NLRB PROTECTION IN THE NONUNION WORKPLACE: A GLIMPSE AT A GENERAL THEORY OF SECTION 7 CONDUCT

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Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world. . . .

The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems to me by nature almost as inalienable as individual liberty.

—Alexis de Tocqueville¹

Caught in the labyrinth of modern industrialism [the isolated worker] can attain freedom and dignity only by co-operation with others of his group.

—Senator Robert F. Wagner²

[U]nder prevailing economic conditions . . . the individual unorganized worker [needs to] have full freedom of association

—Section 2, Norris-LaGuardia Act³

INTRODUCTION

Two recent cases arising under the National Labor Relations Act ("NLRA" or "Act")⁴ have focused attention on the role of the National Labor Relations Board ("NLRB" or "Board") in the unorganized workplace: *Meyers Industries, Inc.* ("*Meyers P*"),⁵ which purports to

¹ A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 174-78 (J. Mayer & M. Lerner eds. 1966).

² 79 CONG. REC. 7565 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2321 (1959) [hereinafter LEGISLATIVE HISTORY].

³ Ch. 90, § 2, 47 Stat. 70, 70 (1932) (codified as amended at 29 U.S.C. § 102 (1982)).

⁴ Ch. 372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-68 (1982)), amended by Labor-Management Relations (Taft-Hartley) Act of 1947, ch. 120, 61 Stat. 136, and Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519.

⁵ 268 N.L.R.B. 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.) [*Prill I*], cert. denied, 474 U.S. 948 (1985), on remand, 281 N.L.R.B.

define the elements of employee concerted activity engaged in for "mutual aid or protection,"⁶ and *E. I. DuPont de Nemours & Co.* ("*DuPont III*"),⁷ which held that *Weingarten*⁸ rights were not applicable in the nonunion workplace. These cases directly affect the right of association in the employment relationship and present critical issues concerning basic organizational rights of workers under American labor law. The ultimate disposition of these issues will influence the long term course of industrial relations in this country.

Many people will be surprised that the actions of the NLRB have any relevance for nonunion establishments, except when a union is attempting to organize. Indeed, to most participants in the employment relations community, the NLRB might seem to have been relegated to a decidedly secondary role in the employment law arena. According to this conventional wisdom, the National Labor Relations Act has only minor importance in the real world of industrial relations⁹ and most current legal restraints on the workplace consist of a potpourri of federal statutory and state common law that protect *individual* employment rights, not *collective* rights. History, however, has a way of reminding us that conventional wisdom can be deceptive. This Article is intended to challenge that conventional wisdom by examining the congressional intent, embodied in Section 7 of the Act more than a half century ago, and by applying that intent to the interaction of employers and employees in the disposition of their disputes in the nonunion workplace. Many employers, perhaps most, and certainly most employees, are totally oblivious of the existence of this important body of law. Yet despite such mass unawareness, the NLRA is the only law governing the relationship between an employer and its employees as a

No. 118 (Sept. 30, 1986) [*Meyers II*], *enforced sub nom.* *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) [*Prill II*], *cert. denied*, 108 S. Ct. 2847 (1988).

⁶ 29 U.S.C. § 157 (1982) (Section 7 of the Act).

⁷ 289 N.L.R.B. No. 81 (June 30, 1988). *E.I. DuPont de Nemours & Co.*, 274 N.L.R.B. 1104 (1985) [*DuPont II*], remanded back to the Board by the Third Circuit. *See Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986). *DuPont III* is the Board's decision after the Third Circuit's remand. Companion cases include *E.I. DuPont de Nemours & Co. v. NLRB*, 733 F.2d 296 (3d Cir. 1984); *E.I. DuPont de Nemours & Co. v. NLRB*, 724 F.2d 1061 (3d Cir. 1983); *E.I. DuPont de Nemours & Co.*, 262 N.L.R.B. 1028 (1982) [*DuPont I*].

⁸ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (holding that an employee in a unionized workplace subjected to an investigatory interview about matters that might reasonably lead to discipline is entitled to have a union representative present during the interview); *infra* notes 260-66 and accompanying text (discussing the *Weingarten* rule).

⁹ For a discussion of the emergence of the current nonunion industrial relations system, see T. KOCHAN, H. KATZ & R. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 47-80 (1986).

group in most private sector establishments in this country.¹⁰ Notwithstanding the recent lull in union organizational activity and the past reluctance of the NLRB to provide vigorous enforcement of the core provisions of the Act,¹¹ the Board is currently very much alive and increasingly active—and potentially very active. Indeed, because so many more nonunion, as compared to union, establishments exist today, the Board's presence is more important to nonunion establishments and their employees than ever before.¹² It is therefore not surprising that the Board has recently issued a number of decisions concerning Section 8(a)(1)¹³ conduct involving the association of unorganized employees where there was no pertinent evidence of outside union activity.¹⁴

Six of those decisions, including *Meyers I* and *DuPont III*, pertain to real-life scenarios, centering on individual employees,¹⁵ that could easily have arisen in almost any company in the United States. All of them occurred in nonunion establishments; none of them involved an organizational campaign by an outside union. I chose to analyze those fact situations, and to examine the manner in which the NLRB has responded to them, in order to provide a glimpse at a general theory that should help define the concept of protected concerted action under the Act. By "general theory" I mean a broadly applicable coherent set of propositions that will help to explain, with reasonable consistency and predictability, when and what employee conduct is protected by Section 7, particularly the conduct embraced by the statutory phrase

¹⁰ The principal exceptions to such coverage are the railroad and airline industries, which are covered by the Railway Labor Act, 45 U.S.C. §§ 151-88 (1982 & Supp. IV 1986).

¹¹ See generally Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9 (1987) (urging a non-legislative restructuring and a corresponding revitalization of the Board to achieve more effective enforcement of the Act).

¹² The decline in unionization continued through last year. See *Union Membership Falls to 16.8% in 1988*, Daily Labor Report (BNA) No. 18, Jan. 30, 1989, (reporting that last year's decline in the percentage of unionized workplaces continued a trend started four decades ago). Thirty five percent of non-agricultural workers in 1946 were union members. See N. CHAMBERLAIN, D. CULLEN & D. LEWIN, *THE LABOR SECTOR* 124 (3d ed. 1980).

¹³ 29 U.S.C. § 158(a)(1) (1982).

¹⁴ See, e.g., *Hamilton Plastics*, 291 N.L.R.B. No. 90 (Oct. 31, 1988); *Owens Illinois, Inc.*, 290 N.L.R.B. No. 155 (Sept. 22, 1988); *Whittaker Corp.*, 289 N.L.R.B. No. 116 (July 18, 1988); *Oakes Machine Corp.*, 288 N.L.R.B. No. 52 (Apr. 14, 1988); *Quality Pallet Sys., Inc.*, 287 N.L.R.B. No. 123 (Feb. 15, 1988); *Glenwood Management Corp.*, 287 N.L.R.B. No. 113 (Jan. 29, 1988); *Salisbury Hotel, Inc.*, 283 N.L.R.B. No. 101 (Apr. 21, 1987); *Jhirmack Enters.*, 283 N.L.R.B. No. 91 (Apr. 19, 1987); *Joseph De Rario*, 283 N.L.R.B. No. 86 (Apr. 10, 1987); *Millcraft Furniture Co.*, 282 N.L.R.B. No. 83 (Jan. 5, 1987); *Every Woman's Place, Inc.*, N.L.R.B. No. 48 (Dec. 11, 1986); *Consumers Power Co.*, 282 N.L.R.B. No. 24 (Nov. 13, 1986).

¹⁵ See *infra* notes 181-353.

that guarantees employees the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."¹⁶

This Article provides only a glimpse at a general theory because its scope covers only employee pre-organizational activity,¹⁷ although the broad range of Section 7 rights also covers union organizational activity, the collective bargaining process, and enforcement of the collective bargaining agreement. But if this general theory is credible, it should also be applicable to these other aspects of Section 7 activity and the enforcement of the collective bargaining agreement,¹⁸ although such application must await further exposition at other times and other places.

This study concentrates on the conduct typified by the six scenarios. The situations which they describe are so common that most employers and employees will readily empathize with their familiar fact patterns. In addition, the scenarios provide ideal materials for testing the application of the general theory: Each arose in a nonunion setting, and each raises the question of whether the employee conduct constituted an exercise of a protected right to engage in concerted activity for mutual aid or protection. The *first* involves a truck driver fired for reporting the unsafe condition of his truck to a state public service commission and for his refusal to drive that vehicle.¹⁹ The *second* involves an employee fired for calling the Wage and Hour Division of the Department of Labor on her own initiative but after several employees had each complained about a holiday overtime matter.²⁰ The *third* involves an employee fired for speaking up about a change in the lunch hour policy that concerned her and several other employees.²¹ The *fourth* involves an employee fired for discussing with another employee the fact that she had been placed on probation.²² The *fifth* involves an employee transferred to a different shift and given a reduced work week because she had spoken to other employees about the termination

¹⁶ 29 U.S.C. § 157 (1982).

¹⁷ Pre-organization activity includes any mutual activity covered by Section 7 when no union is present. It does not necessarily contemplate a union organizational drive. Cf. *infra* notes 66-68 and accompanying text (discussing case law that rejects the contention that Section 7 pertains only to union or union related activity).

¹⁸ See *infra* note 169 and accompanying text.

¹⁹ See *infra* notes 181-220 and accompanying text (discussing *Meyers I* and *Meyers, Indus.*, 281 N.L.R.B. No. 118 (Sept. 30, 1986) [*Meyers II*]).

²⁰ See *infra* notes 221-24 and accompanying text (discussing *Every Woman's Place, Inc.*, 282 N.L.R.B. No. 48 (Dec. 11, 1986)).

²¹ See *infra* notes 225-36 and accompanying text (discussing *Salisbury Hotel, Inc.*, 283 N.L.R.B. No. 101 (Apr. 21, 1987)).

²² See *infra* notes 237-44 and accompanying text (discussing *Parke Care of Finneytown, Inc.*, 287 N.L.R.B. No. 73 (Dec. 16, 1987)).

of a fellow employee.²³ The *sixth* involves an employee fired for refusing to meet with his manager unless he was allowed to have a co-worker present during the interview; the purpose of the meeting was to inquire into an incident for which the employee expected to be disciplined.²⁴

How many of these scenarios constitute protected concerted activity? All of the situations are cut from the same fabric, and they should, but not necessarily must, yield the same answer. This Article seeks to delineate the patterns in that fabric which might provide an explanation of why they should all yield the same answer. In my view, the plain meaning of the language of Section 7 and the original congressional intent, coupled with the guidelines provided by mainstream judicial opinion, can yield a relatively simple formula that will make it easier to distinguish conduct that is congressionally protected from conduct that is not. The theory will also make it easier to distinguish conduct the Board is required to protect from conduct it may protect. As to the former distinction, the formula leaves no room for the exercise of either administrative or judicial discretion. As to the latter, the formula provides a guideline to assist the Board in choosing whether to treat such conduct as protected or unprotected.

The six scenarios will be discussed following an examination of pertinent statutory language, legislative history, and the manner in which the Board and courts have treated the statutory provision. These three areas provide the chief components of the general theory.

I. THE QUEST FOR STATUTORY MEANING

A. *The Statutory Language*

The place to begin the search for meaning is in the language of the provision itself. As enacted in 1935, Section 7 reads as follows: "Employees shall have 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 concerted activities for the purpose of collective bargaining or other mutual aid or protection."²⁵

²³ See *infra* notes 245-58 and accompanying text (discussing *Adelphi Inst., Inc.*, 287 N.L.R.B. No. 104 (Jan. 19, 1988)).

²⁴ See *infra* notes 288-353 and accompanying text (discussing *DuPont III*).

²⁵ Ch. 372, § 1, 49 Stat. 449, 452 (1935) (emphasis added). The phrase "and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)" was added in 1947 by the Taft-Hartley amendments. See Labor-Management Relations (Taft-Hartley) Act of 1947, ch. 120, § 7, 61 Stat. 136, 140 (codified at 29 U.S.C. § 157

Section 7 of the Act is a more definite expression of federal law than that contained in Section 7(a)(1) of the National Industrial Recovery Act, from which it was derived.²⁶ Unlike the NIRA provision, Section 7 provides that employees shall have the *right*—not just an abstract expression of freedom as had appeared in Section 7(a)(1)—to engage in the broadly phrased concerted activities. This is a feature of Section 7 upon which the Board has not focused, certainly not the recent Board that framed the current version of the basic rule in the two *Meyers* decisions. Rather, the Board and the courts have tended to look to the *activity* in question to determine whether it is concerted in nature.²⁷ The statute, however, does not merely protect activity in concert; more broadly, it protects the *right* to engage in such activity. This concept provides one of the underlying premises upon which a complete definition of protected concerted activity should be based.

I shall not parse the remainder of the language in Section 7, except to note that the “concerted activities” that the statute protects may have any one or more of three distinct purposes: the purpose of collective bargaining, the purpose of mutual aid, or the purpose of protection (which can also be read as “mutual protection”). All of those rights may be added to, modified, or affected by the separate statement of specific rights in the initial part of the paragraph, which spells out the right to “self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing.” The broader “mutual aid or protection” language is particularly important in defining conduct that precedes formal organizational activity, the conduct on which this Article concentrates.

Having stressed the clarity of the language of the provision, I want to call attention to the commonly accepted meaning of two key words:

(1982)). This phrase is not pertinent to this discussion because it contemplates an expansion of rights, and thus would not constrain employees in their exercise of mutual aid or protection.

²⁶ See National Industrial Recovery Act, ch. 90, § 7(a)(1), 48 Stat. 195, 198 (1933), *declared unconstitutional*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The NIRA had required the adoption of industrial codes for the purpose of regulating competition. Each code was intended to be binding on employers within a particular industry, and Section 7(a)(1) required that every code provide:

That *employees* shall have the right to organize and bargain collectively through representatives of their own choosing, and *shall be free from the interference, restraint, or coercion of employers or labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*

Id. (emphasis added).

²⁷ See *Prill v. NLRB*, 835 F.2d 1481, 1483-85 (D.C. Cir. 1987) [*Prill II*], *cert. denied*, 108 S. Ct. 2847 (1988).

"concerted" and "mutual." *Concerted* derives its meaning from *concert* and is generally synonymous with the phrase *in concert*. Those three terms all convey a clear meaning. In reverse order, they mean "together; jointly;" "agreement of two or more individuals in a design or plan; combined action; accord or harmony;" and "contrived or arranged by agreement; planned or devised together; done or performed together or in cooperation."²⁸ The meaning of *mutual* is equally explicit: "possessed, experienced, performed, etc., by each of two or more with respect to the other; . . . held in common, shared *Mutual* indicates an exchange of a feeling, obligation, etc., between two or more people, or an interchange of some kind between persons"²⁹ The foregoing dictionary definitions will be useful to describe the kind of employee activity illustrated by the cases, including the specified scenarios.

Finally, when searching for meaning in the language of Section 7, we should remind ourselves that the Supreme Court has indicated on many occasions that in order to effectuate congressional intent, that section's provisions should be liberally construed.³⁰

B. Congressional Intent

While the language of Section 7, standing alone, is broad and relatively unambiguous in conveying its general mandate, its legislative history also supports an expansive interpretation. As noted previously, the language of the provision was derived from the National Industrial Recovery Act; its key phrases, however, are even older.³¹

The first of the antecedent statutory provisions is Section 20 of the Clayton Act of 1914, which sought to insulate "any person or persons, whether [acting] singly or in concert" from federal injunctions against

²⁸ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 423 (Unabridged 2d ed. 1987).

²⁹ *Id.* at 1270.

³⁰ See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (holding that Section 7 protects a broader range of activities than the "narrow[] purposes of 'self-organization' and 'collective bargaining'"); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22-23 (1964) (disallowing a "good faith" defense to a Section 8(A)(1) charge; allowing such a defense would have a "deterrent effect" on future concerted activity); see also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (indicating the Board is to foster employees' right "to organize for mutual aid without employer interference").

³¹ For a detailed discussion of the history of Section 7 of the NLRA, see Gorman & Finkin, *The Individual and The Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 331-46 (1981). See also Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History*, 50 IND. L.J. 720, 726-49 (1975) (carefully reviewing the legislative history behind the language of Section 7).

such economic labor weapons as strikes, boycotts, and picketing.³² Although the Supreme Court in *Duplex Printing Press Co. v. Deering*³³ held this section to be merely "declaratory of the law" as it stood before passage of the Act,³⁴ the provision provided a degree of congressional legitimacy for American workers engaged in concerted activity.

After the *Duplex* decision, federal court injunctions continued to frustrate organized labor's exercise of economic weapons,³⁵ setting the stage for passage of the Norris-LaGuardia Act in 1932.³⁶ Congress intended that Act to block the use of federal injunctive power in labor disputes by imposing jurisdictional and procedural limitations on the federal district courts. Section 2 contained the key language of the declared "public policy of the United States":

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore though he should be free to decline to associate with his fellows, it is necessary that he have full *freedom of association*, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be *free from the interference, restraint, or coercion of employers* of labor, or their agents, in the designation of such representatives or in self-organization or *in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*³⁷

Not surprisingly, in view of its largely borrowed origin, there is little discussion or debate about specific language of Section 7 in the formal legislative history. The brief references inserted in the legislative record, however, are consistent and unambiguous regarding both the statute's intent and derivation.

In his statements to the committee conducting hearings on the

³² See 29 U.S.C. § 52 (1982).

³³ 254 U.S. 443 (1921).

³⁴ *Id.* at 470.

³⁵ See Witte, *The Federal Anti-Injunction Act*, 16 MINN. L. REV. 638, 638-39 (1932).

³⁶ Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-15 (1982)).

³⁷ 29 U.S.C. § 102 (1982) (emphasis added).

House version of his bill, Senator Wagner said that the "language [of Section 7] follows practically verbatim the familiar principles already embedded in our law by section 2 of the Railway Labor Act of 1926, section 2 of the Norris-LaGuardia Act, . . . [and], section 7(a) of the National Industrial Recovery Act"³⁸ Earlier, the Senate Committee report accompanying the first draft of the bill had noted that Section 7 rights restated earlier law. It then went on to discuss the idea of "industrial democracy," which Senator Wagner viewed to be the end product of his bill:

The language [of Sections 7 and 8(a)(1)] restrains employers from attempting by interference or coercion to impair the exercise by employees of rights that are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of democracy, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities.³⁹

Senator Wagner explained that changes in the wording used in past laws were made for the guidance of the courts and were not intended to place any "limitations upon the broadest reasonable interpretation of [Section 7's] omnibus guaranty of freedom"⁴⁰

The main objective behind Section 7 was also noted in the general debates and other contemporaneous material concerning the entire statute, because Section 7 embodied the substantive content of all the original unfair labor practice protections. Its intent, therefore, was in essence the intent of the Act. Among his statements describing the purpose of the bill, Senator Wagner outlined his vision of a cooperative relationship between workers and employers and the requirements that would be necessary to achieve that goal: "The primary requirement for cooperation is that employers and employees should possess equality of bargaining power. The only way to accomplish this is by securing for employees the full right to act collectively through representatives of

³⁸ *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 13 (1935) [hereinafter Statement of Senator Wagner], reprinted in 2 *LEGISLATIVE HISTORY*, *supra* note 2, at 2487.

The Railway Labor Act, 45 U.S.C. § 151a (1982), begins: "The purposes of the chapter are . . . (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization" *Id.*

³⁹ S. REP. NO. 1184, 79th Cong., 2d Sess. 5 (1934) (statement of Senator Wagner), reprinted in 1 *LEGISLATIVE HISTORY*, *supra* note 2, at 1103.

⁴⁰ Statement of Senator Wagner, *supra* note 38, reprinted in 2 *LEGISLATIVE HISTORY*, *supra* note 2, at 2487.

their own choosing.”⁴¹

This combined theme of equality and cooperation runs throughout the legislative history. Wagner said that the bill “conforms to the democratic procedure that is followed in every business and in our governmental life.”⁴² He saw the proposed statute as “the next step in the logical unfolding of man’s eternal quest for freedom.”⁴³ Wagner wanted the process of union organization to be especially protected, because he viewed the “isolated worker” as a “plaything of fate”: “Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, he can attain freedom and dignity only by cooperation with others of his group.”⁴⁴

Leon Keyserling, Wagner’s Legislative Assistant, wrote Wagner’s speeches and was the principal draftsman of the statute and Senate Reports. Shortly before his death in 1987, Keyserling gave an extended interview in which he discussed the drafting of the Wagner Act.⁴⁵ He confirmed that the Act was indeed intended “to place labor in a more equal bargaining position.”⁴⁶ He said that “it was our view that the greatest contribution to greater equity and the distribution of the product between wages and profits 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.”⁴⁷ According to Keyserling, “[o]ur approach was to make the worker a free man and give him equality of bargaining power and let him make his contract if he could.”⁴⁸

The purpose of the Wagner Act, and therefore the purpose of the undisturbed language of Section 7, was to bring to the workplace a legally protected right of association.⁴⁹ This principle took the form of statutory protection for the right of employees to organize themselves. It was designed to allow employees to participate on equal terms with

⁴¹ 78 CONG. REC. 3679 (1934), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 2, at 20.

⁴² 79 CONG. REC. 2371 (1935) (statement of Senator Wagner), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 2, at 1313.

⁴³ *Id.* at 7565, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 2, at 2321.

⁴⁴ *Id.*

⁴⁵ See Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 297 (1987).

⁴⁶ *Id.* at 319.

⁴⁷ *Id.*

⁴⁸ *Id.* at 329.

⁴⁹ See Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 697 (stating that “[n]ational labor policy, as articulated by Congress, was rooted in the first amendment right of freedom of association; Congress acted to protect that right because the courts had failed to do so”).

their employers in the determination of "rates of pay, wages, hours of employment, or other conditions of employment."⁶⁰ Accordingly, Congress conceived protected concerted activity as a guarantee of the right of workers to organize and express themselves freely, in a democratic manner, concerning their wages and working conditions.

Senator Wagner recognized that for his concept of democracy in the workplace to succeed, workers must be accorded the same right of association vis-à-vis their employers as all Americans possessed vis-à-vis their governments. That right of free expression is protected by the Constitution⁶¹ and is endemic to the American way of life. More than a century and a half ago, Alexis de Tocqueville described the importance of associations in America:

Better use has been made of associations and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world.

Apart from permanent associations such as townships, cities, and counties created by law, there are a quantity of others whose existence and growth are solely due to the initiative of individuals.⁶²

Regarding the quality of individualism, so often employed to describe the American ethic, de Tocqueville observed that the "inhabitant of the United States learns from birth that he must rely on himself to combat the ills and trials of life,"⁶³ but he also stressed that individuals succeeded in their endeavors because they readily associated with each other to accomplish a myriad of tasks. According to de Tocqueville, "[t]here is no end which the human will despairs of attaining by the free action of the collective power of individuals."⁶⁴ He continued his description of associations in America with the following high praise:

The right of associations being recognized, citizens can use it in different ways. An association simply consists in the public and formal support of specific doctrines by a certain num-

⁶⁰ This is the undisturbed language of the original Section 9(a). See 29 U.S.C. § 159(a) (1982).

⁶¹ Protection of the right of association stems primarily from first amendment guarantees of freedom of speech, press, assemblage, and petition. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-12 (1982); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295-99 (1981); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-23 (1967); *NAACP v. Button*, 371 U.S. 415, 430 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

⁶² A. DE TOCQUEVILLE, *supra* note 1, at 174.

⁶³ *Id.*

⁶⁴ *Id.* at 174-75.

ber of individuals who have undertaken to cooperate in a stated way in order to make these doctrines prevail. An association unites the energies of divergent minds and vigorously directs them toward a clearly indicated goal.

. . . .

The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems to me by nature almost as inalienable as individual liberty.⁵⁵

During the century that followed, as work in America shifted from small employing units and self-employed workers to large scale industry and commerce with little self-employment, it was inevitable that the need for associations in the workplace would be perceived as comparably important to the need for associations in public places. Such perception culminated in Senator Wagner's vision, a vision in which he saw a means to transform the typically authoritarian employer-employee relationship into an equal partnership—at least regarding working conditions. The collective bargaining relationship was deemed to be naturally compatible with the democratic philosophy that is indigenous to the American way of life.

Accordingly, it was the declared objective of the Wagner Act—an objective deliberately left intact by the Taft-Hartley amendments⁵⁶—that the protected process of concerted activity in the workplace would be comparable to the rights of freedom of speech and association the first amendment guaranteed to workers' in their political lives. Indeed, the Supreme Court, in *NLRB v. Gissel Packing Co.*,⁵⁷ drew that comparison in stating that an employer's rights of free speech under the first amendment of the Constitution and Section 8(c)⁵⁸ of the Act "cannot outweigh the *equal* rights of the employees to associate

⁵⁵ *Id.* at 175, 178.

⁵⁶ Although the Taft-Hartley Act added new dimensions to the scope of the NLRA, the underlying objective of the basic statute remained intact. Indeed, the statutory statement of policy retained and reaffirmed the primary purpose of the original Act. See National Labor Relations Act, 29 U.S.C. § 151 (1982). During the Senate debate preceding the vote to override President Truman's veto, Senator Taft emphasized that the bill "is based on the theory of the Wagner Act It is based on the theory that the solution of the labor problem in the United States is free, collective bargaining" 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1653 (1948); see Morris, *supra* note 11, at 11-17 (noting that Taft-Hartley did not "change the core objective of the statute").

⁵⁷ 395 U.S. 575 (1969).

⁵⁸ 29 U.S.C. § 158(c) (1982).

freely, as those rights are embodied in § 7.”⁵⁹ The right of association is thus the hallmark of the design of American industrial relations. The National Labor Relations Act is the blueprint of that design, and Section 7 is the cornerstone of the edifice that Congress intended to erect.

C. *The View from the Board and the Courts*

It may appear to some that the Board and the courts have vacillated in their interpretation of the meaning of Section 7 concerted activity. Indeed, many Board and appeals court decisions lack consistency. Nevertheless, a coherent policy does permeate Supreme Court and most administrative and appellate decisions involving the unorganized workplace. Those cases have frequently failed, however, to reveal a clear understanding of the scope and intent of the statutory provision. To understand better the relationship of activity in the unorganized workplace—which I refer to as pre-organizational activity—the Supreme Court’s majority opinion in *NLRB v. City Disposal Systems, Inc.*⁶⁰ provides an introduction to the broad spectrum of Section 7 concerted activity. Although *City Disposal* directly addressed employee activity in an organized workplace, Justice Brennan used the occasion to provide an in-depth review of Section 7’s scope and legislative intent. After examining the legislative history, the Court concluded:

[I]t is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process. Instead, what emerges from the general background of § 7—and what is consistent with the Act’s statement of purpose—is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of

⁵⁹ *Gissel Packing*, 395 U.S. at 617 (emphasis added).

⁶⁰ 465 U.S. 822 (1984).

*collective-bargaining agreements.*⁶¹

Justice Brennan's analysis thus recognizes three distinct stages⁶² or "processes" in the organizational relationship between employees and their employer. In each stage Congress intended the Act to provide an equality of power between the parties. *City Disposal* defines the three processes to which the standard of equality shall apply: (1) "the entire process of labor organizing," (2) "the entire process of . . . collective bargaining," and (3) "the entire process of . . . enforcement of collective bargaining agreements."

This Article divides the first process, labor organizing, into two distinctive parts: the pre-organizational stage and the union organizational stage. As to the former, before any union contact exists, the nascent organizational process may simply consist of one or more employees attempting to interact or make common cause with one another regarding a matter relevant to their working conditions. The process may or may not come to the attention of the employer, and it may or may not reach the stage of formal union organizational activity. Congress embraced such preliminary activity with the broadly protective language of "concerted activities for the purpose of . . . mutual aid or protection" and guaranteed that employees would be protected in their "right" to engage in such activities. The "right" has clearly not been limited to organized workplaces.

Several key decisions have contributed to the shaping of the law in the nonunion workplace. It is appropriate to begin our review with Judge Learned Hand's opinion in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*,⁶³ which affirmed the Board's reinstatement of an employee who had been discharged for instigating the adoption of a resolution by employee members of an unaffiliated "union." The resolution protested the employer's failure to support a dairy farmers' strike. It was published in the local newspapers and was considered by the company to be gravely injurious to its business. The court conceded that the striking farmers were not "employees" within the meaning of the Act, hence mutual aid and protection could not apply to them. However, it deemed the act of passing the resolution to be activity for the purpose of mutual aid or protection among the employees in the unaffiliated union at the employer's factory. The adoption of the resolution was, therefore,

⁶¹ *Id.* at 835 (emphasis added).

⁶² The term "stages" only emphasizes the distinctive levels of activity being described. Justice Brennan's use of the term "process" communicates more accurately the dynamic nature of the affected conduct.

⁶³ 130 F.2d 503 (2d Cir. 1942).

protected.⁶⁴ Judge Hand's opinion contributed the following much-quoted dictum, which the Supreme Court in *Weingarten* quoted with approval:

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.⁶⁵

*NLRB v. Phoenix Mutual Life Insurance Co.*⁶⁶ put to rest any lingering notion that Section 7 was intended to cover only activity related to a labor dispute, a labor union, or a labor organization.⁶⁷ The employer had discharged two insurance salesmen because of their participation in informal meetings, their discussions about the filling of the position of a cashier, and their activity in drafting a letter to management on behalf of the salesmen. The Board found that the salesmen's commission earnings were affected by the cashier's performance. Hence a direct connection existed between the cashier and the salesmen's working conditions. Davis had been selected by his fellow salesmen to draft a letter recommending the present assistant cashier for the cashier's position. Davis, with the assistance of Johnson and a third employee, prepared a tentative draft of the letter, but before it could be completed and presented, the third employee was questioned about the letter and advised not to sign it. Davis and Johnson were then terminated. Agreeing that "the moderate conduct of Davis and Johnson and the others bore a reasonable relation to conditions of their employment," the court concluded that by incorporating the "mutual aid or protection" language of the provision:

Congress must have intended to include within the act what the usual meaning of these unambiguous words conveys. A

⁶⁴ See *id.* at 505-06.

⁶⁵ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 261 (1975) (quoting *Peter Cailier*, 130 F.2d at 505-06).

⁶⁶ 167 F.2d 983 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948).

⁶⁷ See *id.* at 988 (stating that "[a] proper construction [of Section 7] is that employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated").

proper construction is that the employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated.⁶⁸

In examining the cases that have interpreted and applied the right to engage in concerted activities for mutual aid or protection, it is important to distinguish between three dimensions of Section 7 organizational activity: *concertedness*, *object*, and the *conduct*, i.e., the nature of the activity itself. It is usually not difficult to determine when an activity is "concerted," notwithstanding the Board's confusion in *Meyers I* and *DuPont III*,⁶⁹ nor is it very difficult to determine whether the activity is for "mutual" aid or protection. It is often a puzzling task, however, to determine whether the nature of the activity is protected and whether the type of object for which the employees engage in the activity deprives them of the Act's protection.

In a given case, each dimension must be separately evaluated and balanced against the other dimensions in order to arrive at a decision that is consistent with a rational theory of protected concerted activity. Implicit in this process is the realization that the same conduct may be protected for some objectives, but not for others. Similarly, the same objective may be deemed protected or unprotected, depending on the means used to achieve it. The courts and the NLRB have never read Section 7 so literally as to apply its protection to all concerted activity regardless of purpose, time, place, or means. Certain types of concerted activity engaged in by groups of workers, whether for the purpose of collective bargaining or for mutual aid or protection, may be unprotected.⁷⁰ For example, conduct that is unlawful,⁷¹ in breach of contract,⁷² disloyal to the employer,⁷³ or undermines the authority of the

⁶⁸ *Id.* NLRB v. Schwartz, 146 F.2d 773 (5th Cir. 1945), underscored the point that the statute was passed as "a grant of rights to the *employees* rather than as a grant of power to the union." *Id.* at 774. Consequently, the discharge of an employee, whom a supervisor had mistakenly thought to have been circulating a petition to present to the company for the allowance of additional overtime work, was deemed to interfere with Section 7 rights, notwithstanding the fact that the employee had actually been passing out union cards. *See id.* The case also demonstrated an example of concerted employee conduct of a relatively mild, non-coercive nature.

⁶⁹ *See infra* notes 180-220 & 288-353 and accompanying text.

⁷⁰ *See* 1 C. MORRIS, *THE DEVELOPING LABOR LAW* 159-64 (2d ed. 1983); *id.* Supp. IV at 69-72; Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 325 (1951); Gregory, *Unprotected Activity and The NLRA*, 39 VA. L. REV. 421, 436 (1953).

⁷¹ *See, e.g.,* Southern S.S. Co. v. NLRB, 316 U.S. 31, 39-40 (1942) (violation of mutiny statutes by seamen); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 248-49 (1939) (workers seized company buildings in sit-down strike).

⁷² *See, e.g.,* NLRB v. Sands Mfg. Co., 306 U.S. 332, 336-39 (1939) (union

majority representative,⁷⁴ is outside the protected coverage of the Act. Such conduct is not within the main scope of this Article, but various examples of unprotected conduct (based both on the object and on the nature of the conduct) will be used to construct and describe a general theory.

I will first address those cases that focus on the determination of "concertedness." This factor is of particular importance to the unorganized workplace.⁷⁵ The Sixth Circuit's decision in *NLRB v. Guernsey-Muskigum Electric Co-op, Inc.*,⁷⁶ illustrated and confirmed that employees may act in concert with little or no conscious direction or leadership and with a total lack of formality. The case involved employee dissatisfaction with the quality of their supervision. Dick Boyer was one of several employees who had complained among themselves, and then to management, about the selection of an inexperienced foreman and about the need for a pay raise and sick leave. According to the court, the purpose of their complaints was to have the foreman removed and reclassified as a laborer. The court found ample evidence to support the Board's finding that Boyer had been discharged because of his activity in connection with the position of the foreman. In approving the finding of protected activity, the court provided the following useful description of the concerted conduct:

The mere fact that the men did not formally choose a

breached departmental seniority provision of collective bargaining agreement).

⁷³ See, e.g., *NLRB v. Local 1229, Int'l Bhd. of Elec. Workers [Jefferson Standard Broadcasting Co.]*, 346 U.S. 464, 475-76 (1953) (holding that an employee's attack upon the quality of the employer's product was just cause for dismissal because attack was on "the very interests which the attackers were being paid to conserve and develop" and that therefore attacked was deemed disloyal); *Patterson-Sargent Paint Co.*, 115 N.L.R.B. 1627, 1628 (1956) (upholding the dismissal of striking employees who distributed handbills to the public that "impugn[ed] the quality and visibility of . . . [the employer's] product").

⁷⁴ See, e.g., *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 60-70 (1975) (finding unprotected the conduct of minority employees who picketed despite an unresolved grievance presented by the majority representative).

⁷⁵ In the organized workplace, assertion of rights under a collective bargaining agreement will ordinarily be governed by a grievance procedure and arbitration, but the assertion itself will also be protected under Section 7. This is the Board's *Interboro* doctrine. See *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (finding the discharge unlawful because the employee complaints constituted protective activity, for they were "made in the attempt to enforce the provisions of the existing collective-bargaining agreement"), *enforced*, 388 F.2d 495 (2d Cir. 1966). The *City Disposal* Court expressly affirmed the *Interboro* doctrine, stating: "[T]he assertion of a right contained in a collective-bargaining agreement is an extension of the concerted action that produced the agreement; and . . . the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement." *City Disposal*, 465 U.S. at 829; see *Bunney Bros. Constr. Co.*, 139 N.L.R.B. 1516, 1519 (1962).

⁷⁶ 285 F.2d 8 (6th Cir. 1960).

spokesman or that they did not go together to see Mr. Scott [one of the company's trustees] does not negative concert of action. It is sufficient to constitute concert of action if from all of the facts and circumstances in the case a reasonable inference can be drawn that the men involved considered that they had a grievance and decided, among themselves, that they would take it up with management.⁷⁷

An employee acting alone may also be engaged in protected conduct when her activity sufficiently relates to concerted matters. The case that firmly articulated the proposition that a single employee's discussion with other employees can constitute protected concerted activity was *Root-Carlin, Inc.*⁷⁸ In that case, the Board held, in an oft-quoted commentary, that "the guarantees of Section 7 of the Act 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."⁷⁹

*Mushroom Transportation Co. v. NLRB*⁸⁰ also involved activity of a single employee. The Third Circuit's analysis in that case of the requisite conduct for protection under the umbrella of "mutual aid or protection" has had a far-reaching influence on the view of the Board and courts as to the meaning of that key statutory phrase—a view which has been unnecessarily restrictive. Although the case arose in a unionized setting, the union's presence is not significant to the decision. Charles Keeler, a non-regular employee of a trucking company, drove as an "extra" pursuant to an "extra list" maintained by the union. He was in the habit of talking to other employees and advising them of their rights. The company heard rumors that he was telling other drivers that they were not getting what they were entitled to under the union contract. The Board found Keeler's activity within the ambit of protected concerted conduct under Section 7. The Third Circuit disagreed. It "look[ed] in vain" for evidence of any effort by Keeler to initiate or promote any concerted action, and could find none.⁸¹ Whether the court looked hard enough is now academic, because *Mushroom Transportation's* significance is not based on the facts of

⁷⁷ *Id.* at 12.

⁷⁸ 92 N.L.R.B. 1313 (1951).

⁷⁹ *Id.* at 1314. The activity in question was a discussion in which the employee urged fellow employees to form a union and referred to a specific union. Although the Board found his discharge for such activity to be in violation of Section 8(a)(3), it separately and expressly found that the conduct was protected by Section 7. Therefore, the discharge was also an independent violation of Section 8(a)(1).

⁸⁰ 330 F.2d 683 (3d Cir. 1964).

⁸¹ *See id.* at 684.

the case but rather on the court's analysis of the components of concerted activity. Therefore, the court's formulation deserves full and verbatim reproduction:

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees. This is not to say that preliminary discussions are disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands. We recognize the validity of the argument that, inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition. However, that argument loses much of its force when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to.

Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and if it looks forward to no action at all, it is more than likely to be mere "gripping."⁸²

The italicized part of the *Mushroom Transportation* analysis, usually the only part quoted, is relatively innocuous, for the phrases "preparing for group action" and "relation to group action in the interest of the employees" is sufficiently broad and vague to cover most situations that were intended to be covered by Congress.⁸³ The remainder of the statement, however, wholly misses the thrust of the statutory in-

⁸² *Id.* at 685 (emphasis added); cf. *NLRB v. Office Towel Supply Co.*, 201 F.2d 838, 840-41 (2d Cir. 1953) (reversing the Board and agreeing with the trial examiner that the employee had been discharged because of her complaints and uncooperative attitude, not for her union activity, of which the employer had no knowledge).

⁸³ See *Mushroom Transp.*, 330 F.2d at 685.

tent. And like the *Mushroom Transportation* opinion, and often in reliance on it, the Board and some of the courts have focused on a search for actual concertedness rather than on the existence of the right to engage in concertedness.⁸⁴ As the Supreme Court recognized in *Washington Aluminum*, however, unorganized employees should not be expected to act with keen and experienced perception in their efforts to express themselves concertedly; they must act "as best they [can]."⁸⁵ Thus, if employees are to have a meaningful right to engage in concerted activity, they must be protected in any of their group conversations that relate to conditions of employment, absent some overriding legitimate employer interest requiring a limit to such conversation. The limit, however, should be based on such factors as time, place, and interference with productive work, and not on the Board's determination—often highly subjective—of whether the conversation in question has reached the advanced stage of looking toward group action. A sufficient basis for the statutory requirement of concerted activity, or, more accurately, the requirement of the right to engage in such activity, should exist if the discussion's subject matter reasonably relates to working conditions and two or more employees are involved in the discussion.

*Ontario Knife Co. v. NLRB*⁸⁶ makes a positive contribution to the process of distinguishing between individual and concerted activity in a nonunion establishment. Employees Cobado and Swift had often registered their complaints to each other and to management about what they perceived to be an unfair distribution of burdensome work on machetes between the day and night shifts. Finally they told their supervisor that they were going to refuse to work on machetes the next time it was their turn. The supervisor told them that if they did not like the type of work required, they should leave and the employer would find others to replace them.⁸⁷ According to Cobado, the supervisor looked at her and said, "If there is a thing on there [the day foreman's list] that says you have to kiss my ass, that is what you are going to do," to which Cobado responded, "I don't need this garbage."⁸⁸ She then "walked to her machine, shut it down, packed her belongings, and walked off the job, punching out and crying as she left."⁸⁹ The next

⁸⁴ But see *infra* notes 86-97 and accompanying text (discussing Judge Friendly's opinion in *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980)).

⁸⁵ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962); see *infra* notes 103-06.

⁸⁶ 637 F.2d 840 (2d Cir. 1980).

⁸⁷ See *id.* at 841-42.

⁸⁸ *Id.* at 842.

⁸⁹ *Id.*

day Cobado telephoned her boss, apologized for having walked off the job, and begged for her job back. The Company's response was to terminate her.⁹⁰

Judge Friendly's well-reasoned analysis opened with a reminder that in construing Section 7, "courts should adhere rather closely to the statutory text."⁹¹ His opinion recognized that prior to Cobado's walking off the job, she and Swift had indeed been engaged in concerted activity, "meeting the 'mutual aid or protection' requirement of § 7."⁹² Their complaints to each other and to management represented a classic example of two employees who were acting together or jointly. Here was an "agreement of two or more individuals" attempting to act "in cooperation."⁹³ But Judge Friendly noted that the concertedness stopped short of a concerted walkout, which would have been protected. He observed that "[n]ot only must the ultimate objective [of the action] be 'mutual' but the activity must be 'concerted' or, if taken by an individual . . . must be looking toward group action."⁹⁴ Accordingly, the court reversed the Board because it "did not and could not reasonably find that Cobado was discharged for making the protest in which Swift joined; she was discharged and refused reinstatement because she walked off her job. . . . Swift [however] went on with her work."⁹⁵ In other words, a one-person walkout cannot be a strike. This result may seem harsh for employee Cobado, but the message of the case is fully consistent with the statutory intent to encourage employees to act together for their mutual aid and protection. The NLRA was designed to protect group or collective rights, not individual rights.

Another feature of *Ontario Knife* is worth noting. In the process of analyzing the reach of Section 7, Judge Friendly recognized the "right" involved and used that concept to explain why the one-person action described as protected in the *Mushroom Transportation* formulation was entitled to such deference.⁹⁶ He said:

While by definition, an individual acting alone cannot act in concert, § 7 is not limited to concerted activity per se. Instead, it protects the 'right to engage in . . . concerted activities.' If workers have the right to engage in concerted activities and to associate freely, then . . . employers cannot

⁹⁰ See *id.*

⁹¹ *Id.* at 843.

⁹² *Id.* at 844.

⁹³ See *infra* notes 133-40 and accompanying text.

⁹⁴ *Ontario Knife*, 637 F.2d at 845.

⁹⁵ *Id.*

⁹⁶ This concept also appears as a component of the general theory formulation described below. See *infra* notes 173-213 and accompanying text.

obstruct an employee's efforts to exercise those rights.⁹⁷

The nature and the object of the concerted activity are closely linked in the case law. The courts and the Board often commit a fundamental error in balancing these factors. For instance, *Joanna Cotton Mills v. NLRB*⁹⁸ involved the discharge of an employee for having circulated a petition asking for the discharge of a supervisor. After concluding that the object of the employee's activity was unrelated to collective bargaining or mutual aid or protection, the Fourth Circuit reversed the Board. The court found the conduct to be a "mere carrying forward of the defiant attitude of a recalcitrant employee whose manifest object was to defy proper discipline"⁹⁹ In the court's view, the employee had a defiant and insulting attitude; therefore, his circulation of the petition "was conduct calling for discharge if any order or discipline in the plant was to be maintained."¹⁰⁰

In my view, the court overreacted to what it perceived to be an "unwarranted interference with management."¹⁰¹ Although the employer would have been free to discharge the employee for his defiant and insulting attitude, his circulation of a petition, which was concerted conduct of a moderate nature that bore a reasonable relation to employee working conditions, should have been deemed protected. Therefore, the court erred in its construction of the statute.¹⁰²

In 1962 the Supreme Court in *NLRB v. Washington Aluminum Co.*¹⁰³ addressed the issue of protected concerted activity by unorganized employees. The case involved a work stoppage rather than one of the milder forms of concerted activity typified by the court of appeals

⁹⁷ *Ontario Knife*, 637 F.2d at 844-45 (citation omitted).

⁹⁸ 176 F.2d 749 (4th Cir. 1949).

⁹⁹ *Id.* at 753.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 754.

¹⁰² *G & W Electric Specialty Co. v. NLRB*, 360 F.2d 873 (7th Cir. 1966), is a similar failure to weigh the object of the concerted activity against the moderate nature of the conduct. The Seventh Circuit denied enforcement of a Board order finding a Section 8(a)(1) violation in an employer's discharge of an employee for distributing a circular addressed to fellow employees. The circular sought support for the employee's complaints concerning the manner in which the credit union was being operated. The court found that the subject matter of the circular (the object of the concerted activity) was not sufficiently related to conditions of employment to warrant protection. It did not call for any action by the company, and the company had no control over the matter in issue. The court therefore found the employee's conduct outside "the ambit" of Section 7 protection. *See id.* at 875-77. Considering the moderate nature of the activity and the presence of an obvious, albeit weak, connection between the company and the credit union, the court should have upheld the Board's finding that the conduct was protected. *See infra* notes 107-13 and accompanying text (discussing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)).

¹⁰³ 370 U.S. 9 (1952).

decisions noted above. The Court's opinion set the tone for measuring protected concerted activity among nonunion workers, a tone that made allowances for the employees' lack of sophistication and organizational experience. Seven workers had walked out of an extremely cold factory after their complaints had been ignored by the company. Despite the fact that they had violated a plant rule prohibiting employees from leaving work without permission, the Court upheld a Board finding that their activity was protected concerted conduct. In rejecting the appeals court rationale that the activity was unprotected because the employer had not been given an opportunity to respond, the Court noted that requiring the employees to provide advance notification "might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities."¹⁰⁴ The Court recognized that the employees "were wholly unorganized [and that] they had to speak for themselves as best they could."¹⁰⁵ The Court stated:

We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions.¹⁰⁶

The extent of the range of object or purpose for which concerted activity may be protected under the rubric of "mutual aid or protection" was treated by the Supreme Court in *Eastex, Inc. v. NLRB*.¹⁰⁷ At issue was the employer's efforts to prevent distribution of a union newsletter on company property during nonworking time. The letter included material critical of a presidential veto of an increase in the minimum wage, and it also urged employees to oppose inclusion of a right-to-work provision in the state constitution.¹⁰⁸ In approving the Board's finding of protected activity, the Court indicated that Congress intended a broad area of protection by the phrase "mutual aid or pro-

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ 437 U.S. 556 (1978). Although *Eastex* involved a unionized establishment, the presence of a union was not a distinguishing feature.

¹⁰⁸ See *id.* at 559-61.

tection." It found "no warrant for [the] view that employees lose their protection . . . when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship."¹⁰⁹ Furthermore, it held that the reach of Section 7 encompassed concerted activity of employees "in support of employees of employers other than their own."¹¹⁰ The Court said,

It is true . . . that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause. It is neither necessary nor appropriate, however . . . to attempt to delineate precisely the boundaries of [that] clause.¹¹¹

The Court also clarified that the forms that such concerted activity may permissibly take "may well depend on the *object* of the activity."¹¹² It quoted approvingly Professor Getman's suggestion of an appropriate relationship between an employer's ability to affect the object of the activity and the nature of the activity: "The argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within 'mutual aid or protection' is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing."¹¹³

The final area of this case study concerns the legal justifications an employer may interpose to prevent or penalize the exercise of otherwise protected concerted conduct. Two cases, *Republic Aviation Corp. v. NLRB*¹¹⁴ and *Jeannette Corp. v. NLRB*,¹¹⁵ provide the basic parameters.

In *Republic Aviation*, the Supreme Court approved the Board's finding that an employer violated Section 8(a)(1) by maintaining a broad no-solicitation rule prohibiting employees from exercising their Section 7 rights of association on company property during non-work-

¹⁰⁹ *Id.* at 565. Among the examples provided by the Court were "resort to administrative and judicial forums [and] appeals to legislators to protect their interests as employees." *Id.* at 566.

¹¹⁰ *Id.* at 564.

¹¹¹ *Id.* at 567-68.

¹¹² *Id.* at 568 n.18 (emphasis added).

¹¹³ *Id.* (quoting Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1221 (1967)).

¹¹⁴ 324 U.S. 793 (1945).

¹¹⁵ 532 F.2d 916 (3d Cir. 1976), enforcing 217 N.L.R.B. 653 (1975).

ing time. Noting that the "right of employees to organize for mutual aid without employer interference [is] the principle of labor relations which the Board is to foster," the Court emphasized that "[a]n essential part of [the] system is the provision for the prevention of unfair labor practices by the employer which might interfere with the guaranteed rights."¹¹⁶ The case posed the question of how to make "an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments."¹¹⁷ The Court's opinion stressed that the "[o]pportunity to organize and proper discipline are both essential elements in a balanced society."¹¹⁸ It approved the Board's accommodation of those competing interests, as expressed in *Peyton Packing Co.*¹¹⁹

The Act . . . does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that *time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property.* It is therefore not within the province of an employer to promulgate and enforce a *rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.*¹²⁰

In *Jeannette Corp.* the Third Circuit reiterated that

[i]n weighing the justifications offered by the employer, we

¹¹⁶ *Republic Aviation*, 324 U.S. at 798-99. It is noteworthy that Section 10 of the Act is entitled "Prevention of Unfair Labor Practices." 29 U.S.C. § 160 (1982).

¹¹⁷ *Republic Aviation*, 324 U.S. at 797-98.

¹¹⁸ *Id.* at 798.

¹¹⁹ 49 N.L.R.B. 828 (1943).

¹²⁰ *Republic Aviation*, 324 U.S. at 803 n.10 (emphasis added) (quoting *Peyton Packing*, 49 N.L.R.B. at 843-44).

must heed the Supreme Court's admonition that "[i]t is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'"¹²¹

Jeannette involved the termination of an employee who, in violation of a company rule prohibiting wage discussions among employees, had engaged in conversations about wages with two other employees. The Board found the rule and the termination unlawful under Section 8(a)(1) because such discussions were deemed an integral part of organizational activity.¹²² Affirming that conclusion, the Third Circuit observed that it was "obvious that higher wages are a frequent objective of organizational activity, and discussions about wages are necessary to further that goal."¹²³ Accordingly,

[a] rule barring wage discussions among employees without any limitation as to time or place would presumably forbid employee discussions on breaks, in waiting time, before and after hours of work, during luncheons, and in restrooms. Such an unqualified rule would deny freedom of discussion among employees at times and places when such activity could not adversely affect job performance.¹²⁴

The court found appropriate for Section 8(a)(1) application the standard and order of proof that the Supreme Court had prescribed for Section 8(a)(3) in *NLRB v. Great Dane Trailers, Inc.*: "Once the Board makes out a prima facie case of discrimination in violation of section 8(a)(3), 'the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.'"¹²⁵ As to the employer's rule in *Jeannette*, the court confirmed that "[t]he possibility that ordinary speech and discussion over wages on an employee's own time may cause 'jealousies and strife among employees' is not a justifiable business reason to inhibit the opportunity for an employee to exercise section 7 rights."¹²⁶

Needless to say, the development of the law defining concerted ac-

¹²¹ *Jeannette Corp.*, 532 F.2d at 918 (citing *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967))).

¹²² See *Jeannette Corp.*, 217 N.L.R.B. 653, 656 (1975).

¹²³ *Jeannette Corp.*, 532 F.2d at 918.

¹²⁴ *Id.* at 919.

¹²⁵ *Id.* at 919 n.4 (quoting *Great Dane Trailers*, 388 U.S. at 34 (emphasis added)).

¹²⁶ *Id.* at 919.

tivity under Section 7 is reflected in hundreds of cases, but the cases reviewed above will serve to highlight the important milestones in that development.¹²⁷

II. A GLIMPSE AT A GENERAL THEORY

The general theory outlined in this section splits the concept of Section 7 concerted activity into its logical components in an attempt to offer a rational view of the diverse elements that make up the statutory scheme. The theory is not a simplistic formula designed to provide instant answers to complex problems. By thus clarifying the process, however, the Board and courts will have an analytical framework through which to apply the congressional intent implicit in the statutory language. This formulation should be suitable for evaluating both broad and specific fact situations, whether in the context of fact-oriented adjudications or rule-making proceedings. As to the latter, the formulation should be equally useful whether the rule is promulgated through notice-and-comment procedures under the Administrative Procedure Act¹²⁸ or though the Board's more familiar process of adjudication in individual cases.¹²⁹

The conduct in the six scenarios on which this Article concentrates concerns activity in which the primary issue is concertedness, or in the alternative, activity which is sufficiently related to concertedness to merit statutory protection. Because this Article examines only the ini-

¹²⁷ I have omitted from the above discussion the two lead cases contained in the scenarios in this Article—*Meyers I* and *DuPont III*—as well as the cases that they overruled or replaced, *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975), and *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982), respectively, inasmuch as those cases are treated in detail below.

¹²⁸ 5 U.S.C. § 553 (1982).

¹²⁹ See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (recognizing that "the Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board's discretion"); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) [*Chenery I*] (finding that "[t]here is . . . a very definite place for the case-by-case evolution of statutory standards"). The literature on this point is extensive. See, e.g., Morris, *supra* note 11, at 27-42 (advancing eleven reasons the Board should favor the use of substantive rulemaking); Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149 (1986) (analyzing the potential for a broad movement away from rulemaking toward adjudication); Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970) (arguing that administrative agencies possessing both rulemaking and adjudicatory authority should make greater use of their rulemaking powers). The Board has recently shown greater receptivity toward APA rulemaking. On April 20, 1989, it issued a final rule, 29 C.F.R. Part 103 (1989), providing for appropriate bargaining units in the health care industry. See Daily Labor Report (BNA) No. 76, Apr. 21, 1989.

tial aspect of the first process that Justice Brennan defined in *City Disposal*, the pre-organizational stage of the organizational process, the general theory it postulates concerns directly only concerted activity engaged in for the purpose of mutual aid or protection, not concerted activity engaged in for the purpose of collective bargaining.

This general theory, however, should also be applicable to the later processes that Justice Brennan defined: the process of collective bargaining and the process of enforcement of the bargaining agreement. Although those subsequent processes are clearly related to organizational activity, concerted conduct in which employees engage for "mutual aid or protection" may not necessarily be intended to achieve union organization, at least not deliberately or initially. In some situations the involved employees will have no present or foreseeable desire to organize into a union; in other cases they may have such a desire; and in some situations such a desire might eventually develop. Such nexus between unstructured concerted activity and more formalized union activity is central to the legislative intent embedded in Section 7. Congress thus intended by the broad language of the provision to encourage a flexible and relatively unstructured process. Hence, it should follow that unrepresented, and usually ill-informed, employees ought not to be required to act at their peril when they begin informal joint discussions, for they may not yet be "looking toward group action."¹³⁰ But given the opportunity, group action—be it mild or assertive—might in time evolve from that rudimentary process.

In the early organizational stages of the process that Section 7 describes, employees need not be consciously aware that they are engaged in a concerted act. They need only be involved in an act of association, speech, or petition ("petition," in workplace terminology, being essentially the presentation of a grievance) that reasonably relates to "wages, hours, [or] other terms and conditions of employment."¹³¹ It is important, however, that the employer must not have unreasonably interfered with or denied their opportunity to engage in such activity. If equality of organizational power is to have a meaning consistent with the policy of the statute, then it follows that Section 7 guarantees (1) that employees will have the right to confer among themselves about any of the foregoing matters; (2) that several employees may each voice a common concern about such matters and thereby impliedly engage in concerted activity; (3) that a single employee has the right to turn to one or more fellow employees to seek mutual aid or protection as to such matters;

¹³⁰ *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1004 (1st Cir. 1988) (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

¹³¹ 29 U.S.C. § 158(d) (1982).

and (4) that a single employee has the right to attempt to initiate an action or seek support, for the benefit of the employees as a group, with respect to such matters, regardless of whether she or he is ultimately successful in that endeavor. The only restrictions the employer should be able to place on such conduct are those for which there are "legitimate and substantial business justifications."¹³²

As I have noted previously, the several dimensions that characterize Section 7 activity are the dimensions of *concertedness*, *object*, and *conduct*. In a given situation, some or all of these dimensions must be evaluated both separately and comparatively. The analyses to be applied in such evaluations, discussed in the following sections, comprise the building blocks of a general theory.

A. *Separate Evaluations*

Perhaps the most logical way to begin evaluating a given fact situation is to ask and answer a series of questions. Each question addresses one of the three dimensions.

1. The First Question: *Concertedness*

The *first question* asks *whether the employee or employees are engaged in activity that is either concerted or so related to concertedness that the right to engage in concerted conduct is reasonably affected*. This question concerns whether the action involves employees as a group or whether an individual employee is seeking to explore the possibility of, or is initiating, group activity. This question is crucial to the coverage of the Act. Unless the question is answered in the affirmative, Section 7 will be inapplicable to the conduct in question and that conduct would be *per se* unprotected.¹³³ The answer to the question will not necessarily turn on an employee's perceived or articulated intent, or on the Board's or a court's speculation as to such intent, because the

¹³² *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (quoting *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967)).

¹³³ Activities by individual employees on their own behalf are not "concerted" within the meaning of Section 7. *See, e.g., Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980) (arguing that "not only must the ultimate objective [of the action] be 'mutual' but the activity must be 'concerted' or, if taken by an individual . . . must be looking toward group action"; *see supra* notes 86-97 and accompanying text); *Kohls v. NLRB*, 629 F.2d 173 (D.C. Cir. 1980) (holding that individual protesting work assignment not engaged in concerted activity); *Del E. Webb Realty & Management Co.*, 216 N.L.R.B. 593, 593 (1975) (holding that "where an individual employee turns to his employer alone to improve this condition of employment and is in no sense joined in his actions by any other workmen, he has not engaged in concerted activities in the statutory sense and may be discharged").

right to engage in the activity presupposes a preliminary stage of probing and uncertainty as to the direction the effort will take.

When employees deliberately act together, or agree to act together, their conduct is clearly concerted. However, a finding of actual concertedness need not be based on explicit evidence of agreement or accord.¹³⁴ In view of the express statutory protection of the *right* to engage in such concerted activity, it would be appropriate in some cases for the Board to find, on the basis of either implicit evidence or a presumption, that a single employee is engaged in concerted activity. A presumption should arise if there is some reasonable link that connects the employee's activity with similar expressions or acts by other employees,¹³⁵ or if the single employee's activity initiates a process that is intended to benefit the employees generally.¹³⁶ An example of reasonable linkage would be a situation in which several different employees have voiced a common complaint to their employer, after which the employer disciplines a single employee for again voicing the same complaint. In such a case the Board could properly find concerted activity.¹³⁷ It may be presumed that the other employees, who expressed the same complaint, tacitly authorized or made common cause with the one who has had the temerity to speak up again on their behalf. Similarly, an employee who seeks outside assistance for the benefit of the employees generally may be presumed to act with the support of other employees.¹³⁸ In either case, the presumption could be rebutted by a showing that the single employee speaks for no one but herself.¹³⁹ Because a single employee acting to improve conditions for the employees as a group will more likely than not act with the approval of at least some of her fellow employees, the Board should use a presumption to establish a *prima facie* case of concertedness in such a factual situation. The statutory element of *right* to engage in concerted activity warrants a liberal construction of facts that reasonably point toward concerted activity. A strict construction of such facts would tend to diminish the right to engage in the activity that Section 7 protects. As the Supreme Court concluded in a different context, though for similar policy reasons, "[d]oubts should be resolved in favor of coverage."¹⁴⁰

¹³⁴ See *infra* notes 221-36 and accompanying text.

¹³⁵ *Id.*

¹³⁶ See *supra* notes 78-79 and accompanying text; *infra* notes 237-59 and accompanying text.

¹³⁷ See *Every Woman's Place, Inc.*, 282 N.L.R.B. No. 48 (Dec. 11, 1986); see also *infra* notes 221-24 (discussing *Every Woman's Place*).

¹³⁸ See *supra* notes 190, 201-17 and accompanying text.

¹³⁹ See *infra* note 202 and accompanying text.

¹⁴⁰ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583

In a literal sense, it is true that a discussion among employees about a matter affecting their employment in which no agreement is reached may not be "concerted," and perhaps it might never become such. Nevertheless, such a discussion must be protected, because it is from such exchanges that agreements, formal or informal, tacit or explicit, arise.¹⁴¹ Thus, an employer's interference with or denial of the opportunity for such discussion, absent legitimate justification for doing so, constitutes a denial of the *right* to engage in concerted activity. Recalling the dictionary definition of the phrase "in concert,"¹⁴² it is conceivable that whatever employees do "together"—even talking among themselves—could be considered concerted activity. But the statute indicates that the action must also be "mutual." Therefore, a more precise reading of the language would seem to require that actual concertedness contain at least a minimum element of accord or agreement. Thus, to avoid a gap in essential coverage, the Board and the courts need to focus on the *right* to engage in concerted conduct as well as on the conduct itself.¹⁴³

The foregoing discussion introduces one of the essential components of the general theory: that the *right* to engage in concerted activity for mutual aid or protection is itself entitled to protection. However, for purposes of this analysis, the right to engage in such activity will be treated as one element in determining the existence of concertedness. Accordingly, in this discussion, concertedness includes both literal concerted action and the right to engage in such action.

2. The Second Question: *Object*

If the answer to the first question, regarding concertedness, is in the affirmative, a *second question* becomes appropriate: *What is the object of the activity?* This question explores whether the conduct is engaged in for the purpose of mutual aid or protection, which includes a broad range of objectives, or whether it is engaged in for one or more of the specific statutory objectives of "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

(1960) (referring to a presumption of arbitrability in construing labor agreements providing for arbitration under § 301 of the Taft-Harley Act).

¹⁴¹ See *infra* notes 235-59 and accompanying text.

¹⁴² See *supra* note 28 and accompanying text.

¹⁴³ Root-Carlin, Inc., 92 N.L.R.B. 1313 (1951), is an example of the Board finding concertedness based on the action of a single employee. See *supra* notes 78-79 and accompanying text. More accurately, the employee's conduct was protected because his "right" to engage in concerted activity was protected.

for the purpose of collective bargaining”¹⁴⁴ Although the analysis in this Article focuses on the “mutual aid or protection” objectives, the process of determining statutory coverage would be the same for these other more specific objectives spelled out in the provision.

If it is found that the object of the activity is reasonably related to “wages, hours, and other terms and conditions of employment,”¹⁴⁵ but not necessarily within¹⁴⁶ that statutory definition of mandatory subjects of bargaining,¹⁴⁷ the concerted conduct may be protected. However, such protection may be restricted by one or more of four additional factors: (1) whether the object is unlawful or contrary to public policy, particularly the policy of the National Labor Relations Act;¹⁴⁸ (2) whether and to what extent the employer has the capacity to control or affect the object of the activity;¹⁴⁹ (3) whether the employer has a legiti-

¹⁴⁴ 29 U.S.C. § 157 (1982).

¹⁴⁵ *Id.* at § 158(d).

¹⁴⁶ See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558-62 (1978); *supra* notes 107-13; see also *NLRB v. Guernsey-Muskingum Elec. Co-op., Inc.*, 285 F.2d 8, 12 (6th Cir. 1960) (holding that activities reasonably related to Section 7 rights should be protected); *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948) (same); *Millcraft Furniture Co.*, 282 N.L.R.B. No. 83, slip op. at 6 (Jan. 5, 1987) (stating that it “is well settled that concerted protest of supervisory conduct is protected activity under § 7 of the Act”).

¹⁴⁷ See generally *C. MORRIS, supra* note 70, at 757-844; *id.* at Supp. IV at 360-91.

¹⁴⁸ This factor is addressed by many of the cases defining unprotected concerted activity, at least those cases in which the activity is unprotected because of the object of the conduct rather than because of the nature of the conduct itself. See *supra* notes 71-74 and accompanying text. Some of these cases involve gray areas in which the Board should be able to exercise its administrative discretion, subject only to limited judicial review. See, e.g., *Crystal Linen & Uniform Servs., Inc.*, 274 N.L.R.B. 946 (1985) (holding unprotected, employee solicitation of employer’s customers to transfer their business during a strike); *Bell Fed. Savs. & Loan Ass’n*, 214 N.L.R.B. 75 (1974) (holding unprotected, switchboard operator’s disclosure to union of information about frequency of calls to company’s labor counsel). For coverage of administrative discretion and judicial review, see *infra* notes 170-74 and accompanying text (discussing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987), and *NLRB v. Food & Chemical Workers*, 108 S. Ct. 413 (1988)).

¹⁴⁹ Most of the subjects concerning the employment relationship about which employees tend to raise questions are matters that are so closely related to the objectives of the statutes that concerted activity for such an object would ordinarily be deemed protected because an employer can control those subjects. See, e.g., *NLRB v. American Spring Bed Mfg. Co.*, 670 F.2d 1236, 1240 (1st Cir. 1982) (holding that wage rate discussion among employees are protected); *NLRB v. Sencore, Inc.*, 558 F.2d 433, 434 (8th Cir. 1977) (noting that “higher wages are a frequent objective of organizational activity and discussions about wages are necessary to further that goal”); *Quality Pallet Sys., Inc.*, 287 N.L.R.B. No. 123, slip op. at 2 (Feb. 15, 1988) (holding that protest following a reduction in pay is concerted action). This would be true even if the conduct involves a work stoppage. See *infra* note 153. This would certainly apply regarding traditional matters directly affecting employment, such as wages, overtime, grievances, workplace environment, along with matters affecting the employees’ immediate

mate justification for limiting or preventing the conduct;¹⁵⁰ and (4) whether the nature of the conduct taints its object.¹⁵¹

When the Board or a reviewing court examines any of these four restrictive factors, it is important that they be fully cognizant of and sensitive to the lucid language of the statutory provision, for "mutual aid or protection" is not an arcane or ambiguous expression. The plain meaning of "mutual" has previously been noted,¹⁵² and "aid" and "protection" are familiar concepts. The congressional intent, as well as the language, is quite clear. Unless one or more of the four restrictive factors are applicable, there is no room for the Board to exercise administrative discretion, because the Act mandates that such activity be protected. When employees engage in concerted activity for an employment-related purpose, they are protected by the Act. And such protection applies regardless of the meager nature of their purpose. The purpose may simply be the "aid" that one employee feels from the presence of another employee, or the "aid" or perceived "protection" that a group of employees may feel by virtue of their being part of a group, even when the group does not make overtures to management. "Mutual aid or protection" even includes the aphorism, "misery loves company."¹⁵³

supervision. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962). However, as will be noted under the separate discussion of the nature of the conduct, some concerted activity, notwithstanding its proper and conventional object, may be deemed unprotected because of the nature of the activity itself. See, e.g., *supra* notes 71-73 and accompanying text (illegal or disloyal conduct, or conduct in breach of contract is unprotected activity).

But, depending on the nature of the conduct, the employer's lack of control over the object of the activity would not necessarily render the conduct unprotected. This problem was illustrated in part by *Eastex*. See *supra* notes 107-13 and accompanying text. There, the employees had been seeking mutual aid and protection in the form of solidarity with other employees outside their immediate place of employment. The court held that distribution of a mild non-coercive newsletter, dealing with legislative matters of concern to workers generally, was protected, even though the employer had virtually no way to affect the objects of the action. See *Eastex*, 437 U.S. at 567. Had the conduct consisted of a work stoppage, albeit for the same purpose, the concerted activity might have been deemed unprotected. At least such an interpretation would have been a permissible construction of the statute. *Eastex* thus demonstrates that the object of the activity, in order to be protected, need not always be subject to the employer's control or ability to affect the outcome.

¹⁵⁰ Such a justification, if one exists, may be related not only to the object of the conduct, but also to the nature of the conduct, or both. But since this factor most often relates to the nature of the activity, it will be discussed under the dimension of the nature of the conduct in the discussion under the third question.

¹⁵¹ This area will also be treated separately in the discussion of the third question.

¹⁵² See *supra* note 29 and accompanying text.

¹⁵³ See *infra* notes 237-59 and accompanying text.

3. The Third Question: *Conduct*

If the answers to the first two questions have produced findings of concertedness and proper object, the *third question* would then be asked: *Is the nature of the conduct such that it is entitled to protection?* Or, to put it in the more familiar negative form, is the concerted activity so offensive as not to merit the protection of the statute?

Concerted activity as mild as conversation among employees and preparation and circulation of petitions or other written materials will almost always be within the ambit of the statute.¹⁵⁴ More vigorous and assertive forms of concerted activity, such as a work stoppage,¹⁵⁵ conduct the Supreme Court deemed protected in *Washington Aluminum*,¹⁵⁶ may also be within its ambit. As to any type of concerted conduct, however, two limitations could render the conduct unprotected: (1) If the conduct violates law or policy or (2) if there is some legitimate business justification for the employer's limiting or preventing the conduct, such as the need to maintain production or discipline.¹⁵⁷ As to the first kind of limitation, the same questions heretofore noted regarding object would arise; for example, concerted conduct of a violent,¹⁵⁸

¹⁵⁴ See, e.g., *NLRB v. Charles H. McCauley, Assocs.*, 657 F.2d 685, 688 (5th Cir. 1981) (holding that conversations among employees regarding improved working conditions and circulation of a memo constituted protected concerted activity); *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969) (holding that circulation of petition regarding co-worker's difficulties in getting a ride home during a personal emergency was protected activity); *Glenwood Management Corp.*, 287 N.L.R.B. No. 113, slip op. at 2 (Jan. 29, 1988) (finding employees meeting with management to ask for a "decent" wage increase constituted protected conduct); *Mac Tools, Inc.*, 271 N.L.R.B. 254, 259 (1984) (holding informal employees' meeting regarding working condition and grievances was protected concerted conduct).

¹⁵⁵ See generally *Getman*, *supra* note 113 (supporting protection of economic pressure brought by employees).

¹⁵⁶ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962); *supra* notes 103-06 and accompanying text; see also *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 636 (5th Cir. 1986) (protecting work stoppage over "unusually hazardous conditions"); *Triad Management Corp.*, 287 N.L.R.B. No. 132, slip op. at 1 n.1 (Feb. 25, 1988) (protection work stoppage over wage decrease); *Quality C.A.T.V., Inc.*, 278 N.L.R.B. 1282, 1282 (1986) (protecting work stoppage which consisted of refusal to climb wet utility poles); *Daniel Constr. Co.*, 277 N.L.R.B. 795, 795 (1985) (protecting work stoppage over adverse working conditions).

¹⁵⁷ The business justification, however, must be legitimate. See, e.g., *Scientific-Atlanta, Inc.*, 278 N.L.R.B. 622, 625 (1986) (affirming an ALJ's conclusion that "[t]he possibility that ordinary speech and discussion over wages on an employee's own time may cause jealousies and strife among employees is not a justifiable business reason to inhibit the opportunity for an employee to exercise Section 7 rights"); see also *Stein Seal Co. v. NLRB*, 605 F.2d 703 (3d Cir. 1979) (holding restriction of employee's in-plant movements violated Section 8(a)(1)); *Waco, Inc.*, 273 N.L.R.B. 746 (1984) (holding that an unexcused absence is a legitimate business reason for dismissal).

¹⁵⁸ See *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984) (finding threats and damage to property legitimate business reasons for dismissal), *enforced mem.* 765

disloyal,¹⁵⁹ or disruptive nature,¹⁶⁰ or concerted conduct that violates other laws, such as the law of trespass,¹⁶¹ may be unprotected. As to the second kind of limitation, the legitimate justification for interference by the employer, important problems of proof are presented. When an employer interferes with the right of its employees to engage in otherwise protected activity, there is a presumption, which may be rebutted, that such interference violates Section 8(a)(1).¹⁶² When employer interests and employee rights are found to be in conflict, it is the function of the Board to strike an appropriate balance in accordance with the policy of the statute. At the pre-organizational stage, that balance would almost always be struck with the acknowledgement that "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property."¹⁶³

B. *Comparative Evaluations*

Having examined and described the separate aspects of the three dimensions of Section 7 activity, it is now appropriate to investigate the manner in which the dimensions affect each other. By dividing the issues relating to concerted activity for mutual aid or protection into their constituent elements, the formulation of the general theory in this Article invites the Board, subject to appropriate judicial review, and the courts in the exercise of their proper reviewing roles,¹⁶⁴ to recognize which of the elements are relatively inelastic and which are elastic. The more elastic the element, the more appropriate the exercise of the Board's administrative discretion. To the extent that the two highly elastic dimensions, *object* and *conduct*, require comparison in a given fact situation, it will be the function of the Board to exercise its administrative discretion to effectuate the policy of the Act. But as to the relatively inelastic dimension of *concertedness*, there will be less room

F.2d 148 (9th Cir. 1985); cf. 29 U.S.C. § 160(c) (1982) (providing in part that "[n]o order of the Board shall require the reinstatement of any individual . . . if such individual was suspended or discharged for cause").

¹⁵⁹ See *supra* note 73.

¹⁶⁰ See *Crystal Linen & Uniform Servs., Inc.*, 274 N.L.R.B. 946 (1985); *Bell Fed. Savs. & Loan Ass'n*, 214 N.L.R.B. 75 (1974); *Elk Lumber Co.*, 91 N.L.R.B. 333, 336 (1950).

¹⁶¹ See *supra* note 71 and accompanying text.

¹⁶² See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945); *Jeanette Corp. v. NLRB*, 532 F.2d 916, 919 n.4 (3d Cir. 1976); see also *supra* notes 114-26 and accompanying text (discussing *Republic Aviation* and *Jeanette*).

¹⁶³ *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), quoted with approval in *Republic Aviation*, 324 U.S. at 803 & n.10 (1945).

¹⁶⁴ See *infra* text accompanying notes 170-74.

for the exercise of administrative discretion.

The dimension of *concertedness* will generally be relatively inelastic because a particular fact pattern can ordinarily be found to be either concerted or not, without regard to the characteristics of the other two dimensions. Therefore, if concerted action exists, and there is no question regarding object or conduct, the action is protected. However, there are a few gray areas where administrative discretion might be appropriate. In particular, the Board can use its discretion regarding constructive concerted activity based on the conduct of a single employee.¹⁶⁵

On the other hand, the dimensions of *object* and *conduct* are relatively elastic. Each of the latter dimensions is subject to being found protected or unprotected, depending on the quality of the corresponding dimension. Each is subject to being pulled in one direction or another—protected or unprotected—depending on the relative weight each is accorded in the circumstances of particular cases. For example, if the object of the conduct is fairly far removed from the direct concern of the workplace, whether the conduct will be deemed protected or not may depend on how mild or how coercive it is. A work stoppage or picketing for a remote object might thus be unprotected, whereas a conversation or the circulation of a flyer or petition among employees on their own time, for the same remote object, would likely be deemed protected.¹⁶⁶ The opposite situation would require a similar weighing process: If the object concerns a highly relevant workplace issue, such as distribution of overtime, but the means, i.e., the conduct, consists of intermittent work stoppages or a sitdown strike, such coercive activity would assuredly be deemed unprotected.¹⁶⁷ To the extent that the elements of object and conduct require comparison in a given fact situation, the Board may exercise its administrative discretion to effectuate the policy of the Act. Discussion below of the six scenarios will further illustrate each of these three elements and the applicable processes that should be used to analyze them.

¹⁶⁵ See *supra* text accompanying notes 78-84; *infra* text accompanying notes 198-219.

¹⁶⁶ See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (holding that employee distribution of union newsletter which concerned political matters not within the employer's control, was protected by the Act). Justice Powell, writing for the Court, indicated that if some concerted activities bear a less immediate relationship to the employees' interests, those activities may not fall within the "mutual aid or protection" clause of the Act. *Id.* at 567-68.

¹⁶⁷ See *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 39-40 (1942); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 248-49 (1939); *supra* text accompanying notes 71 & 161; cf. *U.A.W., Local 232 v. Wisconsin Employee Relations Bd.*, 336 U.S. 245 (1949) (finding it within the power of the State to prohibit irregular work stoppages when no specific demands were being made or concessions sought).

C. *The Union Factor*

The presence or absence of a union is also a variable that must be considered in the evaluation of Section 7 conduct. At the pre-organizational stage, on which this Article focuses, the union is important by its absence, a factor the Supreme Court noted in *Washington Aluminum*.¹⁶⁸ Unrepresented employees are deemed entitled to greater leeway in the manner in which they engage in their concerted activity. Indeed, many of these cases will involve an employee's first attempt to act in concert. On the other hand, when a union is present, particularly if it is actively involved in the conduct in question, a higher standard of accountability will ordinarily be appropriate. Whether particular conduct is deemed protected may be influenced by, or even be dependent upon, not only the presence of a union but also the relative position of the union in the hierarchy of Section 7 activity.¹⁶⁹

D. *Applying the Theory*

The formulation of the above components and procedures applicable to Section 7 protection of employees who may be engaged in concerted activity for mutual aid or protection spells out a general theory designed to facilitate the process of determining what conduct is protected and what conduct is not. This general theory can be useful both for the purpose of determining clear statutory intent, which is ultimately a judicial function, and for the purpose of determining statutory policy, which is the Board's function when it exercises its administrative discretion to arrive at a permissible construction of the language of Section 7.

The two areas of statutory application contemplated by the congressional mandate are, in my view, fairly well marked as to Section 7.

¹⁶⁸ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

¹⁶⁹ For example, it will make a difference whether the union is present at the polarized organizational stage, or at a later stage of responsible collective bargaining, or perhaps at an even more mature stage involving the enforcement of a collective bargaining agreement containing both a no-strike clause and a grievance/arbitration procedure. For further implications of the union presence, for example the matter of balancing property rights and Section 7 conduct, see *Hudgens v. NLRB*, 424 U.S. 507 (1975); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Jean Country*, 291 N.L.R.B. No. 4 (Sept. 27, 1988). However, the detailed effect of the union's presence at the various stages of section 7 activity is beyond the reach of this Article, this being only a glimpse at a general theory that concentrates only on the pre-organizational stage. But I mention these additional elements because they are important for the long-run evaluation and application of Section 7 throughout all of the processes enumerated by Justice Brennan in *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984). See *supra* notes 61-63 and accompanying text (discussing *City Disposal*).

In the first area, where clear statutory intent exists, there is no room for exercise of administrative discretion. In the second area, where the statute is either silent or ambiguous, the Board can properly exercise its administrative discretion. Both areas will be illustrated in the discussion of the scenarios treated in this Article. And both areas will presumably now be governed by the Supreme Court's sharp differentiation, as expressed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁷⁰ *INS v. Cardoza-Fonseca*,¹⁷¹ and *NLRB v. Food & Commercial Workers*,¹⁷² between the roles of administrative agencies and reviewing courts in interpreting statutes that the agencies administer.¹⁷³

In *Food and Commercial Workers*, the Court affirmed that the application of the standards of judicial review prescribed in *Chevron* and *Cardoza-Fonseca* were applicable to the Board's interpretation of the National Labor Relations Act. It defined the judicial role as follows:

On a pure question of statutory construction, our first job is to try to determine congressional intent, using "traditional tools of statutory construction." If we can do so, then that interpretation must be given effect, and the regulations at issue must be fully consistent with it However, where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." . . . Under this principle, we have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute.¹⁷⁴

Accordingly, in applying and interpreting Section 7 it is important to distinguish between what the provision requires and what the provision permits. The formulation of the general theory herein is an attempt to provide a rational framework for the performance of that task.

¹⁷⁰ 467 U.S. 837 (1984).

¹⁷¹ 480 U.S. 421 (1987).

¹⁷² 108 S. Ct. 413 (1987); cf. *Edward J. DeBartolo Co. v. Florida Gulf Coast Bldg. & Constr. Trades*, 108 S. Ct. 1392, 1397 (1988) (recognizing the usual deference paid to the Board's interpretation of the NLRA but stating "where an otherwise acceptable construction of a statute would raise serious Constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

¹⁷³ See Pierce, *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988).

¹⁷⁴ *Food & Commercial Workers*, 108 S. Ct. at 421 (citations omitted).

III. TESTING THE THEORY: TWO REAGAN BOARDS, SIX SCENARIOS, AND THE STATUTORY DIRECTIVE

It is not easy to understand the current Board's interpretation of Section 7 language relating to concerted activity for mutual aid or protection, in part because of the Board's recent ambivalence about its own nominal rule or rules. The rule, of course, is the *Meyers* rule. But which *Meyers* rule: that of *Meyers I* or of *Meyers II*?¹⁷⁵ Although *Meyers I* formally states the rule, *Meyers II*, to a large degree, interprets it. The two decisions are quite different, not only because the Board was required to reconsider the case on remand from the District of Columbia Court of Appeals, but also because, with the passage of time, the Board's membership had changed. Two Reagan Boards, Reagan Board I and Reagan Board II, considered these cases, and those are decidedly different Boards.¹⁷⁶ Reagan Board I displayed an essentially revisionist attitude toward the statute,¹⁷⁷ and a significant number of its more controversial rulings have been reversed or remanded by the reviewing courts.¹⁷⁸ *Meyers I* was one such case. In contrast, Reagan

¹⁷⁵ *Meyers Indus. Inc.*, 281 N.L.R.B. No. 118 (Sept. 30, 1986), *enforced sub nom.* *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) [*Prill I*], *cert. denied*, 108 S. Ct. 2847 (1988).

¹⁷⁶ Reagan Board I extended roughly from 1984 through 1985 and Reagan Board II extended roughly from 1986 through the end of 1988. The periods generally coincided with the time-span in which Chairman Dotson was voting with the majority on critical cases (Reagan Board I) and the span in which he was filing his numerous dissents and also the remaining period in 1988 after his departure (Reagan Board II).

¹⁷⁷ See Morris, Harper & Van Os, *Panelists Debate Merits of Current NLRB Decisions at Meeting in Dallas*, Daily Labor Rep. (BNA) No. 68, Apr. 9, 1985, at A2. See generally Modjeska, *The Reagan NLRB, Phase I*, 46 OHIO ST. L.J. 95, 130-31 (1985) (analyzing reversals of the Reagan Board and arguing that they reflect a reduction in employee protection and a significant curtailment of union power); Morris & Turk, *A Labor Roundup and Forecast: The Balance Continues to Shift*, 11 EMPL. REL. L.J. 32, 54-55 (1985) (reviewing significant decisions of the Reagan Board and arguing that they demonstrate a conservative shift favoring management over labor).

¹⁷⁸ See, e.g., *Edward J. DeBartolo Co. v. Florida Gulf Coast Bldg. & Constr. Trades*, 108 S. Ct. 1392, 1396 (1988); *NLRB v. International Bhd. of Elec. Workers*, 481 U.S. 573, 588 (1987); *NLRB v. International Longshoremen's Ass'n*, 472 U.S. 61 (1985); *NLRB v. International Bhd. of Elec. Workers, Local 1395*, 797 F.2d 1027 (D.C. Cir. 1986); *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986); *Financial Inst. Employees of Am.*, 752 F.2d 352 (9th Cir. 1984), *rev'g* 265 N.L.R.B. 426 (1982), *aff'd*, 475 U.S. 192 (1986); *E.I. DuPont de Nemours & Co.*, 274 N.L.R.B. 1104 (1985) [*Dupont II*], *rev'd and remanded sub. nom.* *Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986); *Meyers I*, 268 N.L.R.B. 493 (1984), *remanded sub. nom.*, *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) [*Prill I*], *cert. denied*, 474 U.S. 948 (1985), *on remand*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) [*Prill II*], *cert. denied*, 108 S. Ct. 2847 (1988); *Herbert F. Darling, Inc.*, 267 N.L.R.B. 476 (1983), *rev'd and remanded sub. nom.* *Ewing v. NLRB*, 732 F.2d 1117 (2d Cir.), *on remand* *Herbert F. Darling, Inc.*, 273 N.L.R.B. 346 (1984) [*Darling II*], *rev'd and remanded sub. nom.* *Ewing v. NLRB*, 768 F.2d 51 (2d Cir. 1985) [*Ewing II*], *on remand* *Herbert F. Darling, Inc.*, 287 N.L.R.B. No. 148 (Feb. 29, 1988) [*Darling III*].

Board II made more of an effort to enforce the statute in accordance with its terms. Nevertheless, at least in the area of protected concerted activity for mutual aid or protection, Reagan Board II seemed unable to formulate a clear statement of either policy or interpretive standards. This may have been due in part to its face-saving reluctance to abandon the rule of *Meyers I*; consequently, the current Board has paid lip service to *Meyers I* while actually applying the broader principles of *Meyers II*.¹⁷⁹

The promulgation of the *Meyers* rule illustrates the gamut of problems that attend rulemaking by adjudication. Rather than give notice to the labor-management community that it was considering the issuance of a new, comprehensive rule to govern concerted activity, and thereby allow and encourage the marshalling of facts and arguments in healthy debate, Reagan Board I issued the rule in question in an obscure case involving one individual, Kenneth Prill, and his employer, Meyers Industries. The Board was ostensibly only reversing the rule of *Alleluia Cushion Co.*,¹⁸⁰ but in reality it was promulgating, albeit in the form of dicta, a new and comprehensive definition of protected concerted activity.

A. *The Concept of Constructive Concerted Activity*

Scenario Number 1: *Meyers Industries, Inc.*¹⁸¹

The first scenario involves a truck driver, Kenneth Prill, who was employed by an aluminum boat company in Michigan. Prill had repeatedly complained to his employer about the unsafe condition of the equipment that he had been assigned to drive. After an accident in Tennessee, which the Board found was caused by malfunctioning brakes, Prill contacted the Tennessee Public Service Commission to arrange for an inspection. The inspection resulted in a citation that put the unit out of service. Two days later he was called in by his supervi-

¹⁷⁹ See *Hamilton Plastics*, 291 N.L.R.B. No. 90 (Oct. 31, 1988); *Owens Illinois, Inc.*, 290 N.L.R.B. No. 155 (Sept. 22, 1988); *Whittaker Corp.*, 289 N.L.R.B. No. 116 (July 18, 1988); *Oakes Machine Corp.*, 288 N.L.R.B. No. 52 (Apr. 14, 1988); *Quality Pallet Sys., Inc.*, 287 N.L.R.B. No. 123 (Feb. 15, 1988); *Glenwood Management Corp.*, 287 N.L.R.B. No. 113 (Jan. 29, 1988); *Salisbury Hotel, Inc.*, 283 N.L.R.B. No. 101 (Apr. 21, 1987); *Jhirmack Enters.*, 283 N.L.R.B. No. 91 (Apr. 19, 1987); *Joseph De Rario*, 283 N.L.R.B. No. 86 (Apr. 10, 1987); *Millcraft Furniture Co.*, 282 N.L.R.B. No. 83 (Jan. 5, 1987); *Every Woman's Place, Inc.*, 282 N.L.R.B. No. 48 (Dec. 11, 1986); *Consumers Power Co.*, 282 N.L.R.B. No. 24 (Nov. 13, 1986).

¹⁸⁰ 221 N.L.R.B. 999 (1975), *overruled*, *Meyers I*, 268 N.L.R.B. 493 (1984), *remanded sub nom. Prill I*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985).

¹⁸¹ *Meyers I*, 268 N.L.R.B. 493 (1984).

sor and discharged because "we can't have you calling the cops like this all the time."¹⁸² The Administrative Law Judge found Prill's activity to be concerted under the Board's then effective *Alleluia* doctrine.

Reagan Board I disagreed, overruling *Alleluia*.¹⁸³ In *Alleluia*, the Board had held that a single employee's invocation to an external public agency about an employment-related matter constituted protected concerted activity. Such finding of constructive concerted activity was based on a presumption that "consent of action emanates from the mere assertion of statutory rights."¹⁸⁴ The Board declared that "in the absence of any evidence that fellow employees disavow such representation" it would find an "implied consent thereto."¹⁸⁵ Although not expanded upon, the *Alleluia* Board also provided another basis for its holding: that an employer's retaliation against the whistle-blowing employee would have a chilling effect on other employees seeking outside assistance.¹⁸⁶

¹⁸² *Prill I*, 755 F.2d at 945.

¹⁸³ See *Meyers I*, 268 N.L.R.B. at 493. *Alleluia* involved an employee in a nonunion plant, Jack Henley, who was discharged for writing a letter to the California Occupational Safety and Health Administration (OSHA) about alleged safety violations. The Administrative Law Judge ruled that his activity was unprotected because he had never discussed the matter with any fellow employees. The Board, however, found the activity protected, reasoning that it would be incongruous with the public policy enunciated in the OSHA legislation "to presume that, absent outward manifestation of support, Henley's fellow employees did not agree with his efforts to secure compliance with the statutory obligations imposed on [the employer] for their benefit." *Alleluia*, 221 N.L.R.B. at 1000.

¹⁸⁴ *Alleluia*, 221 N.L.R.B. at 1000.

¹⁸⁵ *Id.*

¹⁸⁶ The Board stated that Henley's discharge, one day after OSHA had inspected the workplace, "would indicate to the other employees the danger of seeking assistance from Federal or state agencies in order to obtain their statutorily guaranteed working conditions." *Id.*

Following *Alleluia*, the doctrine of constructive concerted activity was applied to other situations in which employees had appealed to outside authority for assistance in correcting perceived employer wrongdoings or in enforcing employment related legislation. See, e.g., *Hitchiner Mfg. Co.*, 238 N.L.R.B. 1253, 1257 (1978) (requesting management to investigate an abusive supervisor was protected activity); *Bighorn Beverage*, 236 N.L.R.B. 736, 755 (1978) (discharging an employee for reporting unsafe practices to a state agency was an unfair labor practice), *vacated*, 614 F.2d 1238 (9th Cir. 1980); *Air Surrey Corp.*, 229 N.L.R.B. 1064, 1071 (1977) (holding that employee's attempt to determine employer's financial status was protected activity), *enforcement denied*, 601 F.2d 256 (6th Cir. 1979); *Dawson Cabinet Co.*, 228 N.L.R.B. 290, 291 (holding that work stoppage in support of a grievance concerning conditions of employment—equal pay for equal work—was protected), *enforcement denied*, 566 F.2d 1079 (8th Cir. 1977); *Triangle Tool & Eng'g Co.*, 226 N.L.R.B. 1354, 1357 (1976) (discharging an employee for reporting to the Wage and Hour Division was an unfair labor practice).

The doctrine did not, however, fare well in the Circuits. The leading example of appellate rejection of *Alleluia* was *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980), *denying enforcement to* 245 N.L.R.B. 1053 (1979). The *Krispy*

Reagan Board I seized the opportunity provided by *Meyers I* to redefine the meaning of Section 7's language to require the existence of literal concertedness. This new rule, justified primarily by the bald assertion that such a definition was "mandated by the statute itself,"¹⁸⁷ states:

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, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.¹⁸⁸

On review, the District of Columbia Court of Appeals, in a penetrating opinion written by Judge Edwards, reversed and remanded the case because the Board had erroneously held that its narrow interpretation of concerted activity was statutorily required and because it had also relied on a misinterpretation of prior Board and court precedent. In particular, the court's opinion stressed that the Supreme Court's holding in *City Disposal*¹⁸⁹ had "made clear that Section 7 does not compel a narrowly literal interpretation of 'concerted activities,' but rather [it] is to be construed by the Board in light of its expertise in labor relations."¹⁹⁰ Judge Edwards reminded the Board that the Court in *City Disposal* had emphasized that, "[w]hat is not self-evident from

Kreme court relied on the Third Circuit's formulation in *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), *see supra* text accompanying notes 80-85, to conclude that for a single employee's activity to be deemed concerted, it must have been "engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." *Krispy Kreme*, 635 F.2d at 307 (citing *Mushroom Transp.*, 330 F.2d at 685). The Fourth Circuit contended that the *Alleluia* presumption was primarily "theoretical," *id.* at 307, 308, for the single employee's action would be "for the benefit of other employees only in a theoretical sense." *Id.* The court thus ignored the fact that the Act protects the "right" to engage in concerted activity as well as actual concerted activity. But inasmuch as the Board itself had failed to focus on the "right," it is not surprising that the court focused solely on conduct that was overtly related to concerted activity.

¹⁸⁷ *Meyers I*, 268 N.L.R.B. at 496.

¹⁸⁸ *Id.* at 497.

¹⁸⁹ *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984).

¹⁹⁰ *Prill v. NLRB*, 755 F.2d 941, 951 (D.C. Cir.) [*Prill I*], *cert. denied*, 474 U.S. 948 (1985). Noting the absence of any reference to the possibility of a chilling effect, Judge Edwards also chided the Board for failing "even to consider whether the discharge of an employee because of his safety complaints would discourage other employees from engaging in collective activity to improve working conditions." *Id.* at 953.

the language of the Act . . . is the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity."¹⁹¹ Accordingly, on the basis of the rule of *SEC v. Chenery Corp.* ("*Chenery P*"),¹⁹² *Meyers I* was remanded for reconsideration.

Meanwhile, the Board's membership had changed. It was now Reagan Board II that received the case on remand and decided *Meyers II*.¹⁹³ Although the decision paid lip service to the *Meyers I* rule, or at least the first part of it,¹⁹⁴ the opinion provided such a broad interpretation of the earlier decision that much of the damage of the original rule was abated.

Meyers II expressly affirmed the portion of the *Meyers I* rule that stated 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

¹⁹¹ *City Disposal*, 465 U.S. at 830-31. In *City Disposal*, the Court approved the Board's *Interboro* doctrine. See *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966) (holding that the action of a single employee in asserting rights under a collective bargaining agreement is protected concerted activity under Section 7), *enforced*, 388 F.2d 495 (2d Cir. 1967); see *supra* note 75 (discussing *Interboro*).

¹⁹² 318 U.S. 80 (1943). In *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) [*Chenery II*], the Court articulated the *Chenery* rule:

to the effect that a reviewing court, in dealing with a determination or judgement which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Id. at 196. The Court also noted an "important corollary of the . . . rule[:]" If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *Id.*

¹⁹³ Chairman Dotson joined in the opinion in *Meyers II*, which I find inexplicable in view of his later dissenting and concurring opinions in *Every Woman's Place, Inc.*, 282 N.L.R.B. No. 48 (Dec. 11, 1986) and *Salisbury Hotel, Inc.*, 283 N.L.R.B. No. 101 (Apr. 21, 1987).

¹⁹⁴ Curiously, *Meyers II* omitted reference to the second part of the rule, the requirement of employer knowledge and unlawful motivation. I hesitate to comment on the meaning of this omission, if it has meaning, for the missing part was later included, but without comment, in *Herbert F. Darling, Inc.*, 287 N.L.R.B. No. 148, slip op. at 7 (Feb. 29, 1988) [*Darling II*]. The absence of unlawful motivation is not ordinarily a defense in a Section 8(a)(1) case. See *NLRB v. Burnup & Sims*, 379 U.S. 21, 22-23 (1964); *ILGWU v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 738 (1961). At the very least, however, the ambiguity attached to the employer-knowledge-and-motive part of the *Meyers I* rule underscores the inadequacy of the process of promulgating substantive rules of broad application in dicta of adjudicated cases. No one can really know whether this second part of the *Meyers I* rule is prevailing law, because it was not part of the case which was reviewed by the D.C. Court of Appeals in *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) [*Prill II*], *cert. denied*, 108 S. Ct. 2847 (1988).

by and on behalf of the employee himself.”¹⁹⁵ But Reagan Board II did not permit that seemingly rigid language to carry its own plain meaning. Instead of requiring an agency-like authorization if an employee’s act was to be protected, the Board explained, by way of interpretative glosses, that the provision really meant something else:

On linkage:

[J]oint employee action [is] the touchstone for our analysis. . . . The definition of concerted activity which the Board provided in *Meyers I* proceeds logically from such an analysis insofar as it requires some *linkage* to group action in order for conduct to be deemed “concerted.”. . . [The *Meyers I* definition is] expansive enough to include individual activity which is connected to collective activity.¹⁹⁶

On group activity:

When the record evidence demonstrates *group* activities, whether “specifically authorized” in a formal agency sense, or otherwise, we shall find the conduct to be concerted.¹⁹⁷

On single employee activity:

There is nothing in the *Meyers I* definition which states that

¹⁹⁵ *Meyers II*, 281 N.L.R.B. No. 118, slip op. at 11 (Sept. 30, 1986), *enforced sub nom. Prill II*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2847 (1988).

¹⁹⁶ *Meyers II*, 281 N.L.R.B. No. 118, slip op. at 6-7 (emphasis added). This may be only loose “linkage.” See *Salisbury Hotel*, 283 N.L.R.B. No. 101, slip op. at 6-7; *Every Woman’s Place*, 282 N.L.R.B. No. 48, slip op. at 1-2; see also *Whittaker Corp.*, 289 N.L.R.B. No. 116, slip op. at 5-6 (July 18, 1988) (holding that employee protest at employee meeting called by management regarding withholding of annual pay-increase was protected); *Jhirmack Enters.*, 283 N.L.R.B. No. 91, slip op. at 5 (Apr. 19, 1987) (finding that employee’s speaking to another employee about matters raised at an employee gripe session called by management was protected concerted activity).

¹⁹⁷ *Meyers II*, 281 N.L.R.B. No. 118, slip op. at 13. Never mind that this interpretation appears to contradict the plain meaning of the words in the original rule, thus providing further evidence of the hazards of rulemaking by adjudication.

For examples of when the Board has found employee’s activity “authorized” and therefore protected, see *Hamilton Plastics*, 291 N.L.R.B. No. 90, slip op. at 2 (Oct. 31, 1988) (holding that employee’s complaint is concerted because it involved several other employees); *Owens Illinois, Inc.*, 290 N.L.R.B. No. 155, slip op. at 1 (Sept. 22, 1988) (finding that employer’s perception that employee was acting with other employees was evidence of concerted action); *Oakes Machine Corp.*, 288 N.L.R.B. No. 52, slip op. at 1-2 (Apr. 14, 1988) (finding that unsigned letter’s use of “we” gave adequate notice of concerted nature of employee’s complaint); *Joseph De Rario*, 283 N.L.R.B. No. 86, slip op. at 5-6 (Apr. 10, 1987) (finding employee authorized to talk on behalf of other employees); *Consumers Power Co.*, 282 N.L.R.B. No. 24, slip op. at 6-7 (Nov. 13, 1986) (finding that a coworker’s silent acquiescence was sufficient to find that the active employee acted “on the authority of” the coworker).

conduct engaged in by a single employee at one point in time can *never* constitute concerted activity within the meaning of Section 7.

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[W]e intend that *Meyers I* be read as fully embracing the view of concertedness exemplified by the *Mushroom Transportation* line of cases [O]ur definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

.
[I]ndividual activity "looking toward group action" is deemed concerted.¹⁹⁸

Notwithstanding the explanatory glosses, *Meyers II* failed to recognize the true relationship between activity for mutual aid or protection and group action, because it failed to see that the former is but a prelude to group action, and, therefore, entitled to protection as part of the right to engage in such action. The Board even "freely acknowledged that efforts to invoke the protection of statutes benefiting employees are efforts engaged in for the purpose of 'mutual aid of protection,'"¹⁹⁹ but it failed to make the logical connection between such activity and the benefit other employees would receive. Instead of addressing the presumption created by *Alleluia*, it set up two other possibilities as straw men: "either . . . to indulge in a presumption that *all* statutes that benefit employees are the product of concerted employee activity or . . . to make factual inquiries into who had worked for passage of the law in question."²⁰⁰ The Board then, promptly, and probably correctly, proceeded to demolish both of those far-fetched possibilities. But nowhere did it address the real presumption raised by *Alleluia*, which was a rebuttable presumption, not a per se rule as both Reagan Boards were fond of claiming.²⁰¹ Member Zimmerman, in his dissent in *Meyers I*, paraphrased the *Alleluia* presumption as follows:

[I]t is reasonable to presume that when an individual

¹⁹⁸ *Meyers II*, 281 N.L.R.B. No. 118, slip op. at 11, 15-16; see *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

¹⁹⁹ *Meyers II*, 281 N.L.R.B. No. 118, slip op. at 17.

²⁰⁰ *Id.* at 19.

²⁰¹ See *Herbert F. Darling, Inc.*, 287 N.L.R.B. No. 148, slip op. at 6, 15 (Feb. 29, 1988) [*Darling III*], *aff'd sub nom.* *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988); *Meyers I*, 268 N.L.R.B. at 495.

employee invokes a statute governing a condition in the workplace he is within the scope of employee action contemplated by the Act [I]t would be incongruous with the public policy embedded in employment-related legislation . . . to assume that, in the absence of an express manifestation of support, other employees do not collectively share an interest in an attempted vindication of the statutory right created for their benefit

Making this presumption does not end the matter; it merely shifts the burden to the employer to show that, in a particular case, the employees, for whatever reasons, opposed the individual's assertion of that interest or that the individual specifically acted in his own interest.²⁰²

Member Zimmerman's interpretation of the statute would have been wholly consistent with Section 7 policy, because his concept of constructive concerted activity provided meaningful protection for the "right" to engage in such activity. This is not to say, however, that such an interpretation was required by the statute, for here we may be dealing with an area in which the statute is silent or ambiguous. But if the Board chose, as it did, to reject that interpretation, it was obligated to provide a rational basis consistent with the policy of the Act for doing so.

Was the interpretation that it provided rational and consistent with the statute?²⁰³ Primarily, the Board avoided commenting on the real *Alleluia* presumption, notwithstanding that such presumption was backed by essentially the same reasoning as the presumption that the Supreme Court had approved in *Republic Aviation*.²⁰⁴ *Meyers II* purported to rely on *City Disposal*, but in fact it relied on a misreading of that case. It is true, as the Board noted, that the Court there "found 'concerted' activity because the employee's invocation of the contract

²⁰² *Meyers I*, 268 N.L.R.B. at 503; see also *Ewing v. NLRB*, 768 F.2d 51 (2d Cir. 1985) [*Ewing II*].

We reject the view of the Fourth Circuit in *Krispy Kreme*, that the presumption is irrebuttable and that therefore the concertedness requirement is read out of the Act Just as an employer may show that a presumptively invalid no-solicitation rule is "necessary in order to maintain production or discipline," an employer may demonstrate that an employee's presumptively concerted action was, in fact, frivolous or in bad faith and, therefore, both unprotected and lacking in group support.

Id. at 56 (citation omitted).

²⁰³ See *supra* notes 170-74 and accompanying text.

²⁰⁴ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). See *supra* notes 112-15 & 195 and accompanying text (discussing *Republic Aviation*).

was an extension of the collective employee activity that produced the contract,"²⁰⁵ but that was only because the Court had before it a mature collective bargaining relationship that allowed this easy reference to collective action in *City Disposal*. But the situation under Section 7 at the pre-organizational stage is different, so *Alleluia* and *Meyers* need not depend on existing concerted activity. It suffices that the *right* to engage in such activity be material to that issue. Accordingly, the Board should have directly addressed the *Alleluia* presumption and also the question of whether the discharge or discipline of an employee who seeks outside assistance has a chilling effect on other employees who might later wish to engage in conduct protected by Section 7.

The Board's treatment of the latter question, which had been specifically posed by Judge Edwards,²⁰⁶ was to beg the question. Its first response was contained in *Meyers II*, but it had much more to say on the subject in the *Darling*²⁰⁷ case, in which it reaffirmed the rule of *Meyers I*, at least as modified by *Meyers II*. The *Meyers II* response was categorical: it simply declared, without benefit of any developed record on the subject, empirical data, or reference to reasoned expert opinion, that: "We do not view Prill's discharge as having a 'chilling effect' on the exercise of Section 7 rights by other employees."²⁰⁸ Notwithstanding that it was consciously promulgating a rule—for *Meyers II* opened with the statement that *Meyers I* "defined the concept of concerted activity for purposes of Section 7"²⁰⁹—the Board suddenly switched gears to the adjudicatory mode, saying that it found no chilling effect in Prill's activity because "[t]he *record* fails to establish that his purely individual activities were 'related to other employees' concerted activities' in any demonstrable manner."²¹⁰ In the first place, the Board had no proper basis for making that specific finding, for it did not remand the case to the Administrative Law Judge for development of evidence on that issue and the matter had not been an issue in the original trial because of the prevailing *Alleluia* presumption. In the second place, and more importantly, this was a rule of general application. Therefore, the Board should have used either of two possible options available to it: (1) It could have relied upon the type of reasoning and expertise that it had employed in fashioning the rule and presumption regarding solicitation on an employee's own time, as enunciated in

²⁰⁵ *Meyers II*, 281 N.L.R.B. No. 18, slip op. at 17.

²⁰⁶ See *supra* note 182.

²⁰⁷ Herbert F. Darling, Inc., 287 N.L.R.B. No. 148 (Feb. 29, 1988) [*Darling III*], *aff'd sub nom.* Ewing v. NLRB, 861 F.2d 353, 355 (2d Cir. 1988).

²⁰⁸ *Meyers II*, 281 N.L.R.B. No. 118, slip op. at 20.

²⁰⁹ *Id.* at 1 (emphasis added).

²¹⁰ *Id.* at 20 (emphasis added).

*Peyton Packing*²¹¹ and *Republic Aviation*;²¹² or, (2) it could have relied upon expert opinion or empirical evidence gleaned from a notice-and-comment APA rulemaking proceeding.²¹³

The Board's more extensive response in *Darling* was prompted by the Second Circuit's intimation that the layoff of employee Ewing, which the Board found to have been based on the employer's belief that Ewing had filed a safety complaint with the Occupational Safety and Health Administration, may have had a "'chilling effect' on other employees' concerted activity."²¹⁴ This time the Board provided an explanation that was premised on an approach that the Board and the Supreme Court had long ago specifically rejected in *Republic Aviation*²¹⁵ and many other cases, which was that there must be proof of specific harm in the specific case. Looking at the record in the specific case, but again not remanding it for further development on the point in issue, the Board concluded that there had been no chilling effect because there was no "connection to other employees' concerted activities."²¹⁶ Rather than drawing the logical inference as to what message such discipline would ordinarily send to other employees, the Board had again made it clear that it would look only to the particular fact situation. Based on a narrow reading of the facts in *Darling*, it found:

no contention that the Respondent thought or communicated to other employees that it considered Ewing's suspected activity as tied to any group action. In fact, the record shows that, at the time, there was not any ongoing group activity relating to safety complaints at the respondent's jobsite. [Ac-

²¹¹ *Peyton Packing Co.*, 49 N.L.R.B. 828 (1943)

²¹² *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945).

²¹³ See 5 U.S.C. § 553 (1982); see also *supra* note 129 and accompanying text.

²¹⁴ *Herbert F. Darling, Inc.*, 287 N.L.R.B. No. 148, slip op. at 8 (Feb. 29, 1988) [*Darling III*], *aff'd sub nom. Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988).

²¹⁵ In *Republic Aviation* the employers (Republic and La Tourneau) contended:

that there must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company. Neither in the *Republic* nor the *Le Tourneau* cases can it properly be said that there was evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members.

Republic Aviation, 324 U.S. at 798-99.

²¹⁶ *Darling III*, 287 N.L.R.B. No. 148, slip op. at 14. Although *Darling III* was affirmed on appeal, the appellate court's decision was critical of the Board's reasoning, noting that "[t]he Board's conclusion that a single employer's invocation of a statutory employment right is not 'concerted activity' under § 7 is not, in our view, preferable. Nevertheless, we reluctantly conclude that the Board has offered a reasonable interpretation of the Act." 861 F.2d at 355.

cordingly,] we do not see the action against Ewing as signaling a message to others to refrain from concerted activity, any more than we found such a signal in Prill's situation in *Meyers II*, where we noted that he "acted alone and without an intent to enlist the support of other employees."²¹⁷

The Board thus avoided answering the right question: whether the discipline of Prill and Ewing respectively would *generally* have the effect of discouraging other employees from reporting such violations in the future or from engaging in any other protected concerted activity, regardless of the intent of either the whistle blowing employee or his employer. But elsewhere the same Board has conceded that when more than one employee report a violation, their similar but separate activity is deemed concerted even though they did not necessarily plan to act in concert.²¹⁸ How then can the example made of those such as Prill or Ewing fail to represent to a prospective but cautious whistle blower a denial of the right to engage in similar protected conduct?

Although the concept of constructive concerted activity in *Alleluia* may not be required by the statute, the Board should nevertheless be required to articulate the rationality of its current interpretation and explain fully its rejection of the prior *Alleluia* rule.²¹⁹ Thus far, in my view, it has failed to comply with that basic administrative responsibility. However, the panel of the District of Columbia Circuit that reviewed *Meyers II* was less demanding. In a brief opinion (*Prill II*) written by Judge Silberman, the court uncritically affirmed the Board's case-oriented treatment of the *Alleluia* presumption.²²⁰ Although the decision was entirely case-oriented rather than rule-oriented, for purposes of notice to the employment law community, *Meyers* stands as a rule.

B. *The Concept of Concertedness*

Scenario Number 2: *Every Woman's Place*²²¹

An employee was fired for calling the Wage and Hour Division of

²¹⁷ *Id.* (citing *Meyers II*, 281 N.L.R.B. No. 118, slip op. at 20).

²¹⁸ See *id.* at 12; *Salisbury Hotel, Inc.*, 283 N.L.R.B. No. 101, slip op. at 6-7 (Apr. 21, 1987); *Every Woman's Place, Inc.*, 282 N.L.R.B. No. 48, slip op. at 1-2 (Dec. 11, 1986); *infra* text accompanying notes 214-28.

²¹⁹ See *infra* notes 319-25 and accompanying text (emphasizing the need for clarity and full explanation when the Board changes an existing rule).

²²⁰ See *Prill v. NLRB*, 835 F.2d 1481, 1485 (D.C. Cir. 1987) [*Prill II*], *cert. denied*, 108 S. Ct. 2847 (1988).

²²¹ *Every Woman's Place, Inc.*, 282 N.L.R.B. No. 48 (Dec. 11, 1986).

the Department of Labor, on her own initiative, after several employees had each complained about a holiday overtime matter. The employer, which was engaged in providing shelter and counseling services to run-away youths, had recently reorganized as a result of merger, and the staff was concerned about the prospect of changes in working conditions and compensation. Several employees, during regular staff meetings with their supervisors, asked one of the managers what the new holiday and compensatory policy would be. His answers were inconclusive. So employee Cathy Doran, solely on her own initiative, called the Wage and Hour Division of the United States Department of Labor and asked how employees were legally entitled to be paid when they worked on holidays.²²² She then relayed to management the information she received, but management was displeased with her action and subsequently discharged her.

The Board's majority opinion held that her call to the Department of Labor was "sufficiently linked to group activity to constitute 'concerted' activity" on the authority of *Meyers II*.²²³ Her phone call was deemed the "logical outgrowth" of the earlier protest by other employees. It is not surprising that Chairman Dotson dissented. He charged his colleagues with ignoring the dictates of *Meyers I*, which had required that the protected employee be the "group's specifically designated agent."²²⁴ But *Meyers II* controlled. Indeed, *Every Woman's Place* demonstrates the basic difference between the holdings in the two *Meyers* cases.

Based on Doran's call to the Wage and Hour Division, Chairman Dotson accused his colleagues of applying the *Alleluia* presumption. Actually, that call was significant only for its triggering effect on management; it was not significant to establish the existence of concerted activity. As it was explained earlier in the discussion of the general theory, the statutory element of the *right* to engage in concerted activity warrants the Board finding the existence of concert based on a liberal construction of facts pointing to concert. Thus the fact that several employees, including Cathy Doran, had raised the question about the holiday overtime matter was sufficient for the Board to recognize the existence of a presumption. It presumed that the other employees who had raised the same questions tacitly authorized or made common cause with Doran when she carried the question a step further by calling the Wage and Hour Division. The majority was correct in finding suffi-

²²² Doran testified, "I took it upon myself to call the Wage and Hour Division." *Id.* at 7 (Dotson dissenting).

²²³ *Id.* at 2.

²²⁴ *Id.* at 7-8 (Dotson, dissenting).

cient linkage.

Scenario Number 3: *Salisbury Hotel*²²⁵

The third scenario involves an employee who was fired for speaking up about a lunchbreak problem that concerned her and several other employees. Cheryl Resnick worked for a New York hotel in a job that was not covered by a union contract. The problem began when the company changed its lunch hour policy. Reservation desk employees had formerly been permitted to forego their lunch hour and also allowed to leave an hour early or report an hour late. When the company announced a new policy that all employees must now take their lunch hour, the front office manager qualified that policy by announcing that only women would be required to take the lunch break "[b]ecause it's the law . . . women have to take a lunch hour."²²⁶ Everybody balked, but Resnick was the most vocal complainer; in fact she did more than complain. She called the United States Department of Labor and was told that it was unlawful to apply the lunchbreak policy only to women. She reported this to her supervisor, who said he "stood corrected [and] from then on everybody was taking lunch hours."²²⁷ Two weeks later Resnick was fired. The Board found that she was discharged because (1) she had complained to other employees and to the company about the lunch hour policy, (2) she had contacted the Department of Labor, and (3) her employer had mistakenly believed that she was engaged in union activity.²²⁸ The first reason, which was sufficient to find a violation, is the one that is central to this inquiry.

The Board could not find that the employees had explicitly agreed to act concertedly. It did find, however, that they had tacitly agreed to take the new lunch hour issue up with management.²²⁹ Accordingly, the Board found on the authority of *Meyers II* that the employees had been engaged in a concerted effort to change the lunch policy and that Resnick's individual complaints had been a part of that concerted effort. No formal concertedness was required. Her independent call to the La-

²²⁵ *Salisbury Hotel, Inc.*, 283 N.L.R.B. No. 101 (Apr. 21, 1987). Switchboard operators were unionized, reservation clerks were not. Because Resnick had adamantly objected to becoming affiliated with any union, the company accommodated her when she was hired by assigning her to a combination reservation-clerk/switchboard-operator job in which she would work more hours as a reservation clerk, and thus not be included in the union bargaining unit that covered switchboard operators. Considering Resnick's disdain for unions, what eventually happened to her job was ironic.

²²⁶ *Id.* at 3 (quoting office manager's testimony).

²²⁷ *Id.*

²²⁸ *See id.* at 2 (adopting finding of ALJ).

²²⁹ *See id.* at 6.

bor Department was deemed a continuation of the implied concerted activity. Resnick had indeed acted for her fellow employees' mutual aid and protection.²³⁰

It is not surprising that Chairman Dotson again dissented, for the case was much like *Every Woman's Place*. But in *Salisbury Hotel* the majority more clearly articulated its reasoning, pointing out that although there was "no evidence that the . . . employees explicitly agreed to act together to change the Respondent's lunch hour policy, they did at least tacitly agree that they had a grievance and that they should take it up with management."²³¹ The Board thus made it clear that the *Meyers* rule no longer required literal concertedness. It noted that it was sufficient that there be only a communication from speaker (Resnick) to listener (other employees), for "such activity is an indispensable preliminary step to employee self-organization."²³² The Board also relied on the fact that the "employees complained among themselves and most, including Resnick, brought the complaint directly to [management]."²³³ It found that "Resnick's complaints to other employees, as well as her individual complaints to [management], were part of that concerted effort."²³⁴

It was in this case that Member Johansen began to separate himself from his colleagues' still rigid requirement of overt concertedness, albeit concertedness established by presumption, implied evidence, or perceived intent. He indicated that he would find a discussion between two or more employees regarding terms and conditions of employment to be necessarily concerted activity because it is an "indispensable preliminary step to employee self-organization;" thus, he would not have required "that the discussion otherwise appear calculated to induce or prepare for group action, or that it otherwise be related to group action,"²³⁵ the essential elements in the *Mushroom Transportation* formulation.²³⁶

Regardless of the rationale, however, the Board had now established, on the basis of *Every Woman's Place* and *Salisbury Hotel*, that when several employees express a common complaint about their employment, whether expressed individually or as part of an employees' meeting with supervision, such activity constitutes protected concerted

²³⁰ See *id.* at 7.

²³¹ *Id.* at 6.

²³² *Id.* (quoting *Meyers II*, 281 N.L.R.B. No. 118, slip op. at 16 (quoting Root-Carlin, Inc. 92 N.L.R.B. 1313, 1314 (1951))).

²³³ *Id.* at 6-7.

²³⁴ *Id.* at 7.

²³⁵ *Id.* See *infra* notes 241-42 & 248-52 and accompanying text.

²³⁶ See *supra* notes 80-84.

activity for mutual aid or protection. How farreaching the implication of this conclusion will be depends on (1) how successfully the Board and other interests will be in disseminating information about this concept of protected activity and (2) how vigorously and expeditiously the Board will enforce the law of Section 8(a)(1) to make meaningful its protection of such concerted activity.

In my view, the finding of concerted activity in these two scenarios was *required* by the statute, for it was necessary to make meaningful the protection of the *right* to engage in concerted activity. There was thus no call for the exercise of administrative discretion because the activity itself was inherently concerted. The policy and legislative history behind Section 7 left the Board no room to maneuver. Had the Board dismissed Doran's and Resnick's complaints, it would have been appropriate for the reviewing Circuit Courts to reverse and require that the discharged employees be reinstated and made whole.

C. *The Concept of the Right to Engage in Concerted Activity*

Scenario Number 4: *Parke Care*²³⁷

This scenario involves a nursing home employee who was transferred to a different shift and given a reduced work week because she had spoken to other employees about the termination of a fellow employee. Gwen Herald was a nurse's aide who happened to be present when a fellow employee, Gail Davis, was given a termination notice. A few days later some fellow employees asked Herald about Davis, and she told them that she had been terminated, adding that she thought the discharge unfair compared to the offenses of some other employees. Herald said that it was a shame Davis could not hire a lawyer and fight it. Another aide expressed the opinion that Davis would lose such a legal fight to the nursing home's wealthy owner. Herald agreed but said she hoped Davis would at least be able to receive unemployment compensation. That conversation took place in the front nursing station; other conversations about Davis took place in the lobby or, according to Herald, "wherever someone asked me."²³⁸

The Administrative Law Judge found that Herald's transfer and the reduction of her work week were due to her conduct with respect to the termination of Davis. He concluded, however, that Herald's conversation about Davis' termination did not constitute concerted activity under *Meyers II*. Relying on the *Mushroom Transportation* formula-

²³⁷ *Parke Care of Finneytown, Inc.*, 287 N.L.R.B. No. 73 (Dec. 16, 1987).

²³⁸ *Id.* at 3 app.

tion, the Board panel majority of Chairman Dotson and Member Babson agreed both with the ALJ's finding and his conclusion, because "there was no evidence that Herald or any of the employees with whom she had discussed Davis' discharge, contemplated doing anything about the discharge."²³⁹ Wholly misconceiving the requirement of the statute, the opinion treated as significant the fact that there was "not even the suggestion that the employees might attempt to give mutual aid or protection to Davis by encouraging her to institute legal action to challenge her termination."²⁴⁰ In the words of dissenting Member Johansen, the majority had concluded that "Herald's statements were not protected because no group action was intended, contemplated, or referred to."²⁴¹ Such a structured concept of mutual aid is not required by either the language of the statute or its policy. But what the majority failed to recognize their dissenting colleague saw clearly: that the employees' concerted action for mutual aid or protection did not need to include any action involving the terminated employee, Davis.

Member Johansen perceptively observed that the ALJ and the Board panel majority had missed the point, for "[w]hatever Herald was intending, contemplating, or referring to, she was engaged in actual concerted activity when she spoke with her fellow employees on [the day in question]."²⁴² In Johansen's view, a conversation between employees about a fellow employee's dismissal constitutes actual concerted action. The majority unrealistically conditioned protection of Herald on some contemplation of overt concerted action.²⁴³ But at such an amorphous stage of pre-organizational activity, an employee may not know what she wants or intends to do. It is certainly anomalous for the Board to tell her that her job will be protected if she openly asserts herself regarding her concerted activity, but not if she remains quiescent. Such advice undercuts the protection which Congress intended.²⁴⁴

Although Herald's motive should not be an issue, the possible reasons she and her fellow employees engaged in the conversations are relevant to the broad purpose of the Section 7 right. She and her fellow employees may have been concerned not only about the perceived injustice of Davis' discharge, but also about the problem of job security for themselves. Indeed, misery does love company. Although their conversation was in itself concerted action, it could also have been the begin-

²³⁹ *Id.* at 4.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 8 (Johansen, dissenting).

²⁴² *Id.* (Johansen, dissenting).

²⁴³ *See id.* at 4.

²⁴⁴ *See supra* notes 129-30 & 137-39 and accompanying text.

ning of further and more effective concerted action. Thus, it was entitled to the highest protection; for if an employer can nip such preliminary activity in the bud by eliminating or silencing vocal employee leaders like Herald before real organization occurs, it may never have to face organized activity among any of its employees.

Scenario Number 5: *Adelphi Institute*²⁴⁵

This scenario involves an employee who was fired for discussing with another employee the fact that she had been placed on probation. Karen St. John Black had been employed by a trade school to locate and enroll students. When she failed to enroll a sufficient number of students to meet her admissions quota she was placed on probation and given a letter explaining the probation. Her reaction was not unusual. She simply went to another employee, Sylvester Humbert, and asked him if he had ever been on probation. He replied that he had not. Humbert then called the school director and told him about Black's inquiry. Whereupon, the director fired Black because, as he testified at the Board hearing, her discussion with the other employee was "the straw that broke the camel's back."²⁴⁶

The Board panel majority of Chairman Stephens and Member Babson agreed with the ALJ's finding that Black's inquiry of Humbert was the motivating factor for her discharge, but the discharge was not deemed unlawful because her motive in that conversation had been purely personal. The opinion stated that there was no evidence "that Black's concern over her probation was directed toward group action," hence the conversation was not considered concerted activity within the meaning of *Mushroom Transportation* or *Meyers*.²⁴⁷

Member Johansen again dissented. He would have found that Black "was engaged in actual concerted activity when she spoke to Humbert" about her probation.²⁴⁸ Similar to his approach in *Parke Care*, Johansen accused the majority of missing the point when they asserted that nothing in Black's conduct suggested that she was contemplating action "with or on behalf of any other employee."²⁴⁹ Relying on *Root-Carlin*,²⁵⁰ Johansen insisted that "[a] conversation between employees is concerted activity . . . even though it involves only a speaker and a listener. . . . [and] it can scarcely be doubted that Black was

²⁴⁵ *Adelphi Inst., Inc.*, 287 N.L.R.B. No. 104 (Jan. 19, 1988).

²⁴⁶ *Id.*

²⁴⁷ *See id.* at 2-3.

²⁴⁸ *Id.* at 8 (Johansen, dissenting).

²⁴⁹ *Id.* (Johansen, dissenting) (quoting majority opinion).

²⁵⁰ *Root-Carlin, Inc.*, 92 N.L.R.B. 1313 (1951).

seeking the aid of Humbert at least in determining the impact of probation.”²⁵¹ Johansen may have been right, but the majority countered that it was an “unfounded assumption that there could be just one purpose for Black’s inquiry.”²⁵²

I would agree with Johansen’s conclusion that Black’s conversation was entitled to protection, but I would arrive at that result by a different route. The purpose of Black’s inquiry should have been irrelevant. She was obviously deeply concerned about being placed on probation. She was discharged for discussing the matter with a fellow employee. It should have been sufficient that the probation was the subject of the discussion; the finding of concertedness, or the right to engage in concerted conduct, surely cannot be based on the employee’s own perception of purpose. An employee may have no clear perception of her intent when she first engages in a discussion with a fellow employee about a condition of employment. Clear intent may not develop until after that discussion, or it may never develop. Nor should it be the function of the Board to find her intent, whether a “personal” one as the majority found, or a “concerted” one as the dissent found. If “equality” between employee and employer means anything at all at the pre-organizational stage of Section 7, it means that employees cannot be prohibited from engaging in discussions about their conditions of employment, unless there is a showing of legitimate businesses justification.²⁵³

In *Adelphi*, the employee was unsuccessful in her effort to find a sympathetic response from Humbert, so there was never a ripening of concerted activity, as there had been in *Parke Care*. Nevertheless, Black’s effort should have been protected not because it was in itself concerted but because she was attempting to initiate concerted activity—even though it might have been only of the misery-loves-company type. To permit the employer to discharge her for such an attempt, as the Board did, effectively denied her the “right” to engage in concerted activity for mutual aid or protection. Indeed, her conversation was of the type through which effective concerted action begins; it was therefore entitled to the greatest measure of protection. And because such a right is so basic to the essence of the intent behind Section 7, there is no room for the exercise of administrative discretion.²⁵⁴

This is not to say, however, that the employer can never limit conversations such as those in which Gwen Herald engaged. But such lim-

²⁵¹ *Adelphi*, 287 N.L.R.B. No. 104, slip op. at 8-9 (Johansen, dissenting).

²⁵² *Id.* at 4.

²⁵³ See *supra* notes 114-26, 151 & 162-63 and accompanying text.

²⁵⁴ See *supra* text accompanying note 150.

itations must meet the test of legitimate justification, such as the promulgation of a clearly stated rule limiting extensive non-work related conversations to non-working time, similar to the time and place limitations that may be placed on union solicitation.²⁵⁵ But the burden would be on the employer to establish such a justification.²⁵⁶

The majority misjudged its statutory responsibility when it tried to fit the conversation at issue within the narrow confines of *Mushroom Transportation*: that it "must appear . . . that [the conversation] was engaged in with the object of initiating or inducing or preparing for group action."²⁵⁷ It was also irrelevant for them to observe that subject matter alone, which here was related directly to Black's employment, was not enough to find concert. The majority failed to come to grips with the underlying problem, which, as it was perceived by the Court in *Washington Aluminum*,²⁵⁸ is that in dealing with unorganized employees, the Board should not interpret and apply the statute in a "restricted fashion" that "would only tend to frustrate the policy of the Act."²⁵⁹

D. *The Weingarten Rule in the Nonunion Workplace*

1. *The Weingarten Rule, Materials Research, and Sears*

The final scenario raises the proposition of whether *Weingarten*²⁶⁰ rights apply in workplaces where there is no collective bargaining representation. Before considering that scenario, which is derived from the *DuPont* cases,²⁶¹ some background regarding the *Weingarten* rule and its fate in the hands of the NLRB is in order. The Supreme Court defined the *Weingarten* right, applicable to unionized workplaces, as

²⁵⁵ See *supra* notes 114-26, 157 & 162-63 and accompanying text; see also NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 787-88 (1979) (applying the principles of *Beth Israel* and *Republic Aviation* to uphold the NLRB's presumptive invalidation of the hospital's prohibition against union solicitation in non-work areas); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492-93 (1978) (holding that restrictions on employee solicitation during nonworking time presumptively violates Section 8(a)(1) of the Act unless employer offers evidence sufficient to show the rules are necessary to maintain discipline or production).

²⁵⁶ See *supra* note 125 and accompanying text.

²⁵⁷ *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

²⁵⁸ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

²⁵⁹ *Adelphi*, 287 N.L.R.B. No. 104, slip op. at 14.

²⁶⁰ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

²⁶¹ See *E.I. DuPont de Nemours & Co.*, 289 N.L.R.B. No. 81 (June 30, 1988) [*DuPont III*]; *E.I. DuPont de Nemours & Co.*, 274 N.L.R.B. 1104 (1985) [*DuPont II*], *rev'd and remanded sub nom. Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986); *E.I. DuPont de Nemours & Co.*, 262 N.L.R.B. 1028 (1982) [*DuPont I*]. Companion cases include *E.I. DuPont de Nemours & Co. v. NLRB*, 733 F.2d 296 (3d Cir. 1984); *E.I. DuPont de Nemours & Co. v. NLRB*, 724 F.2d 1061 (3d Cir. 1983).

follows:

First, the right inheres in §7's guarantee of the right of employees to act in concert for mutual aid and protection. . . .

Second, the right arises only in situations where the employee requests representation. . . . [T]he employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.

Third, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. . . .

Fourth, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one. . . .

Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview.²⁶²

The Court explained that "[t]he employer has no duty to bargain with the union representative at an investigatory interview,"²⁶³ because the representative is there only to assist the employee, for example to attempt "to clarify the facts or suggest other employees who may have knowledge of them."²⁶⁴ The Court declared the right, which the Board had defined, was a "permissible construction of 'concerted activities for . . . mutual aid or protection'" and spelled out that the action of an employee in seeking such assistance clearly falls within the literal wording of the foregoing statutory phrase "even though the employee alone may have an immediate stake in the outcome [because] he seeks 'aid or protection' against a perceived threat to his employment security."²⁶⁵ The opinion also reaffirmed the expression of Congressional intent by noting that to require "a lone employee to attend an investigatory interview which he reasonably believes may result in the imposi-

²⁶² *Weingarten*, 420 U.S. at 256-59.

²⁶³ *Id.* at 260.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

tion of discipline perpetuates the inequality the act was designed to eliminate"²⁶⁶

In 1982, in *Materials Research Corp.*,²⁶⁷ the Board introduced the *Weingarten* rule into the unorganized workplace. The majority opinion stated that the rule also applied to unorganized employees because the Court in *Weingarten* had "emphasized that the right to representation is derived from the Section 7 protection afforded to concerted activity for mutual aid or protection, not from a union's right pursuant to Section 9 to act as an employee's exclusive representative for the purpose of collective bargaining."²⁶⁸ The Board explained that a request for the assistance of a fellow employee, like the comparable request in *Weingarten* for the assistance of a union steward, is "concerted activity—in its most basic and obvious form—since employees are seeking to act together. . . . for mutual aid or protection."²⁶⁹ The opinion noted that the attending co-worker, like the representative in a unionized workplace, could assist the interviewed employee by eliciting favorable facts or helping to get to the bottom of the problem, for the single employee "may be too fearful or inarticulate to describe accurately the incident being investigated, or too ignorant to raise extenuating factors."²⁷⁰ Furthermore, "a coworker who has witnessed employer action and can accurately inform co-employees may diminish any tendency by an employer to act unjustly or arbitrarily."²⁷¹

Notwithstanding its pertinent comparative observations, the *Materials Research* majority committed the same error that the Reagan Board would commit in *Meyers I* and would commit again in *Sears, Roebuck and Co.*²⁷² It held that its construction was *compelled* by the statute.²⁷³ And the *Material Research* Board compounded that error by concluding that "the right enunciated in *Weingarten* applie[d] *equally* to represented and unrepresented employees."²⁷⁴ As will be explained later, the right cannot be the same for represented and unrepresented employees and it need not apply equally.

In 1985, in the *Sears* case, Reagan Board I reversed *Materials Research*. According to the *Sears* majority, its holding was also an in-

²⁶⁶ *Id.* at 262.

²⁶⁷ 262 N.L.R.B. 1010 (1982).

²⁶⁸ *Id.* at 1012.

²⁶⁹ *Id.* at 1015.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² 274 N.L.R.B. 230 (1985).

²⁷³ "[T]he rationale enunciated in *Weingarten* *compels* the conclusion that unrepresented employees are *entitled* to the presence of a coworker at an investigatory interview." *Materials Research*, 262 N.L.R.B. at 1014 (emphasis added).

²⁷⁴ *Id.* at 1016 (emphasis added).

terpretation that "the Act compels."²⁷⁵ The opinion viewed *Weingarten* as dependent on its union setting because the Court had emphasized the union representative's "full collective-bargaining authority."²⁷⁶ The Board concluded that "to place a *Weingarten* representative in a non-union setting is to require the employer to recognize and deal with the equivalent of a union representative, contrary to the Act's exclusivity principle."²⁷⁷ Harboring such an inaccurate view of the scope and scheme of the statute, it is not surprising that the Board—Reagan Board I— failed to recognize the function of Section 7 rights at the pre-organizational stage. Its myopic view of the *Weingarten* rule was perhaps best illustrated by the following statement in the opinion:

When no union is present . . . the imposition of *Weingarten* rights upon employee interviews wreaks havoc with fundamental provisions of the Act. This is so because the converse of the rule that forbids individual dealing when a union is present is the rule that, when no union is present, an employer is entirely free to deal with its employees on an individual, group or wholesale basis. . . . [T]he *Material Research Corp.* majority said that, with respect to disciplinary action, the nonunion employer cannot deal with an employee on an individual basis; it *must* deal on a collective basis.²⁷⁸

That view misconceived both the nature of Section 7 rights at the pre-organizational stage and the difference between an employer's Section 8(a)(5) *duty to bargain* with an exclusive and majority union representative and its *leeway to deal* with groups of employees in concert where there is no majority union representative.²⁷⁹ Although an employer has a duty to bargain with the majority representative of its employees, where one properly exists,²⁸⁰ it has no duty to deal with a group of employees;²⁸¹ but, in the absence of a majority representative,

²⁷⁵ *Sears*, 274 N.L.R.B. at 230 n.5. Concurring Member Hunter, however, viewed the holding as a permissible but not a mandatory construction. See *id.* at 233 (Hunter, concurring).

²⁷⁶ *Id.* at 231 (citations omitted).

²⁷⁷ *Id.* at 232.

²⁷⁸ *Id.* at 231.

²⁷⁹ See Finkin, *Labor Law by Boz—A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155, 178-188 (1985).

²⁸⁰ See 29 U.S.C. §§ 158(a)(5), 159(a) (1982).

²⁸¹ See *Charleston Nursing Center*, 257 N.L.R.B. 554, 555 (1981) (holding that an employer has no duty to meet with unrepresented employees despite the fact they are engaged in protected concerted activity); see also *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). There the Court, explaining the

it may choose, as a matter of discretion or pragmatism, to *deal with* or to *treat with* employees as a group. Thus, when an employee chooses to confront the employer about a grievance or matter of discipline as one person in a group rather than as an individual, the employer can make a choice: either to forego dealing with that employee in direct verbal exchange or to proceed to deal with her as part of her group, even though such group may be limited to the single target employee²⁸² and one fellow employee who has come along to witness the exchange and thereby provide "mutual aid or protection." This is the "right" to engage in concerted activity for "mutual aid or protection" that is guaranteed by Section 7. In the absence of a legitimate reason to bar or limit such right, the employee cannot be denied employment or an emolument of employment on account of her participation in that expression of concerted action, for such a response by the employer would "interfere with, restrain, or coerce" the employee in the exercise of a right guaranteed in Section 7.²⁸³

This is not unlike the situation in a unionized environment under *Weingarten*, precisely because the procedure is governed by Section 7 rather than by Section 8(a)(5).²⁸⁴ When an employee requests union representation at such an investigational interview, the employer is not required to grant the request or to deal with the union representative at the interview. The Court's opinion recognized that the employer has a choice: If the employee insists on representation, the employer may dispense with the interview. It is only when the employee has exercised her right to demand the presence of a union representative and the employer insists on the interview that the employer must now deal with the union representative, i.e., deal with the employee as part of a group.²⁸⁵ Therefore, even where there is no union an employer is not entirely free to deal with its employees individually, certainly not when

limited purpose of the first proviso to Section 9(a) of the Act, stated:

The intentment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of § 8(a)(5). *The Act nowhere protects this "right" by making it an unfair labor practice for an employer to refuse to entertain such a presentation*

Id. at 61 n.12 (emphasis added).

²⁸² Such as the employee in *DuPont III*. See *infra* notes 288-91 and accompanying text.

²⁸³ See *Washington Aluminum*, 370 U.S. 9, 12-13 (1962); 29 U.S.C. § 158(a)(1) (1982).

²⁸⁴ See 29 U.S.C. § 158(a)(5) (1982).

²⁸⁵ See *Weingarten*, 420 U.S. at 258-59.

they choose to confront their employer concertedly.

As noted throughout this Article, the Act recognizes many stages of employee organization,²⁸⁶ but it is only a late stage, the establishment of a union majority in an appropriate bargaining unit, that triggers the employer's mandatory duty to deal with the union on an exclusive and collective basis. Under *Materials Research*, as would also be the case under *Weingarten*, the employee would have the choice whether to confront the employer individually or in concert.

I have discussed the *Sears* holding in some detail for two reasons: first, to illustrate the intimate relationship between *Weingarten* rights and basic Section 7 rights; and second, to call attention to the Board's rationale therein, with all of its patently erroneous legal conclusions, because the current *Dupont* Board has never disavowed that rationale. In reaffirming *Sears* in *Dupont III*, though on different grounds, Reagan Board II did not reject the *Sears* rationale; it only overruled the "finding" in *Sears* that "the Act compels a finding that unrepresented employees are not entitled to the presence of a fellow employee during an investigatory interview."²⁸⁷ More significantly, *Dupont III* reflects essentially the same attitudes as *Sears*.

2 The *Weingarten* Rule and *DuPont*

Scenario Number 6: *DuPont de Nemours & Co.*²⁸⁸

This scenario involves Walter Slaughter, an employee of the DuPont company, who had posted a notice on an employees' bulletin board without company permission. Ironically, the notice was an NLRB poster explaining the basic rights of employees under the National Labor Relations Act. His supervisor saw him post it and asked him to remove it because it had not been approved in accordance with company policy. Slaughter refused. The supervisor contacted him on several occasions to discuss the incident. On each occasion Slaughter stated that he would not discuss the matter without a coworker present; he said he would come to the office only if a fellow employee could act

²⁸⁶ See *supra* text accompanying note 62.

²⁸⁷ E.I. DuPont de Nemours & Co., 289 N.L.R.B. No. 81, slip op. at 5 n.8 (June 30, 1988) [*Dupont III*] (emphasis added).

²⁸⁸ *Dupont III*, 289 N.L.R.B. No. 81 (June 30, 1988). see *Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986), *remanding* E.I. DuPont de Nemours & Co., 274 N.L.R.B. 1104 (1985) [*DuPont II*]; E.I. DuPont de Nemours & Co. v. NLRB, 733 F.2d 296 (3d Cir. 1984); E.I. DuPont de Nemours & Co. v. NLRB, 724 F. 2d 1061 (3d Cir. 1983); E.I. DuPont de Nemours & Co., 262 N.L.R.B. 1028 (1982) [*DuPont I*].

as a witness. The supervisor denied each request.²⁸⁹ Slaughter eventually brought a coworker with him to the office, but the supervisor refused to enter into any discussion while the coworker was present. Slaughter then arranged for another employee to accompany him. This time the supervisor gave Slaughter an ultimatum, his "last opportunity" to discuss the matter, but without a coworker present, telling him that his job was now in jeopardy. Finally Slaughter met with the supervisor alone, and shortly thereafter he was discharged.²⁹⁰ In *DuPont III*, the Board made two critical findings: that Slaughter had "solicited two employees who agreed to act as witnesses for him," and that he "was discharged solely for his refusal to meet with Respondent to discuss the posting incident unless a coemployee was present to serve as a witness."²⁹¹

Dupont I, following *Materials Research*, held that Slaughter had a right under Section 7 to insist upon the presence of a fellow employee during the interview and therefore ordered Slaughter reinstated with back pay.²⁹² A panel majority of the Third Circuit sustained the Board's interpretation of Section 7, enforced the Board order in *Dupont I*, and indicated approval of *Materials Research*.²⁹³ By then, however, because the Board's membership had changed—it was now Reagan Board I—the Board requested that the court's opinion be vacated and the case remanded because it was contemplating reconsideration of the *Materials Research* rule. The Third Circuit complied. Soon thereafter the Board decided the *Sears* case.²⁹⁴ It then issued *Dupont II*, finding that Walter Slaughter had not been engaged in protected concerted conduct, thus his discharge was upheld.

When the Third Circuit again reviewed *Dupont*,²⁹⁵ it again reversed the Board and again remanded the case. The reasons for remanding were similar to the remand of *Meyers I* by the District of Columbia Court of Appeals.²⁹⁶ The court rejected the Board's view that the Act "compels the conclusion"²⁹⁷ that nonunion employees do not

²⁸⁹ See *DuPont*, 724 F.2d at 1063.

²⁹⁰ See *id.* at 1063-64.

²⁹¹ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 4.

²⁹² See *Dupont I*, 262 N.L.R.B. at 1029.

²⁹³ It concluded "that the logic and reasoning of *Weingarten* carry equal force in the non-union context," *DuPont*, 724 F.2d at 1065, although Judge Adams perceptively noted his reservations "about the wisdom of applying *Weingarten* principles to a non-union setting in the same way they have been applied in a union setting." *Id.* at 1065 n.5.

²⁹⁴ See *supra* notes 272-87 and accompanying text (discussing *Sears*).

²⁹⁵ See *Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986).

²⁹⁶ See *supra* text accompanying text 192.

²⁹⁷ *Slaughter*, 794 F.2d at 122 (emphasis omitted).

enjoy *Weingarten* rights, noting that it had previously indicated in its review of *Dupont I* that the contrary position in *Materials Research* represented a permissible interpretation of the Act. Citing *SEC v. Chenery Corp.*,²⁹⁸ the court said that it could sustain the Board only if "no other interpretation of the Act is permissible, regardless of whether their order could be sustained on other grounds."²⁹⁹

The Board retained the remanded case for exactly two years. When it finally issued *Dupont III*, the Board (now Reagan Board II) reaffirmed its rejection of the *Materials Research* rule, holding that "an employee in a non-unionized workplace does not possess a right under Section 7 to insist on the presence of a fellow employee in an investigatory interview by the employer's representatives, even if the employee reasonably believes that the interview may lead to discipline."³⁰⁰

This latest opinion in *DuPont* is curious for many reasons, not the least of which is that it wholly ignores the rule that the Board had so recently promulgated with much fanfare in the *Meyers* cases, even the non-controversial part of that rule that guaranteed that an employee's activity would be deemed concerted if it was "engaged in with . . . other employees."³⁰¹ Notwithstanding the obvious fit between that language and the specific facts of *DuPont*, and notwithstanding that the Board has never denied that when Slaughter obtained the agreement of a fellow employee (in fact two employees) to be present during the investigatory interview that such arrangement constituted concerted activity, the opinion in *DuPont III* made no reference to the "with . . . other employees" part of the *Meyers* rule, or any other part of that rule. In fact, it never mentioned or even cited *Meyers* except with an ambiguous "cf." signal in the opinion's final paragraph as ostensible support for an unrelated conclusion.³⁰² How could this be? How could the Board decide a case involving alleged Section 7 activity of nonunion employees without relying on the very rule that it had so recently promulgated to cover such conduct? I have no legally satisfactory answer to that question. However, apart from its deficiency as a matter of law, it is not hard to fathom the Board's reasoning. The Board simply chose to decide the case on the basis of the Supreme Court's decision in

²⁹⁸ 318 U.S. 80 (1943) [*Chenery I*].

²⁹⁹ *Slaughter*, 794 F.2d at 122.

³⁰⁰ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 5. The Board overruled its finding in *Sears* that the Act compels that interpretation. See *id.* at 5 n.8.

³⁰¹ *Meyers I*, 268 N.L.R.B. at 497; see *supra* notes 187-88 and accompanying text.

³⁰² That it could best effectuate the purpose of the Act by limiting the right of representation in investigatory interviews to employees in unionized workplaces.

Weingarten rather than on the basis of the requirements of Section 7.

The entire opinion in *DuPont III* was devoted to an attempt to demonstrate that the Court in *Weingarten* had not intended that case to cover the nonunion workplace. Thus, at the conclusion of *DuPont III*, the Board stated with obvious relief that it believed "its conclusion to be fully consistent with the Supreme Court's decision in *Weingarten*."³⁰³ In the Board's view, the Court's discourse and framework "presuppose union representation"³⁰⁴ and the "separate factors on which the Court rested its decision translate poorly into a case involving a nonunion workplace."³⁰⁵ The court in *Weingarten* was certainly writing primarily for the unionized workplace, given the facts of the case. Consequently, except for statements relating to legislative history and the general scope of Section 7 language, it was not writing about the requirements of Section 7 vis-à-vis unorganized employees. *Weingarten* was important to the *DuPont* facts, but not in the manner in which the Board chose to use it.

The Board in *DuPont III* simply asked the wrong questions. It should have addressed (1) whether Section 7 required the DuPont supervisor to deal with Slaughter in the presence of one of his coworkers who had previously agreed to join with him at the investigatory interview and (2) whether that supervisor could insist, as a condition of Slaughter's continued employment, that Slaughter abandon his effort to appear concertedly rather than individually to discuss the work-related problem for which he was to be interviewed. *DuPont III* is curious indeed, for it failed to apply the "linkage" concept that the Board had expounded in *Meyers II*, although Reagan Board I had discussed and rejected the same concept in *DuPont II*.³⁰⁶ Under Reagan Board II's new reading of "linkage,"³⁰⁷ a finding of concertedness would have been inevitable.³⁰⁸

For reasons explicated in the general theory formulation, it should be apparent that the foregoing two questions concern the mandatory requirements of the statute. And it should be evident that the answer to the first question is clearly "yes." The answer to the second question is

³⁰³ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 12.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ See *DuPont II*, 274 N.L.R.B. 1104, 1104 n.7 (1985), *rev'd sub nom.* Slaughter v. NLRB, 794 F.2d 120 (3d Cir. 1986). There, the Board stated: "Because there is no linkage between Slaughter's solicitation of employee witnesses and the cause of his discharge, we find *Meyers* inapplicable herein." *Id.*

³⁰⁷ See *supra* notes 196-97 and accompanying text.

³⁰⁸ See *Salisbury Hotel*, 283 N.L.R.B. No. 101, slip. op. at 6-7; *Every Woman's Place*, 282 N.L.R.B. No. 48, slip op. at 2; *Consumers Power Co.*, 282 N.L.R.B. No. 24, slip op. at 6-7 (Nov. 13, 1986).

either “no” or a qualified “no.” The qualification derives from a third question which the Board might ask: Did the employer present any evidence of facts or circumstances that would justify denying or limiting Slaughter’s right to appear with a coworker (his right to pursue concerted activity) as he had requested? Or, in the alternative, the Board might ask, for purposes of broad rulemaking without reference to adjudicatory burden-of-proof considerations: Is there any rationally based justification for employers in general to deny or limit the right of their employees to appear concertedly rather than individually at such investigatory interviews? I cannot conceive of any justification, consistent with Section 7, for an absolute denial of such a right. Reasonable limitations on the right, however, such as might be required to avoid undue interference with production, would certainly be appropriate. But if the Board were to answer the third question in the affirmative, and thus indicate that a legitimate justification exists (for a limitation, not a denial), then it would still be obligated to provide an explanation for that conclusion consistent with statutory policy. *DuPont III*, by any reading, neither asked nor properly answered those questions. And such questions are raised by the basic thrust of the statute.

The Board did, however, suggest an answer to the last question, although without asking it explicitly or implicitly, and without explaining its answer. Its explication consisted solely of the conclusionary statement that it had “tak[en] into account the nonunion employers’ interests in conducting investigations in accordance with their own established practices and procedures and in maintaining efficiency of operation.”³⁰⁹ That conclusion, about which I shall comment shortly, was unsupported by any evidence, empirical data, or explanatory discussion.

Returning to the first two questions posed: At the very least their answers yield a minimum statutory rule, a rule as to which no room exists for the exercise of administrative discretion because fundamental Section 7 rights are at issue. This basic rule, which emerges from the *DuPont* facts, may be stated as follows:

An employee in a nonunion workplace who is called in by the employer’s representative for an investigatory interview which the employee reasonably believes may lead to discipline has a right under Section 7 to insist on the presence at that interview of a coworker who has agreed to be present.

³⁰⁹ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 12. The reference to “employers’” interests, rather than to “the employer’s,” was another indication that the Board was consciously writing a rule of broad application, not merely adjudicating the *DuPont* case.

As I have suggested, such a rule would be subject to reasonable time and place limitations based upon the employer's legitimate business needs. Furthermore, as under the *Weingarten* doctrine,³¹⁰ the employer in the nonunion workplace would not be compelled to conduct the interview if the employee demands the presence of the coworker (assuming one had agreed to present); but if the employer insists on the interview, it must allow the coworker to be present. Likewise, the targeted employee may be required to choose either to appear alone at the interview or to forego the opportunity to present his defensive statement to the employer. Thus, when the employer insists on interrogating the employer about a matter affecting working conditions—indeed in *DuPont* the employee's job was at stake—the rule would guarantee the employee the right to confront the employer *concertedly* rather than *individually*. But such a right could be exercised only if the employee has a coworker who is willing to be present and thereby provide the mutual aid or protection of which the statute speaks. This minimum rule, with the limitations noted, is patently mandated by the statute. Slaughter was entitled to no less.

Beyond this basic rule the Board, in the application of its administrative discretion, could fashion a rule broader than the foregoing minimal statutory standard—one that could be easily understood and applied and one that would further implement statutory policy.³¹¹ Such a rule would follow naturally in the long-standing tradition of other NLRB rules that define and regulate various forms of employer interference with the exercise of Section 7 rights.³¹² Many variations of such a discretionary rule governing investigatory interviews in unorganized workplaces would be feasible. But the most obvious variation would be a rule similar to that in *Weingarten*, but tailored more specifically to conditions in the nonunion workplace. Such a rule might require that when an employer insists upon interviewing an employee about a matter that the employee reasonably believes could lead to dis-

³¹⁰ See *Weingarten*, 420 U.S. at 259 (stating that "the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one").

³¹¹ *Materials Research* almost, but never quite, articulated such a rule.

³¹² Two examples are (1) rules limiting employer restrictions on union solicitation at the workplace, see *Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44 (1943), *quoted in* *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945); *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976); C. MORRIS, *supra* note 70, at 88-107; *id.* Supp. at 19-27; *supra* text accompanying notes 116-20, and (2) rules defining union access to private property, see *Hudgens v. NLRB*, 424 U.S. 507 (1976); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Jean Country*, 291 N.L.R.B. No. 4 (Sept. 27, 1988), *overruling* *Fairmont Hotel Co.*, 282 N.L.R.B. No. 27 (Nov. 13, 1986).

cipline, and the employee requests the presence of a coworker at such interview, the employer must provide the employee with a reasonable opportunity to seek out such a coworker before the interview may proceed. But if, after being given such opportunity, the employee is unable to produce an agreeable coworker, then the employer would be free to proceed with the interview and thus deal with the employee individually rather than collectively.

This limitation would be different from the *Weingarten* rule. In a unionized workplace a union steward, or the equivalent, will usually be available to appear with the interviewed employee. Because of the institutionalized presence of a union, it is not unreasonable to require the employer in a collective bargaining environment to condition the interview on the presence of a union representative, which is what the *Weingarten* rule requires. But in a nonunion setting, where there will normally not be a permanent presence of an employee group, the employer will have no similar reason to refrain from interviewing the employee alone if the employee is unable to produce a coworker willing to be present during the interview.

When an employee has approached one or more other employees seeking such mutual aid or protection (whether on the employee's own initiative or in response to an opportunity provided by the employer) but has failed to convince at least one coworker to provide the desired standby assistance, there is no concerted action. The employee may have exercised a "right" to engage in concerted activity by requesting the presence of a fellow employee at the interview—a right *DuPont III* concedes is protected;³¹³ but if the exercise of that right has not achieved the concerted action which was sought, then the employer should not be further obligated to alter its conduct of the interview. The statute does not guarantee employees the existence of concerted action, only the right to engage in it. This is a distinction that *Materials Research* failed to appreciate when it uncritically held that the *Weingarten* rule applied "equally to represented and unrepresented

³¹³ See *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 18 n.15. The concession appears grudging, because it is buried in the penultimate footnote in a double negative statement:

Our finding . . . should not be read as implying that an employee enjoys no protected right to ask for the presence of a fellow employee at such an interview. The mere act of making such a request in no way impairs the employer interests involved here and thus we would not need to strike the balance as we have done

Id. (emphasis added). Nevertheless, the concession represents a valid legal conclusion. It is strange indeed that the Board would protect the employee's right to request the presence of a coworker, but not protect the employee from the consequences of that request.

employees.”³¹⁴

Because *DuPont III* focused primarily on the text of *Weingarten* rather than on the text of Section 7, it failed to come to grips with the basic statutory issues posed by Slaughter’s conduct. The Board ignored the implications of its own finding of concertedness—that Slaughter had “solicited two employees who agreed to act as witnesses for him.”³¹⁵ And it never discussed the Section 7 implications of Slaughter’s undisputed attempt, together with one of those employees, to confront his supervisor concertedly during the disciplinary interview, which was unmistakably group action. Even as interpreted by the *Meyers* formulation, the statute protected such concerted activity. Accordingly, it was a violation of Section 8(a)(1) for the employer to discharge Slaughter for insisting that a coworker be permitted to appear with him at the interview.

Although the employer could not lawfully terminate Slaughter because of his concerted activity, the supervisor was not *required* to meet with him and his coworker together, for Section 8(a)(1) does not mandate that the employer deal with a concerted group.³¹⁶ This is unlike the requirement of Section 8(a)(5), which does mandate dealing with a union when it is the majority representative of the employees in an appropriate bargaining unit. But under Section 8(a)(1), in the unorganized workplace, the choice is the employer’s to deal or not to deal with the group. It is not an unlimited choice. For, as we have seen in *Weingarten*, if the employer’s representative insists on the investigatory interview, as did Slaughter’s supervisor, he will be required to treat the targeted employee concertedly. Just as in *Weingarten*—for this is an aspect of *Weingarten* grounded in basic Section 7 protection—in the unorganized workplace both the employer and the employee, assuming the existence of a willing coworker witness, have a similar choice. The choice that the Court recognized in the *Weingarten* formulation would thus also be applicable in the nonunion workplace: “[T]he employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview . . . and foregoing any benefit that might be derived from one.”³¹⁷ But be-

³¹⁴ *Materials Research*, 262 N.L.R.B. at 1010 (emphasis added).

³¹⁵ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 3.

³¹⁶ See *supra* note 281.

³¹⁷ *Weingarten*, 420 U.S. at 258; see *id.* at 258-59 (“The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of infor-

cause Slaughter's supervisor insisted on conducting the interview with Slaughter alone, Slaughter's Section 7 rights were violated.

In evaluating the Board's decision in *DuPont III* not to extend *Weingarten* rights to nonunion employees, it must be emphasized that the Board had previously extended such rights through the rule announced in *Materials Research*,³¹⁸ therefore *Sears* and *DuPont* represent a rescission of an existing rule,³¹⁹ and *DuPont III* represents the Board's amended version of its reasons for abandoning that rule.

The Board faces the same constraints on its freedom to rescind an existing rule as any other federal administrative agency.³²⁰ It must provide an adequate explanation for its action,³²¹ and must clearly demonstrate the rationality of the action. This clarity requirement is of paramount importance when the Board engages in rulemaking, regardless of the procedural mode that it chooses to use for the process. And when it changes an existing rule, it has a special duty to explain the basis of its action in order to demonstrate that it has considered appropriate factors in exercising its discretion.³²² As the Supreme Court has em-

mation obtained from other sources.") (quoting *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 1052 (1972)).

³¹⁸ *Materials Research*, 262 N.L.R.B. at 1010.

³¹⁹ The posture of the changed rule is not unlike that which recently faced the Ninth Circuit and the Supreme Court in the *Financial Inst. Employees* case, which involved the Board's alteration of a rule covering the certification of a union's new affiliation. See *Financial Inst. Employees of Am.*, 752 F.2d 352, 360, 364 (9th Cir. 1984) (recognizing its obligation to uphold the Board's new rule "if it is rational and consistent with the NLRA," but finding the new rule inconsistent with "strong national [labor] policy"), *rev'g*, 265 N.L.R.B. 426 (1982), *aff'd*, 475 U.S. 192, (1986) (affirming the time-honored standard of review that the Board's action would be sustained unless it was "irrational or inconsistent with the Act"); see also *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986) (rejecting the Board's new rule concerning deferral to arbitration, promulgated in *Olin Corp.*, 268 N.L.R.B. 573 (1984), because the rule conflicted with the Board's own responsibility to protect employee's rights).

³²⁰ "[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board's discretion," *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), but "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." *Id.* Although the choice between those procedures lies with the Board, it still must satisfy minimum standards generally applicable to any federal administrative agency when it interprets the statute that it is charged with administering. See *supra* note 129. Choosing the adjudicatory mode does not relieve the agency of its substantive rulemaking responsibility, however, as the Board was reminded the hard way regarding the applicability of *Chenery I* to *Meyers* and *DuPont*, the two anchor cases reviewed in the scenarios herein. See *supra* notes 192 & 298 and accompanying text.

³²¹ See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941) (stating that "[t]he administrative process will best be vindicated by clarity in its exercise All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it").

³²² See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) [hereinafter *State Farm*]; *Schaffer Transp. Co. v. United*

phasized, "revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course."³²³ Such explanatory process is especially critical in cases like *DuPont*, where the Board's action has the apparent effect of depriving employees of statutory rights.³²⁴ As the Supreme Court stressed in *State Farm*,

Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.³²⁵

Under these relevant standards, the Board's decision in *DuPont III* leaves much to be desired. Its failure to consider such relevant factors as the impact of its decision on the associational rights of employees ultimately cripples the agency's ability to carry out the will of Congress. Accordingly, it will be instructive to examine the factors that the Board did consider.

The Board specifically referred to the language of Section 7 only once in *DuPont III*. In doing so, it virtually conceded that when measured by the statutory language alone, concerted action was involved. It said that a "literal reading of Section 7 might indeed suggest that it bestows on nonunion employees the right in question here."³²⁶ But it refused to apply the plain language of Section 7, preferring what it

States, 355 U.S. 83 (1957); see also *USV Pharmaceutical Corp. v. Secretary of HEW*, 466 F.2d 455, 462 (D.C. Cir. 1972) (stating that "findings of fact are not mere procedural niceties; they are essential to the effective review of administrative decisions"). In *State Farm*, the Court spelled out with critical precision the rationality standard governing an administrative rescission of a rule. See *State Farm*, 463 U.S. at 42 (arguing that the act of rescission created "at least a presumption that those policies [which Congress had intended] will be carried out best if the settled rule is adhered to . . ."). [A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance" (quoting *Atchison, Topeka & Santa Fe Rly. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973)); *id.* at 43 (stating that the agency has the responsibility to "examine relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

³²³ *State Farm*, 463 U.S. at 41.

³²⁴ My concern with procedure in this analysis is directly related to the substance of the rule being examined, for the Board's failure to consider all relevant factors appears to have contributed to its arrival at a decision at odds with the intent of the statute.

³²⁵ *State Farm*, 463 U.S. at 43.

³²⁶ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 7.

perceived as a *balancing* approach, which was unfortunately based on its misreading of the Supreme Court's opinion in *Weingarten*. Noting the Court's comment that the Board in *Weingarten* had struck "a fair and reasonable balance between the conflicting interests of labor and management,"³²⁷ the *DuPont III* Board attempted to do likewise with the facts of *DuPont*. But, as demonstrated by the following statement from the opinion, it was seeking to reconcile the wrong interests in this nonunion setting:

Taking into account the more questionable value of such a right in the nonunion setting, we find that the interests of both *labor* and *management* are better served by declining to extend this right into that forum. In so holding, we also take into account the nonunion employers' interests in conducting investigations in accordance with their own established practices and procedures and in maintaining efficiency of operation.³²⁸

"Labor" in that statement, as indicated both by its context and the Board's reference to the interests involved in the *Weingarten* doctrine, obviously meant organized labor or unions, not unorganized employees. The statute, however, especially Section 7, is designed primarily for employees—not employers and not unions. The union interest is certainly important at later stages of Section 7 activity, but at the preorganizational stage the Board's focus should be predominately upon the rights of employees.³²⁹ Nor is it appropriate for the Board to "balance" those rights directly against the employer's rights. A different standard, or at least the invocation of a balancing standard at a different burden-of-proof stage, should be utilized to determine employer rights when they conflict with employees rights to engage in concerted activity for purposes contemplated by Section 7. As I have noted previously,³³⁰ any limitation upon the exercise of such rights is presumptively a violation of Section 8(a)(1). That presumption may be rebutted, however, by a showing of the existence of some legitimate justification that requires a limitation, or in rare cases conceivably even a prohibition, of the con-

³²⁷ *Id.* at 6.

³²⁸ *Id.* at 17-18 (emphasis added); *supra* note 309. In referring to "employer's interests," the Board had clearly assumed the rulemaking mode, for it certainly was not referring to DuPont's specific interests, as to which the record was probably silent.

³²⁹ See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (indicating that failure to interpret Section 7 liberally "would effectively nullify the right to engage in concerted activities").

³³⁰ See *supra* notes 158-59 and accompanying text.

certed activity in issue.³³¹ Only after it has been demonstrated that the employer's legitimate need truly conflicts with the employees' Section 7 rights would it be appropriate for the Board to engage directly in a balancing of interests between the employer and the employees. Oddly, the Board in *DuPont III* purported to use *Republic Aviation* as its model, noting in that case a balancing of the "employers' interest in maintaining 'discipline in their establishments' against employees' interests in engaging in activities covered by . . . Section 7,"³³² an analogy that Member Cracraft found unwarranted.³³³ Although she did not indicate the basis for her declining to rely on the analogy to no-solicitation rules, perhaps her reason was the same as one I find to be readily apparent: The Board and the Supreme Court, as expressed in *Peyton Packing* and *Republic Aviation*, indeed accommodated the competing interests of employers and employees, but did so based on a *presumption* that any interference with employee solicitation outside of working hours, although on company property, represented an "unreasonable impediment to self-organization"³³⁴ and was therefore unlawful. The Board in *DuPont* recognized no comparable presumption, though one might have been appropriate.

Aside from the inappropriateness of the Board's attempt to balance the interests of "labor" and "management" in *DuPont III*, in the end there was no balancing at all. In fact, the holding of *DuPont III* would make it more difficult for employees to develop experience in confronting their employer concertedly, albeit in a mild and non-threatening manner,³³⁵ and therefore would also make it less likely that they would dare to assert themselves in forming a labor organization. And on the employer's side of the scale, the Board required no showing at all to justify its yielding to the employer's position. There was no balancing of interests; there was only the Board's bald assertion that it had balanced interests.

True, the Board did indicate that it was taking into account "the nonunion employers' interests in conducting investigations in accordance with their own established practices and procedures and in maintaining efficiency of operation."³³⁶ But where was the evidence or empirical data to support those conclusions? There was no showing that

³³¹ See *supra* notes 116-26 and accompanying text.

³³² See *supra* note 328.

³³³ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 7 n.9.

³³⁴ *Peyton Packing*, 49 N.L.R.B. at 843-44, quoted in *Republic Aviation*, 324 U.S. at 803 n.10.

³³⁵ See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-68, 574 (1978); text accompanying note 166 (discussing the variable nature of concerted activity).

³³⁶ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 17-18.

efficiency of operations would be unreasonably impaired if an employee were permitted to be accompanied by a fellow employee at an investigatory interview. The efficiency factor would likely be the same whether in a union or a nonunion establishment, and *Weingarten* readily disposed of that issue by its stated condition that "exercise of the right may not interfere with legitimate employer prerogatives."³³⁷ In other words, the employer can impose reasonable time and place limitations on the protected interview process. Furthermore, efficiency is no more a prohibitory factor in this case than in employee solicitation cases or in union access cases.³³⁸

DuPont III is replete with irrelevant conclusions and non sequiturs. For instance, it assumes that an employee who enlists the support of a fellow employee for appearance at the interview does so only because of "an implicit promise that the employee enlisting support would offer his own support were the other facing such an interview."³³⁹ That may or may not have been Slaughter's reason, but an employee's subjective reason in such a situation is wholly irrelevant.³⁴⁰ An employee seeking the presence of a coworker at an investigatory interview may do so for a variety of reasons. It may be to have a witness present to protect the "record" of what happens, and if necessary to repeat that record to others, or it may be only to provide the mutual aid or protection that comes from misery loving company. But whatever the reason, since the Board was rescinding the *Materials Research* rule, at the very least it had an obligation, implicit from the requirements of *State Farm*,³⁴¹ to address the possible reasons for having the coworker present which the Board earlier had outlined in *Materials Research*. They were the following:

A coworker can assist by eliciting favorable facts and even, perhaps, save the employer production time by helping to get to the bottom of the problem that occasioned the interview. Certainly, that an employee is not part of a represented unit does not alter the real possibility that a single employee, confronted by an employer investigating conduct which may result in discipline, may be too fearful or inarticulate to describe accurately the incident being investigated, or too ignorant to raise extenuating factors Indeed, without

³³⁷ *Weingarten*, 420 U.S. at 258.

³³⁸ See *supra* note 312 and accompanying text.

³³⁹ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 7-8.

³⁴⁰ Just as the reason for the conversation in the *Parke Care* scenario was irrelevant. See *supra* note 244 and accompanying text.

³⁴¹ See *supra* notes 322-25.

the benefit of a grievance-arbitration procedure to check unjust or arbitrary conduct, an employee in an unorganized plant may experience even greater apprehension than one in an organized plant and need the moral support of a sympathetic fellow employee. Moreover, a coworker who has witnessed employer action and can accurately inform co-employees may diminish any tendency by an employer to act unjustly or arbitrarily.³⁴²

Rather than address those reasons, the Board embarked on another set of non sequiturs, part of its attempt to fit the square peg of the instant case into the round hole of *Weingarten*. It marshalled a number of arguments as to why it believed that the *Weingarten* rule would not be beneficial to employees in a nonunion setting, concluding with the observation that "there is a serious question whether extending the right to nonunion employees may not work as much to their disadvantage as to their advantage."³⁴³ Here the Board was substituting its judgment for that of Congress and the employees. As the *Materials Research* Board had accurately observed: "It is for the employee himself to determine whether the presence of a coworker at an investigatory interview provides some measure of protection."³⁴⁴ If the process should seem more disadvantageous than advantageous to a particular employee, it must be presumed that such employee would opt for an individual interview rather than for a concerted interview with a coworker present. But that is a decision which Congress not only left to the employees to make, it also guaranteed them the right to make such a decision for themselves without undue interference from either the employer or the Board.

Although the Board's reasons for finding a possible disadvantage to the employee are irrelevant, I shall nevertheless note them in order to demonstrate such irrelevance, and/or their lack of substance. First, the Board observed that "in a nonunion setting there is no guarantee that the interests of the employees as a group would be safeguarded by the presence of a fellow employee at an investigatory interview."³⁴⁵ It is not the function of the Board to be concerned about the wisdom of the group action. Congress left the decision to act in concert or to refrain from acting in concert to the employees themselves.³⁴⁶ That is the scheme of the Act. The Board also noted that in a nonunion work force

³⁴² *Materials Research*, 262 N.L.R.B. at 1015.

³⁴³ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 11.

³⁴⁴ *Materials Research*, 262 N.L.R.B. at 1015.

³⁴⁵ *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 12.

³⁴⁶ See 29 U.S.C. § 157 (1982); *supra* notes 31-50 and accompanying text.

the fellow employee has no obligation to represent the interests of the entire bargaining unit.³⁴⁷ Of course not, at least not in any direct way; but the purpose of the pre-organizational protection of Section 7 is to allow employees freedom of association—in fact that may be the very beginning of association.

The Board also made the following three observations: (1) that “an employee in a nonunion work force would be much less able than a union representative to ‘exercise vigilance’” to prevent the employer from imposing unjust punishment,³⁴⁸ (2) that such an employee would be less likely than a union representative “to have access to information as to how other employees had been dealt with in similar circumstances,”³⁴⁹ and (3) that it is unlikely that the nonunion coworker would possess the same level of skill as a representative in a nonunion setting.³⁵⁰ Remarkable, all three of these observations are reasons the protected investigatory interview process in a nonunion setting would provide an excellent training opportunity for nonunion employees to acquire and improve their organizational skills. These are in fact reasons the rule in question relates directly to the organizational process that Section 7 sought to foster and protect. The fact that such nonunion employees presently lack those skills tells us nothing about the skills which some of them might develop if they have a protected opportunity to do so.³⁵¹

The Board then advanced another purported reason that revealed how far removed some its views were from reality. And it did not choose to remand the case to the Administrative Law Judge for evidence of reality, nor did it seek empirical data on the subject through notice-and-comment rulemaking procedures. That additional reason was contained in the following observation:

It is of course obvious that the value of representation at an investigatory interview as a means of heading off formal grievances has virtually no application in the nonunion setting. . . . In the nonunion workplace there typically is no enforceable grievance procedure through which the employee could seek further recourse³⁵²

Although grievance procedures in nonunion establishments may not be legally enforceable, in many companies there are elaborate procedures

³⁴⁷ See *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 12.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ See *id.* at 14.

³⁵¹ Surely there is a role for a shop “mavin” in every workplace.

³⁵² *DuPont III*, 289 N.L.R.B. No. 81, slip op. at 15-16.

in which an organizationally skillful employee might have a meaningful role to play. *DuPont III* assumes that there are no grievance procedures in nonunion companies, whereas in most large nonunion companies just the opposite is true.³⁵³ Although *DuPont* is an example of a large nonunion company, the Board's opinion sheds no light as to what kind of grievance procedure, if any, might have existed at the place where Slaughter worked.

The Board in *DuPont III*, obsessed as it was with *Weingarten* rather than with ordinary Section 7 requirements, succeeded only in obfuscating the Act's purpose. The nonunion investigatory interview rule at issue may indeed be a square peg that does not fit immediately into *Weingarten's* round hole. But there is a peg and there is a hole. The Board's job is to make them fit. That is not really a difficult assignment. Section 7 provides clear language with which to perform the task. When one employee agrees to stand by another employee when the latter is being interrogated about matters that could lead to discipline, concerted activity for mutual aid or protection in its most basic form is being provided. That is what *DuPont* was all about.

IV. CONCLUSIONS

The general theory outlined in this Article spells out the right of employees to engage in concerted activity for mutual aid or protection. It is designed to provide a methodology for interpreting and applying the language of Section 7, particularly in the nonunion workplace. The conclusions to be drawn from such a rationalization of this statutory language are neither obvious nor certain. But if the Board and the courts were to apply the provision as this Article suggests, which is asking no more than what Congress has asked through exceedingly plain language and clear legislative intent, certain developments could likely follow. How likely, however, will depend primarily on three factors, all of which are largely within the control of the Board. These factors are (1) recognition of the rights as formulated, (2) effective enforcement of such rights, and (3) effective dissemination of information. If the rights to engage in protected conduct outlined in this Article are

³⁵³ See F. FAULKS, PERSONNEL POLICIES IN LARGE NONUNION COMPANIES 276-322 (1980); NATIONAL INDUSTRIAL CONFERENCE BOARD, STUDIES IN PERSONNEL POLICY NO. 109, GRIEVANCE PROCEDURES IN NONUNIONIZED COMPANIES 41-47 (1950); A.W.J. THOMSON, THE GRIEVANCE PROCEDURE IN THE PRIVATE SECTOR 11-13 (1974); Westin, *Internal Mechanisms for Resolving Employee Complaints in Nonunion Organizations*, in LABOR LAW DEVELOPMENTS § 13-1 (1986) (Proceedings of the 32nd Southwestern Legal Foundation Labor Law Institute); *Policies for Unorganized Employees*, (BNA) PPF Survey No. 125 (Apr. 1979).

to have a meaningful impact on industrial relations, they must be recognized and enforced vigorously by the Board. But if employees are to use their rights effectively, and if employers are to comply with the statutory requirements voluntarily, employees and employers must be made aware of the Board's rules in this area. The Board has the means to achieve effective enforcement³⁵⁴ and to bring the necessary information relating to the identity and administration of these rights to the attention of employers and employees at their workplaces.³⁵⁵ Unfortunately, the Board's record of enforcing the core provisions of the Act has been less than adequate.³⁵⁶ But hope springs eternal.

In evaluating the conclusions that might be drawn from this general theory, one should not lose sight of the vital nexus that exists between the Act and the language of Section 7 which enunciates the right of employees to engage in concerted activity for mutual aid or protection. I have referred to such activity as *pre-organizational* activity because it is action that Congress clearly intended to protect as activity precursory to formal union organization. That part of Section 7 was never intended to be read in isolation. In particular cases, such as in the six scenarios discussed in this Article, there may be no relevant union presence. This is often the condition when employees assert their right of association at an early stage, when they have not formulated any planned strategy as to how their concerted activity, which is frequently spontaneous, might be translated into improved working conditions.

Not only is the statutory protection of such preliminary activity closely connected with the overall statutory policy of "encouraging the practice and procedure of collective bargaining,"³⁵⁷ such protection applies to perhaps the most critical phase in the entire spectrum of organizational activity. That phase, as illustrated by the commonplace conduct on which this Article has focused, concerns actions and expressions by employees when they are at their most vulnerable stage in the organizational process—when they have no organizational structure, no union, and usually no knowledge of the law to protect them. Consequently, unless the Board intervenes, an alert employer intent on maintaining a union-free environment can, by preemptive action, effectively eliminate or silence any employee who dares make a move to assert a statutory right of association about matters of workplace concern. Although the Board and the courts have not emphasized this strong nexus between traditional union activity and mutual-aid-or-protection con-

³⁵⁴ See Morris, *supra* note 11, at 27-49.

³⁵⁵ See *id.* at 38-41.

³⁵⁶ See *id.* at 17-22.

³⁵⁷ 29 U.S.C. § 151 (1982).

certed activity, it is important that such nexus be fully recognized; for when the Board protects such conduct, it vindicates more than just employment rights of the individual employees involved. It vindicates public rights expressed by the statute.

One salutary result that might ultimately be derived from the formulation I have proposed, assuming it is properly applied with appropriate enforcement and education, is that the "union fear" factor could be substantially eliminated or reduced in the American workplace. Under the Act, employees theoretically have the right to engage in union activity or to refrain from such activity. But the reality has been that American employees are usually afraid to express their feelings about organizational activity, for they fear retaliation within the at-will employment system under which they work. Recognition of the pre-organizational rights outline herein, coupled with adequate enforcement of those rights, could go a long way toward dispelling this fear factor.

In appraising American industrial relations generally, one should not lose sight of the fact that the association among employees that the Act protects does not contemplate association into any particular kind of labor organization, provided only that the organization not be dominated or supported by the employer.³⁵⁸ The scheme of the Act allows for the development of a wide variety of organizational forms and does not rigidly mandate any particular type of collective bargaining.³⁵⁹ The Act provides American employees and their employers with broad legal opportunities to fashion or develop finely tuned instruments of collective bargaining to assist them in improving two important and interdependent aspects of the workplace: employee morale and employee productivity. For such developments, the Act provides the means. The parties—employers, unions, and employees—must themselves provide the appropriate bargaining structures and suitable substantive terms and conditions of employment. The genius of the American system of collective bargaining is that bargaining structures and terms and conditions of employment can be what the parties mutually want them to be. Terms and structures can and do differ from workplace to workplace. Collective bargaining agreements can be tailor-made to suit the eclectic requirements of a variety of bargaining patterns. Consequently, contrary to much conventional wisdom, the National Labor Relations Act

³⁵⁸ See *id.* § 158(a)(2).

³⁵⁹ But see *NLRB v. First Nat'l Maintenance Corp.*, 452 U.S. 666 (1981) (unnecessarily narrowing the scope of bargaining); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (unnecessarily narrowing the definition of employees who may be covered by the bargaining); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958) (unnecessarily narrowing the process of bargaining).

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. This is not to say that the Act cannot be improved by legislation. But any effort at congressional improvement should relate primarily to enhancing the Board's efficiency and enforcement capability; it need not change the basic thrust of the statute.³⁶⁰

It is common knowledge that most American employers, being primarily concerned with short-term profit objectives, prefer not to deal with unions in their establishments. It is not the function of this Article to debate the merits of either of those microeconomic concerns or objectives. However, when I view the macroindustrial scene, I am compelled to note the anachronistic manner in which we have organized our workplaces. Although we live in a politically democratic society, American employment relationships are typically authoritarian and militaristic in structure. Inasmuch as there is no town meeting type democracy available for most people, the workplace is the one place in which they could, given the opportunity, exercise a degree of hands-on democratic participation about matters that greatly affect their lives. Many of America's successful trading partners, perhaps most notably West Germany, Japan, and Sweden, have apparently been able to achieve high productivity with a significant amount of employee participation in workplace decision-making. If American industry is to move in a similar direction, then more employers will need an entity among their employees with whom to communicate and deal. And if workers are truly involved in shared decisionmaking, which may be essential for high productivity in the technological workplace of tomorrow, that entity should belong to them, not to their employer.

These are some of the possible developments that might flow from increased, but also adequately protected, employee organizational activity on which this Article has focused. Such activity often begins with only an elementary expression of mutual aid or protection among a very few employees. If employees begin to know 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

³⁶⁰ This is not to say, however, that no changes in substantive law are needed. See *supra* note 359. But most such changes can be achieved by normal administrative and judicial means.

will indeed have begun to exercise their right of association in the workplace. This was Senator Wagner's grand vision.