that employee turnover is lower in unionized workforces than in unorganized facilities. Employee resignations, according to one study by Professors Freeman and Medoff, are reduced from 31 to 65 percent when employees are organized, and unionization increases employee tenure between 23 and 32 percent. When Professors Freeman and Medoff attempted to isolate the cause of this phenomenon, they concluded that the “voice” provided to employees through union representation constituted the


128. Id. at 108.
dominant influence. Employees were less inclined to quit their jobs in a unionized shop because of their enhanced ability to communicate with the employer.\textsuperscript{129} Although the effect of protecting employee complaints is unlikely to be as dramatic, this evidence suggests there actually may be cost savings for the employer in reduced turnover.

Protection of the employee voice also can benefit employers hoping to defeat any future efforts of union organization. A study by the National Industrial Conference Board concluded that the more employee "voice" permitted, the more likely a company is to win a union election. Employers with no complaint policy won only 44 percent of their elections, while companies with an "open door" policy won 51 percent of the time. Employers with formal grievance appeals procedures fared even better, winning 79 percent of their union elections.\textsuperscript{130} The same study further reported that 63 percent of employers who defeated union organization immediately introduced new complaint policies or procedures.\textsuperscript{131} Such behavior implies that the absence of an employee right to voice dissatisfaction is perceived by employers themselves as an important factor in prompting union organization. When the employer already is providing a communication channel for employee concerns, the need for and likelihood of union organization evidently are diminished significantly.

Protecting the individual offers practical advantages as well in the NLRA's administration. The Board's current approach creates an anomaly between the legality of threats of discharge and the discharge itself. In \textit{Certified Service, Inc.},\textsuperscript{132} the Board found an employer in violation of section 8(a)(1) for threatening retaliation against employees for filing an OSHA complaint. Following an OSHA inspection that resulted in the company being fined, a supervisor shouted to a group of employees that when he discovered who reported to OSHA, "they was gone." When the employer identified and fired the culprit, however, the Board declined to find the employee's complaint protected concerted activity.\textsuperscript{133} If the threat itself is unlawful, "making good" on the illegal threat should be equally improper.\textsuperscript{134}

Individual protection also offers an opportunity for clear

\textsuperscript{129} Id. at 108-09.
\textsuperscript{130} Id.
\textsuperscript{131} \textit{Id.} Cf. R. Lewis & W. Krupman, \textit{Winning N.L.R.B. Elections: Management Strategy and Preventive Programs} 17 (2d ed. 1979) ("A major cause of unsatisfactory employee relations is poor communications or no communications at all. It is a truism in human relations, whether at home or at work, that communicating can avoid misunderstanding. But, communicating is a two-way process. It requires listening, as well as speaking.").
\textsuperscript{132} 270 N.L.R.B. 360 (1984).
\textsuperscript{133} \textit{Id.} at 360.
\textsuperscript{134} See Ewing v. NLRB, 768 F.2d 51, 55 (2d Cir. 1985) ("[I]t is somewhat mystifying that the Board should find that an employer's threat to a group of its employees that it would discharge those responsible for filing a safety complaint is a violation of section 8(a)(1), and yet not find the actual discharge of an employee who filed the complaint to be such a violation.").
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guidelines to govern both employer and employee behavior. An employee could not be terminated lawfully for work-related inquiries unless the means used were unprotected under long-standing Board criteria. The Board would have no need to consider or ponder the indistinct line between individual action and group authorization of a representative. The employer's knowledge of the concerted nature of the action would no longer be a necessary requirement, although it would remain important in cases where the reason for discharge is disputed. Thus, when an employer claims the employee was fired for poor performance and the employee claims retaliation for complaints, the employer's knowledge of the complaint is a very relevant concern. In most cases, however, the employee admittedly was discharged for the complaint, but whether the company was aware that the employee was acting as a spokesman for others is unclear.

The knowledge requirement for a finding of concerted activity is particularly unsatisfactory. The prerequisite of employer knowledge seems inconsistent with the well-established principle, in the context of other section 8(a)(1) violations, that employer motive is usually irrelevant. The Board's concern rests solely on whether the employer conduct had a tendency to interfere with employee section 7 rights, that is, what was the effect of the employer's action? As some commentators note, the discharge of an employee for voicing her work-related complaint predictably will discourage other employees from engaging in similar conduct. The discharge thus "restrains" employees within the meaning of section 8(a)(1).

More significantly, the knowledge requirement unfairly places the risk of a mistake on the party who will be injured the most. Assume

136. See Air Surrey Corp., 601 F.2d at 257.
138. See Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965) ("[A] violation of Section 8(a)(1) alone ... presupposes an act which is unlawful even absent a discriminatory motive."); NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964); American Freightsways Co., 124 N.L.R.B. 146, 147 (1959) ("[I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employee engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."). See generally Christensen & Svane, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 YALE L.J. 1269 (1968) (arguing that the treatment of motive as a critical factor in certain unfair labor practices disguises the thrust of the Act's prohibitions and hampers its administration).
139. See Gorman & Finkin, supra note 21, at 352-53; cf. Ewing v. NLRB, 768 F.2d 51, 55 (2d Cir. 1985) ("Group support [for an individual filing a safety complaint] may rationally be assumed, absent evidence to the contrary, because fellow employees presumably want to be free to assert such a right without fear of losing their jobs.").

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a single employee approaches her supervisor to question the excessive overtime the employees are required to work. The employee is fired on the spot for “meddling.” Even if the employee was formally designated a group spokesman by other employees, the discharge may be lawful if the employee failed to advise her supervisor of this fact. A statement by the employee that, “[w]e were wondering when the overtime would slow down,” might not be sufficient notice. Because the Board requires actual, not inferred knowledge,140 such an ambiguous statement would not necessarily notify the employer of the concerted nature of the complaint. Acting as an authorized spokesman, therefore, might not be enough to afford section 7 protection. The employee must be certain the employer knows of her spokesman status.

The knowledge requirement reinforces the notion that an employee will be protected or unprotected under section 7 by sheer chance because the employee is unlikely to be aware of the Board’s interpretation of the Act’s limitations. The employer risks little in the confrontation because the discharge will be upheld as long as the employee failed to obtain group authorization or the supervisor can claim lack of actual knowledge of the concerted component of the action. If the employer suspects the employee’s complaint is concerted, she has two options. She can terminate the employee anyway, hoping to defend the discharge by proving that the employee was not a designated spokesman or that her suspicions did not constitute actual knowledge. In either case, the employee remains unemployed. The employer’s second option is not to take the risk and simply order the employee back to work. Exercising this latter option, the employer loses the satisfaction of firing someone who complained. The employee remains employed.

3. Delineating the Scope of Protection

To achieve the proposed level of protection, at least two approaches are possible. The first, more limited approach, establishes a rebuttable presumption of concerted interest in any employee complaint regarding working conditions. Discharge of the single employee would be upheld only when the employer could overcome that presumption with evidence that no other employee shared the terminated employee’s concerns. The second, more expansive approach, protects the sole complaining employee whenever terms or conditions of employment are the subject of the complaint. The individual complainer would enjoy an irrebuttable presumption of protection to the same extent that two employees making a joint complaint would be protected. Both approaches require a more expansive reading of section 7 than even that adopted by the pre-Reagan Boards.141 The advantages and disadvantages of each alternative are discussed in turn.

141. See supra notes 37-43 and accompanying text.
The rebuttable presumption approach is more palatable to those who continue to focus on the use of "concerted" in section 7. A presumption of shared employee interest retains more faithfulness to the literal language of the statute even though much diluted from the Board's current analysis. Group or concerted concern remains the centerpiece of section 7 protection. The burden of proof is shifted, however, to the party who is harmed less by the choice between the right to terminate and the right to complain — the employer.

Presumptions are common devices utilized in other areas of the Act's enforcement, perhaps with even less justification than the presumption proposed here. Once a union achieves representative status, for example, the Board presumes that majority support for the union continues regardless of turnover in the workforce. Indeed, the entire bargaining unit may be replaced without altering or affecting this presumption of continued majority status.142 The presumption is irrebuttable during the year following certification143 and during the term of a collective bargaining agreement.144 After the certification year, the employer may withdraw recognition only if she sustains the burden of proving either that the union did not have majority support when recognition was withdrawn, or that the withdrawal was based upon a reasonable, objective, good-faith doubt as to the union's continued majority status.145

Continuing majority status similarly is presumed when a new employer purchases an on-going business and hires enough of her

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143. Brooks v. NLRB, 348 U.S. 96, 104 (1954). Recognition required by a Board bargaining order also is accorded a one year mandatory period of bargaining. See Mar-Jac Poultry Co., 136 N.L.R.B. 785, 786 (1962). When an employer voluntarily recognizes a union, as opposed to recognition following a Board-conducted election, the presumption of majority status is irrebuttable for a "reasonable" period of time. NLRB v. Sierra Dev. Co., 604 F.2d 606, 609 (9th Cir. 1979), enforcing, 231 N.L.R.B. 22 (1977); NLRB v. Cayuga Crushed Stone, Inc., 474 F.2d 1380, 1383 (2d Cir. 1973); Capitol Temptrol Corp., 245 N.L.R.B. 575, 586 (1979).
predecessor's represented employees to constitute a majority of the new employer's workforce. Thus, if the new employer, called a "successor," hires at least fifty-one former employees of the business for a unit of 100 employees, the Board assumes that all fifty-one employees support the union and desire continued representation. The successor employer will be ordered to recognize and bargain with the union recognized by the predecessor employer.

Presumptions of continued union majority support are justified as necessary for industrial relations stability. A presumption of concerted interest in a single employee's complaint about working conditions is required to protect the fundamental integrity of the NLRA's structural reliance on employee/employer communication. In many cases the concerted interest presumption is more likely to reflect reality than the presumption of continuing majority union support. Although the latter presumption may be necessary for the effective operation of the Act, there is little reason to assume the presumption mirrors the actual sentiments of newly hired employees. A presumption of concerted interest, however, often will come much closer to the truth. In Jefferson Electric, for example, the terminated employee was only one of several who were treated for exposure to noxious fumes. More significantly, other employees individually complained to the employer about the fumes. The terminated employee was fired for filing a complaint with the state OSHA agency. One needs little imagination to presume that at least some employees concurred in the dischargee's complaints.

If the employer can affirmatively establish the absence of concerted interest, the presumption could be rebutted, just as a union's presumption of continuing majority status may be overcome after the certification year. Midland Frame is an example of the latter case. The employee in Midland Frame, a vocal advocate of homosexual rights, was discharged for repeatedly challenging the employer's dress code by wearing tight-fitting satin pants and clothing with glitter, and by his oral and written protests of the dress policy. The employer advised the employee that his gay rights activism would not affect his employment but that "business dress" was required on the job. The evidence demonstrated that other employees disagreed with the dischargee's protest.


147. See, e.g., Brooks v. NLRB, 348 U.S. 96, 100, 103 (1954) (ordering an employer to bargain after losing representation election even though a majority of employees subsequently signed a letter stating that they no longer wanted union representation).

148. 271 N.L.R.B. 1089, 1089 (1984); see supra text accompanying notes 53-55 .


150. Based on this evidence, and the terminated employee's own testimony that he
Providing an individual with protection for any work-related complaint is a more far-reaching, and consequently more troubling, approach. This protection arguably ignores entirely the "concerted" limitation of section 7's language. The term "concerted" could be characterized simply as repetitive of the broad scope read into section 7's "mutual aid or protection" language.\footnote{151} Under this proposal, however, the scope of "concerted" is not intended to be as expansive as "mutual aid or protection."

The concert requirement is met by the assumption that any concern regarding working conditions inevitably will impact current or future employees. An individual request for a raise, for example, ultimately will affect how much the employer will pay other employees or future employees in the same job. More attenuated individual protests, such as criticizing a presidential veto of legislation,\footnote{152} would not satisfy the "concerted" requirement. Because the action of two employees otherwise meets the "concerted" criterion, however, their protest of a presidential veto would qualify for protection under the broader "mutual aid or protection" language.\footnote{153}

Defining what constitutes a "work-related" complaint is a problem easily resolved. Under a structural analysis, the communication right of the individual is the parallel of the right of the employees' representative to demand collective bargaining "with respect to wages, hours, and other terms and conditions of employment."\footnote{154} Thus, any issue about which a union lawfully could demand bargaining could be the subject of a protected individual complaint under section 7. The Board need only reference the substantial precedent and expertise developed to identify subjects of mandatory bargaining.\footnote{155}

The employee in Midland Frame,\footnote{156} for example, would be protected in his protest of the employer dress code, irrespective of

\footnote{151. See supra notes 112-15 and accompanying text.}
\footnote{152. See Eastex, Inc. v. NLRB, 437 U.S. 556, 559-60 (1978); see supra text accompanying notes 113-14.}
\footnote{153. One objection to this result is the re-creation of the arbitrary distinction criticized earlier between the actions of one employee versus two employees. The distinction was condemned, however, because it appeared counter-intuitive from the employees' perspectives. See infra note 126 and accompanying text. Expectations of protection for nonwork-related complaints are likely to be more tenuous or nonexistent. Other justifications for protecting individual work-related complaints similarly are absent when addressing the broad scope of issues that traditionally satisfy the "mutual aid or protection" provision.}
\footnote{154. 29 U.S.C. § 158(d) (1982). The employer's duty to bargain is imposed in section 8(a)(5). Id. § 158(a)(5) (1982).}
\footnote{155. See generally THE DEVELOPING LABOR LAW 757-84 (C. Morris 2d ed. 1983).}
\footnote{156. See supra notes 149-50 and accompanying text.}
other employees' disagreement with his position. The complaint could affect future employees who might agree with this employee's objections. The employee would not, of course, be protected from discharge if he repeatedly violated the company policy on business dress. The employee could properly complain about the rule but could not disobey supervisory authority.

Such an expansive reading of section 7 is a necessary growth step for the NLRA. Union organization has been declining steadily since the mid-1950s such that unions now represent less than 20 percent of the workforce. Prompted by the legislation's fiftieth anniversary, commentators have described the Act as outmoded and outdated. For the 80 percent of the workforce that is unorganized, the scope of section 7 protection for concerted activity may be the only NLRA provision of any practical impact or significance. If the Act is to remain (or to be resurrected) as a vital and dynamic bill of rights for the American worker, the lone voice must be accorded the same status as the voice of two. Continuing refinements in the Act's application certainly are possible within the statutory scheme. The communication structure created, however, actually mandates the extended protection proposed to maintain the integrity of the Act.

Some will disagree with the elevated, "constitution-like" role that this Article asserts the Act has and should continue to assume. Requiring full protection for all individual work-related complaints admittedly is a harder case to make than the rebuttable presumption approach suggested first. Those who demand a closer relationship to the "letter of the law" are unlikely to share the expanded vision

157. Union organization peaked in 1954 when 25.4% of the workforce (34.7% of the nonagricultural workforce) belonged to a union. Union membership dropped to 19.7% (23.6% of the nonagricultural workforce) by 1978. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 412 (Dec. 1980). The most recent statistics available from the Bureau of Labor Statistics show 19.9% of all employed individuals are represented by unions, although only 17.5% are actually union members. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 219 (1987). The discrepancy between union membership and union representation results from the fact that employees may be part of a represented bargaining unit without becoming union members if the collective bargaining agreement contains no union security clause, see 29 U.S.C. § 158(a)(3) (1982), or such clauses are illegal under a state's right-to-work law, see 29 U.S.C. § 164(b) (1982).


159. For an excellent discussion of analogous problems for public employees, see Massaro, Significant Silences: Freedom of Speech in the Public Sector Workplace, 61 S. CAL. L. REV. 1 (1987), exploring an individual's First Amendment protection for speaking out in the public workplace.
of the NLRA needed to support this second alternative. It is an issue about which there has and can be much disagreement. Other students of the Act may be unwilling to go so far.

III. Conclusion

Any number of methods could have been chosen by Congress in 1935 to protect and encourage union organization and employee rights. The structure that was chosen is the employee-employer dialogue. The Act unquestionably protects the communication right of the group, either jointly or through an authorized collective bargaining representative. Without the protection of the single voice, that structure remains incomplete and ultimately unstable. Having observed retaliation against one fellow employee for her unwelcome complaints, other employees will be quickly silenced. Labor scholars will know that the employee needed only the support of a friend to prevent her termination. The employees are likely to know only that someone was fired for voicing her criticisms.

The stumbling block for some courts and the Board in extending the scope of section 7 is the language of the section itself. The word "concerted" must be given some meaning. Two possible definitions, admittedly requiring a vision of the Act beyond any dictionary meaning, are suggested. The first presumes group interest whenever the individual's complaint could affect the terms and conditions of employment for at least one other employee. This presumption may be overcome in appropriate cases by evidence that others disagreed with the individual's protest. The second approach to the "concerted" requirement also presumes group interest, but this presumption is irrefutable. Any employee complaint concerning terms or conditions of employment would be a protected communication. It is assumed that any employment-related request eventually will affect present or future employees in some way.

Under this proposal, little is sought from the employer and much is gained for the employee. The employer no longer will be allowed to interfere with employee statutory rights to file agency complaints or to retaliate for complaints brought directly to the employer. The complaints themselves may be ignored entirely or resolved in any way the employer chooses. The employee is permitted to use the statutory procedures created for her own protection and to voice her concerns directly to her employer. The protection sought is so modest that the level of controversy caused by this issue surely must be hard for Mr. Ewing and Mr. Prill to understand.